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Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112
ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

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

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

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

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

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

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

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

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

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

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States’ system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for
pUNITIVE DAMAGES FOR COMMON LAW CONSPIRACY AND TORT CLAIMS, AS DOES TURKEY). IN VENEZUELA, however, THE PLAINTIFF CAN GET UNFORESEEN DAMAGES IF THE DEFENDANT HAS ENGAGED IN GROSS NEGLIGENCE OR WILFUL MISCONDUCT, AND IN ISRAEL, A COURT RECENTLY RECOGNISED THE RIGHT TO OBTAIN ADDITIONAL DAMAGES ON THE BASIS OF UNJUST ENRICHMENT LAW. FINALLY, IN ALMOST ALL JURISDICTIONS, THE PREVAILING PARTY HAS SOME OR ALL OF ITS COSTS COMPENSATED BY THE LOSING PARTY, DISCOURAGING FRIVOLOUS LITIGATION.

CULTURAL VIEWS ALSO CLEARLY AFFECT LITIGATION MODELS. OUTSIDE THE EU AND NORTH AMERICA, THE AVAILABILITY OF GROUP OR CLASS ACTIONS VARY EXTENSIVELY. A GROWING MINORITY OF JURISDICTIONS EMBRACE THE USE OF CLASS ACTIONS, PARTICULARLY FOLLOWING A CARTEL RULING BY THE COMPETITION AUTHORITY (E.G., ISRAEL). SOME JURISDICTIONS (E.G., TURKEY) PERMIT GROUP ACTIONS BY ASSOCIATIONS AND OTHER LEGAL ENTITIES FOR INJUNCTIVE (RATHER THAN DAMAGES) RELIEF. JURISDICTIONS SUCH AS GERMANY AND KOREA GENERALLY DO NOT PERMIT REPRESENTATIVE OR CLASS ACTIONS, BUT INSTEAD HAVE AS A FOUNDING PRINCIPLE THE USE OF COURTS FOR PURSUING INDIVIDUAL CLAIMS. IN SOME JURISDICTIONS (E.G., CHINA, KOREA AND SWITZERLAND), SEVERAL CLAIMANTS MAY LODGE A COLLECTIVE SUIT AGAINST THE SAME DEFENDANT IF THE CLAIMS ARE BASED ON SIMILAR FACTS OR A SIMILAR LEGAL BASIS, OR EVEN PERMIT COURTS TO JOIN SIMILAR LAWSUITS (E.G., ROMANIA AND SWITZERLAND). IN JAPAN, CLASS ACTIONS WERE NOT AVAILABLE EXCEPT TO ORGANISATIONS FORMED TO REPRESENT CONSUMER MEMBERS; HOWEVER, A NEW CLASS ACTION LAW CAME INTO EFFECT IN 2016. IN CONTRAST, IN SWITZERLAND, CONSUMERS AND CONSUMER ORGANISATIONS DO NOT CURRENTLY HAVE LEGAL STANDING AND CANNOT RECUPERATE DAMAGES THEY HAVE INCURRED AS A RESULT OF AN INFRINGEMENT OF THE COMPETITION ACT. IN POLAND, ONLY ENTREPRENEURS, NOT INDIVIDUALS, HAVE STANDING TO BRING CLAIMS UNDER THE UNFAIR COMPETITION ACT, BUT THE GROUP CLAIMS ACT IS AVAILABLE IF NO ADMINISTRATIVE PROCEDURE HAS BEEN UNDERTAKEN CONCERNING THE SAME CASE.

JURISDICTIONS THAT ARE RECEPTIVE TO ARBITRATION AND MEDIATION AS AN ALTERNATIVE TO LITIGATION (E.G., GERMANY, JAPAN, KOREA, THE NETHERLANDS, SWITZERLAND AND SPAIN) ALSO ENCOURAGE ALTERNATIVE DISPUTE MECHANISMS IN PRIVATE ANTIMONOPOLY MATTERS. SOME COURTS PREFER THE USE OF EXPERTS AND STATEMENTS TO DISCOVERY (E.G., IN CHILE; IN FRANCE, WHERE THE APPOINTMENT OF INDEPENDENT EXPERTS IS COMMON; IN JAPAN, WHICH DOES NOT HAVE MANDATORY PRODUCTION OR DISCOVERY EXCEPT IN NARROWLY PRESCRIBED CIRCUMSTANCES; AND IN GERMANY, WHICH EVEN ALLOWS THE USE OF STATEMENTS IN LIEU OF DOCUMENTS). IN KOREA, ECONOMIC EXPERTS ARE MAINLY USED FOR ASSESSMENT OF DAMAGES RATHER THAN TO ESTABLISH VIOLATIONS. IN NORWAY, THE CIVIL PROCEDURE ACT ALLOWS FOR THE APPOINTMENT OF EXPERT JUDGES AND ADVISORY OPINIONS OF THE EFTA COURT. OTHER JURISDICTIONS BELIEVE THAT DISCOVERY IS NECESSARY TO REACH THE CORRECT OUTCOME (E.G., CANADA, WHICH PROVIDES FOR BROAD DISCOVERY, AND ISRAEL, WHICH BELIEVES THAT ‘LAYING YOUR CARDS ON THE TABLE’ AND BROAD DISCOVERY ARE IMPORTANT). VIEWS TOWARDS PROTECTING CERTAIN DOCUMENTS AND INFORMATION ON PRIVILEGE GROUNDS ALSO CUT CONSISTENTLY ACROSS ANTIMONOPOLY AND NON-ANIMONOPOLY GROUNDS (E.G., NO ATTORNEY-CLIENT, ATTORNEY WORK PRODUCT OR JOINT WORK PRODUCT PRIVILEGES IN JAPAN; PRE-EXISTING DOCUMENTS ARE NOT PROTECTED IN PORTUGAL; LIMITED RECOGNITION OF PRIVILEGE IN GERMANY AND TURKEY; AND EXTENSIVE LEGAL ADVICE, LITIGATION AND COMMON INTEREST PRIVILEGE IN THE UK AND NORWAY), WITH THE EXCEPTION THAT SOME JURISDICTIONS HAVE LEFT OPEN THE POSSIBILITY OF THE PRIVILEGE BEING PRESERVED FOR OTHERWISE PRIVILEGED MATERIALS SUBMITTED TO THE ANTIMONOPOLY AUTHORITIES IN CARTEL INVESTIGATIONS. INTERESTINGLY, PORTUGAL, WHICH EXPRESSLY RECOGNISES LEGAL PRIVILEGE FOR BOTH EXTERNAL AND IN-HOUSE COUNSEL, NONETHELESS PROVIDES FOR BROAD ACCESS TO DOCUMENTS BY THE PORTUGUESE COMPETITION AUTHORITY. SOME JURISDICTIONS VIEW SETTLEMENT AS A PRIVATE MATTER (E.G., FRANCE, JAPAN AND THE NETHERLANDS); OTHERS VIEW IT AS SUBJECT TO JUDICIAL INTERVENTION (E.G., ISRAEL AND SWITZERLAND). THE CULTURE IN SOME JURISDICTIONS, SUCH AS GERMANY, SO STRONGLY FAVOURS SETTLEMENT THAT JUDGES WILL REQUIRE PARTIES
to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

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

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New York
March 2020
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In recent years, the private competition litigation landscape in the EU has been shaped by the implementation of the Damages Directive. The Damages Directive was intended to achieve greater harmonisation between private competition enforcement regimes across Member States, in pursuit of the express aim of the European Commission (Commission) to encourage greater private enforcement of competition law. However, while the Damages Directive was successful in prescribing a series of minimum requirements, Member States retain discretion over a range of areas and there remain significant variations between national regimes. In many jurisdictions, the effect of the implementation of the Damages Directive has been to create a unique regime for competition claims that is distinct from general civil litigation claims.

Beyond the Damages Directive, a significant recent EU development in the competition sphere has been an increased focus on harmonisation of the class action regimes across Member States, including the recent legislative activity relating to the draft directive on representative actions.

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

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

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

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

The Damages Directive contains a provision setting out the conditions for the temporal application of its procedural and substantive provisions. Member States had to ensure that: national measures adopted to comply with substantive provisions did not apply (1) retroactively; and (2) to actions for damages of which a national court had taken jurisdiction prior to 26 December 2014.

### i Limitation

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

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

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3 Recital 9, Damages Directive.
4 Article 22, Damages Directive.
5 Article 22(1), Damages Directive.
6 Article 22(2), Damages Directive.
7 Article 10(3), Damages Directive. The limitation period in a number of jurisdictions (e.g., the UK and the Netherlands) already met this requirement, while in others (e.g., Germany and Spain), it was extended by the national implementing legislation.
8 Article 10(2), Damages Directive.
9 Article 10(4), Damages Directive. There has been some criticism, for example by the City of London Law Society in its response to the UK government’s consultation on the national legislation implementing the Damages Directive, that Article 10(4) is not clear as to whether an appeal on penalty alone will suspend the limitation period, and whether an appeal by one addressee suspends the limitation period for all addressees. Such questions were previously addressed by the English courts in relation to the former limitation provisions in the cases of BCL Old Co v. BASF [2009] EWCA Civ 434 and Deutsche Bahn AG v. Morgan Advanced Materials plc [2014] UKSC 24. At an EU level, these ambiguities could result in a preliminary ruling request to the European Court of Justice.
10 Article 18(1), Damages Directive. Recital 48 states that ‘consensual dispute resolution mechanisms’ will include out-of-court settlements, arbitration, mediation and conciliation.
These provisions have significantly extended the limitation periods in a number of Member States.\(^{11}\) Pre-implementation, this was an area where there was wide divergence between Member States, both in terms of the length of limitation periods and the point at which they began to run: compare, for example, the UK (six years after the cause of action accrued) with Spain (one year from the date the injured party discovered the harm). This meant that limitation periods often used to play an important role for claimants when selecting the jurisdiction in which to bring a claim.

Nonetheless, some differences between Member States remain. The Damages Directive does not prevent Member States from imposing limitation periods in excess of five years or absolute limitation periods.\(^{12}\)

The European Court of Justice (ECJ) has recently considered the scope and effect of limitation provisions in competition claims in \textit{Cogeco Communications Inc}.\(^{13}\) While the Damages Directive did not apply to the facts at issue, the ECJ held that overly restrictive limitation periods in place before the application of the Damages Directive may be incompatible with EU law.\(^{14}\)

\[ \text{ii Jurisdiction} \]

Under EU law, jurisdiction is regulated by the Recast Brussels Regulation,\(^{15}\) which applies to proceedings issued on or after 10 January 2015. Under the Recast Brussels Regulation, the default jurisdiction rule is that a claim should be brought in the courts of a Member State where the defendant is domiciled.\(^{16}\) There are, however, a few exceptions to this rule and two are frequently relied on in the context of competition claims.

First, where there are multiple defendants domiciled in different Member States, a claimant can opt to bring a claim in any of those jurisdictions. A defendant may then become an ‘anchor defendant’, with others being joined to that claim, provided that the claims are so closely connected that it is expedient to hear them together so as to avoid the risk of irreconcilable judgments resulting from separate proceedings.\(^{17}\)

\[ \text{\footnotesize 11 By way of example, consider a scenario in which the Commission opened an investigation in 2018 in respect of behaviour that took place between 2010 and 2016, and reached an infringement decision in 2021, with an appeals process lasting until 2024. In this case, the limitation period would only begin to run in 2025, and would last a minimum of five years, until 2030. Therefore, the company would be at risk of a damages claim for almost 15 years after it ceased its anticompetitive conduct.}\]
\[ \text{\footnotesize 12 The Damages Directive does allow for long-stop dates to be put in place. Recital 36 states that ‘Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation’. For example, in the Netherlands, a 20-year long-stop limitation period will apply, starting on the date on which the damage was inflicted, irrespective of the victim’s awareness.}\]
\[ \text{\footnotesize 13 Case C-637/17, Cogeco Communications Inc v. Sport TV Portugal and Others (2019).}\]
\[ \text{\footnotesize 14 On the facts, the ECJ considered the legality of a Portuguese three-year limitation period that commenced on the date on which the claimant became aware of its right to compensation, irrespective of whether the claimant was aware of the identity of the defendant(s) or the full extent of its loss. The ECJ held that this limitation period was incompatible with Article 102 of the TFEU and the EU law principle of effectiveness.}\]
\[ \text{\footnotesize 15 Regulation No. 1215/2012 of 12 December 2012 (Recast Brussels Regulation).}\]
\[ \text{\footnotesize 16 Article 4(1), Recast Brussels Regulation.}\]
\[ \text{\footnotesize 17 Article 8(1), Recast Brussels Regulation.}\]
Second, in matters relating to tort, delict and quasi-delict, a claimant can bring a claim in the courts of a Member State which is ‘the place where the harmful event occurred or may occur’. In the context of competition claims, the ECJ has confirmed that this means a Member State where the cartel was definitively concluded or a Member State where the claimant company has its registered office. Further, in its recent *Tibor-Trans* judgment, the ECJ noted that ‘the place where the harmful event occurred or may occur’ can also cover the place where a market was affected by a competition law infringement, such as the place where prices were distorted and in which the victim claims to have suffered damage.

In relation to parties’ agreements on forum, the ECJ has recently offered some guidance on the enforceability of jurisdiction and arbitration clauses in competition claims. In *Apple Sales International*, the ECJ held that the mere fact that a jurisdiction clause does not explicitly refer to claims based on competition law does not automatically prevent it from applying to actions for damages for abuse of dominance based on Article 102 TFEU. The decision is arguably inconsistent with the ECJ’s earlier decision in *CDC*, which held that an explicit reference to claims based on competition law is a prerequisite for applying a jurisdiction agreement to cartel-related claims based on violations of Article 101 TFEU.

### iii Governing law

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

Generally, the Rome II Regulation allows parties expressly to agree a law to govern their non-contractual obligations, either before or after the occurrence of an event that gives rise to damage. However, in the context of competition claims, such agreements are ineffective insofar as they aim to displace the applicable law determined in accordance with the default rules.

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23 Articles 4 and 6, Rome II Regulation.
24 Article 6(3)(b), Rome II Regulation.
25 Article 14, Rome II Regulation.
26 Article 6(4), Rome II Regulation.
In recent years, Member State courts have considered the application of choice of law rules under the Rome II Regulation (and the respective national rules pre-dating the Rome II Regulation) in the context of competition law claims.\(^{27}\) This developing jurisprudence may result in a preliminary ruling request to the ECJ.

### III  EXTRATERRITORIALITY

EU competition law applies to any conduct that has an appreciable effect on trade between Member States. The EU courts and the Commission have long considered to what extent, and in what circumstances, EU competition law can apply extraterritorially (i.e., to non-EU undertakings and to conduct that takes place outside the EU) without infringing the principles of public international law. The two main legal tests that have been developed to limit the extraterritorial reach of EU competition law are the implementation test\(^{28}\) and the qualified effects test.\(^{29}\) The former requires that the practices that restrict competition are implemented in the EU (e.g., by direct sales into the EU). The latter requires that such practices have immediate, substantial and foreseeable effects in the EU. The relationship between the implementation test and the qualified effects test was clarified in Intel,\(^{30}\) where the ECJ observed that the tests pursue the same objective and that EU competition law is applicable if either one is satisfied.

In recent years, Member State courts have started to examine the limits of the extraterritorial application of EU competition law in the context of private enforcement,\(^{31}\) and it remains to be seen whether a consistent approach will be adopted across the EU.

### IV  STANDING

Any individual or undertaking may claim compensation before national courts for harm suffered as a result of an infringement of EU competition law.\(^{32}\) The exercise of the right to sue is governed by national law provisions in the particular jurisdiction in which an action is brought, but the rules and procedures facilitating such actions cannot be less favourable than those governing similar actions resulting from infringements of national law.\(^{33}\)

The causal relationship between the harm and the infringement need not be direct; and the Damages Directive explicitly granted indirect purchasers standing to sue.\(^{34}\) A party need not have a contractual link to a cartelist and will have a claim against cartelists where its loss was suffered as a result of the actions of an undertaking not party to the cartel (having regard

\(^{27}\) See, for example, Deutsche Bahn AG & Others v. MasterCard Incorporated & Others [2018] EWHC 412.

\(^{28}\) See, for example, case C-89/85 A Ahlström Osakeyhtiö and others v. Commission of the European Communities (1994).

\(^{29}\) See, for example, case T-102/96 Gencor v. Commission (1999).

\(^{30}\) Case C-413/14 P Intel Corp v. Commission (2017).

\(^{31}\) See, for example, Iiyama (UK) Ltd & Others v. Samsung Electronics Co Ltd & Others [2018] EWCA Civ 220.

\(^{32}\) Article 3(1), Damages Directive.

\(^{33}\) Article 4, Damages Directive.

\(^{34}\) Article 12(1), Damages Directive.
to the practices of the cartel), namely where that undertaking sets prices higher than would otherwise have been expected under competitive conditions (umbrella pricing). In recent years, Member State courts have heard numerous cases involving indirect purchasers.

V THE PROCESS OF DISCOVERY

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

To address this, the Damages Directive required Member States to ensure that national courts are able to order defendants or third parties to disclose relevant evidence that lies within their control in response to a reasoned justification by a claimant. Member States must also ensure that national courts are able, on the request of a defendant, to order a claimant or a third party to disclose relevant evidence. To address concerns regarding excessive disclosure or fishing expeditions, the Damages Directive stipulated that national courts must be able to limit disclosure to what is proportionate, having regard to the legitimate interests of all parties concerned. While Member States must ensure that national courts have the power to order the disclosure of relevant confidential information, national courts must concurrently have at their disposal effective measures to protect such information and to give full effect to applicable legal professional privilege rules.

For legal systems unaccustomed to extensive disclosure exercises, these new rules have started to cause significant cultural change (although a combination of transitional rules and the need for national courts to acclimatise means it is likely to be a number of years before the full effects become apparent). In particular, the references in the Damages Directive to disclosure of ‘relevant categories of evidence’ marked a significant change in jurisdictions where disclosure was previously limited to specific documents identified in a disclosure request. However, while there is likely to be some degree of harmonisation between Member

35 Case C – 557/12 Kone AG and others v. ÖBB-Infrastruktur AG (2014).
36 Article 5(1), Damages Directive.
37 Article 5(1), Damages Directive.
38 Article 5(3), Damages Directive. Competition authorities are also expressly permitted to submit observations to the national courts on the proportionality of such disclosure requests (Article 6(11)).
39 Article 5(4), Damages Directive. For instance, through redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in aggregated or otherwise non-confidential form (see Recital 18).
40 Article 5(6), Damages Directive.
41 For instance, the new provisions on disclosure only apply to claims where proceedings were commenced on or after 27 December 2016 in Germany and 27 May 2017 in Spain.
42 Article 5(2), Damages Directive.
States going forward, the Damages Directive only fixed minimum requirements\textsuperscript{43} and a number of jurisdictions have taken the opportunity to go further by creating a substantive right to disclosure (as opposed to giving national courts mere discretion). It remains to be seen whether these regimes will develop to match the extensive disclosure seen in the UK.

As a further protection against excessive disclosure, the Damages Directive contained a number of limits on the disclosure of evidence included in a competition authority’s file. In particular, leniency statements\textsuperscript{44} and settlement submissions,\textsuperscript{45} as well as verbatim quotations from such documents,\textsuperscript{46} were granted absolute protection from disclosure.\textsuperscript{47} Disclosure of the following materials from a competition authority’s file is permissible, but only after the competition authority has closed its proceedings: information prepared specifically for the proceedings of a competition authority; information drawn up by the competition authority and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn.\textsuperscript{48} Even then, national courts should (as part of the proportionality assessment) consider the need to safeguard the effectiveness of public enforcement when choosing whether to order disclosure of such documents.\textsuperscript{49}

The ECJ examined the scope of publication of leniency material in a Commission decision in the \textit{Evonik Degussa} and \textit{AGC Glass Europe} cases.\textsuperscript{50} In \textit{Evonik Degussa}, the ECJ found that the content of a leniency statement can be referred to in a Commission decision, provided that the source cannot be identified and the precise contents of the submission cannot be reconstructed. These principles were affirmed in \textit{AGC Glass Europe}. These decisions form part of an ongoing line of cases concerning the confidential nature of materials relating to Commission decisions, which is particularly important in the context of competition claims in national courts.

\section*{VI USE OF EXPERTS}

The Damages Directive is silent on the issue of experts, but the Commission recognises the importance of expert advice in private competition actions and has published, commissioned and contributed to various guidelines for judges and other practitioners on obtaining and

\textsuperscript{43} Article 5(8), Damages Directive.

\textsuperscript{44} Defined as an oral or written presentation voluntarily provided to a competition authority (or a record thereof) describing the provider’s knowledge of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, and not including pre-existing information (i.e., evidence that exists irrespective of the proceedings of a competition authority: e.g., contemporaneous documents) (Articles 2(16) and 2(17), Damages Directive).

\textsuperscript{45} Defined as a voluntary presentation to a competition authority acknowledging the provider’s participation in an infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure (Article 2(18), Damages Directive).

\textsuperscript{46} Recital 26, Damages Directive.

\textsuperscript{47} Article 6(6), Damages Directive. Previously, national courts were expected to undertake a balancing exercise of weighing up the need to facilitate private enforcement of competition law by allowing disclosure of leniency documents versus the public interest in protecting the effectiveness of leniency regimes.

\textsuperscript{48} Article 6(5), Damages Directive.

\textsuperscript{49} Article 6(4)(c), Damages Directive.

\textsuperscript{50} Case C-162/15 \textit{P Evonik Degussa v. Commission} (2017) and case C-517/15 \textit{AGC Glass Europe and Others} (2017).
This is driven in particular by the complexities of quantifying harm, which in practice requires significant data, with both claimants and defendants routinely engaging economic experts to assess the amount of loss suffered.

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

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

Experts need not always be economics or accounting professionals. There is a growing trend in competition cases for industry experts to testify, lending their knowledge of the dynamics and operation of certain markets, particularly in cases concerning complex distribution chains. This serves the dual purpose of educating the court on the market in question and ensuring that economists approach the relevant questions using correct assumptions.

VII CLASS ACTIONS

On the same day that the Commission published its proposal for the draft Damages Directive (11 June 2013), it also published a Recommendation on collective redress mechanisms for breaches of citizens’ rights granted under EU law (the Recommendation).52 The Recommendation followed a Green Paper on competition law damages actions published in 200553 and a White Paper published in 2008,54 which included suggestions on competition-specific collective redress mechanisms. Due in part to concerns about the potential for US-style class actions, a consensus was not reached on this subject and no provision for collective redress was included in the Damages Directive. Instead, the Commission issued a non-binding Recommendation (and an accompanying Communication)55 to Member States to implement collective mechanisms for violations of EU law rights by 26 July 2015 (concerning both injunctive and compensatory relief). The Recommendation applied not

51 See, for example, Communication from the Commission regarding guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07); ‘Study on the Passing-on of Overcharges’, RBB Economics et al. (2016); Communication from the Commission on quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07); and Commission Staff Working Document: Practical Guide – quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (SWD (2013) 205).

52 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU).


only in the competition sphere, but also in relation to claims for other breaches of citizens’ rights under EU law, including consumer protection, environmental protection, protection of personal data, financial services legislation and investor protection.\footnote{56}{Recital 7, the Recommendation.}

The Recommendation provides, among other things, that collective redress should be based on the express consent of the relevant claimants (i.e., the opt-in model) and that any exceptions to this principle (such as opt-out proceedings) should be ‘duly justified by reasons of sound administration and justice’.\footnote{57}{Paragraph 21, the Recommendation.} The Recommendation also provides that there should be safeguards for minimising the risk of excessive litigation.

The availability of collective redress mechanisms, and safeguards against the abuse of such mechanisms, is not consistent across the EU. On the one hand, some Member States (including Belgium, France, Lithuania and the UK) have actively promoted collective redress since 2013. On the other, there are a number of Member States that do not at present provide for any possibility of collective redress for damages arising from breaches of EU law.\footnote{58}{See the Commission report on the practical implementation of the Recommendation (January 2018).}

VIII CALCULATING DAMAGES

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

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

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

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

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

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

e) Where requested, and if they deem it appropriate, national competition authorities
(NCAs) may provide guidance to national courts on the determination of the quantum
of damages.

IX PASS-ON DEFENCES

Member States are required under the Damages Directive to ensure the availability of the
passing-on defence. This means that any defendant may invoke as a defence that the claimant
passed on the whole or part of the overcharge resulting from the infringement. The burden of
proof that any overcharge was passed on falls to the defendant, who may in turn reasonably
require disclosure from the claimant or from third parties.
The Damages Directive also addressed the position of indirect purchasers, making it easier to claim damages incurred as a result of any overcharge that was passed on down the supply chain. Although the burden lies with the indirect purchaser to prove the existence and extent of any pass-on, there is a rebuttable presumption that this burden is satisfied if the indirect purchaser can establish that: the defendant has committed an infringement of competition law (which is automatically the case in any follow-on action); the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser has purchased the goods or services that were the subject of the infringement, or has purchased goods or services derived from or containing them.71

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

On 9 August 2019, the Commission published guidelines designed to assist national courts in estimating the passing-on of overcharges.72 The guidelines set out the applicable legal framework and discuss the economics of pass-on (including the economic theory and quantification methods).

X FOLLOW-ON LITIGATION

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

To this end, the Damages Directive provided that a final decision by a Member State’s NCA (or review court) finding an infringement irrefutably establishes that infringement for the purposes of follow-on litigation in the courts of that Member State.73 An equivalent EU-level provision, preventing national courts from taking a contrary view to the Commission where the Commission has found an infringement, has been in place for some time.74

The Damages Directive further provided that a final decision in another Member State must be taken at least as prima facie evidence by a court that an infringement occurred.75 It is noteworthy that some Member States have already gone further in this regard, with German law providing that a final decision by any Member State’s NCA will be treated as binding proof of an infringement before the German courts. Implementation has differed significantly across other Member States ranging from Austria (which has followed Germany’s approach) to Hungary (which has taken a more restrictive approach by implementing a rebuttable presumption of an infringement in this situation). Regardless of these discrepancies, the overall effect should be to reduce the base evidentiary hurdle to establishing a breach of competition law for follow-on claimants in the EU.

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71 Article 14, Damages Directive.
72 Communication from the Commission regarding guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07).
73 Article 9(1), Damages Directive.
75 Article 9(2), Damages Directive.
As explained above, the Damages Directive also introduced changes to other key issues that affect follow-on damages, such as limitation and disclosure. The net effect has been to increase venue choice for claimants, with many jurisdictions where the private enforcement regimes were arguably underdeveloped now adopting broadly similar rules.

XI PRIVILEGES

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

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

It will be interesting to observe whether Member States with narrower concepts of legal privilege adapt their regimes in light of the increased disclosure obligations under the Damages Directive to provide defendants with additional protection.

XII SETTLEMENT PROCEDURES

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

76 Article 5(6), Damages Directive.
77 Note that under EU law, legal professional privilege is considered a limitation on the Commission’s investigatory powers and has consequently been defined narrowly. For example, the EU concept of privilege does not extend to advice given by in-house counsel.
78 In common law jurisdictions (such as the UK, Ireland and Cyprus), privilege will protect confidential documents or communications that have been created for the purpose of giving or obtaining legal advice or in preparation for litigation.
79 For example, under English common law, a party is required to disclose all documents on which it relies; which adversely affect or support its or another party’s case; or that it is required to disclose by a relevant practice direction.
80 Recital 5, Damages Directive.
First, as noted above, to provide both sides with an opportunity to engage in settlement discussions before bringing proceedings, limitation periods must be suspended for the duration of a consensual dispute resolution process. Likewise, if proceedings have already been issued, national courts may suspend their proceedings for up to two years to enable settlement discussions to take place.

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

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

Further, in addition to a class actions regime (discussed in Section VII), a number of Member States have collective settlement regimes pursuant to which groups of claims can be settled, including on an opt-out basis. For example, in the UK the collective action regime available in the Competition Appeal Tribunal includes an opt-out collective settlement regime. In the Netherlands, the Dutch Act on the Collective Settlement of Mass Claims similarly provides for an opt-out mechanism that facilitates collective settlement through a binding declaration from the Amsterdam Court of Appeal.

XIII ARBITRATION

Arbitration is listed among the consensual dispute resolution mechanisms that are actively promoted by the Damages Directive. Although the Damages Directive does not prevent claimants from submitting damages claims to arbitration, it is silent on more specific issues such as whether (and how) to include contractual arbitration clauses in respect of competition claims. Arbitration is still relatively rare as a means of resolving competition disputes in Europe, due in part to an inherent tension between arbitration as a private system of dispute resolution.

81 Article 18(1), Damages Directive.
82 Article 18(2), Damages Directive.
83 Article 18(3), Damages Directive.
84 Article 19(1), Damages Directive.
85 According to Recital 51 of the Damages Directive, ‘the claim of the injured party should be reduced by the settling infringer’s share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party’.
86 Article 19(2), Damages Directive.
87 Article 19(2), Damages Directive.
88 See Recital 48, Damages Directive.
and EU competition law as a public system designed to protect consumer welfare and the integrity of the internal market. There are other more specific obstacles to the widespread adoption of arbitration in this field; for example, competition claims often involve a large number of claimants or defendants, or both, from different levels of the distribution chain, which can be problematic where each party has an independent contract with its own arbitration clause (or lack thereof).

On the other hand, both arbitration and competition law claims invariably arise in an international context, and arbitral tribunals are accustomed to complex, multiparty cases. A recent decision by the English High Court\(^9\) to stay court proceedings so as to give effect to an arbitration clause indicates that competition arbitration may be becoming increasingly accepted in the sphere of private enforcement.

**XIV INDEMNIFICATION AND CONTRIBUTION**

The Damages Directive required Member States to ensure that cartelists are jointly and severally liable for the full harm caused by the infringement to which they are a party and that the claimant has the right to full compensation from each of the infringers.\(^{90}\) However, in relation to immunity applicants, it provided that they should only be jointly and severally liable to their own direct and indirect purchasers, and should only be liable to other injured parties where full compensation cannot be obtained from the other infringers.\(^{91}\)

The Damages Directive further provided that Member States must ensure that any individual infringer can recover a contribution from co-infringers, in accordance with the relative responsibility for the harm of each co-infringer.\(^{92}\) Again, a carve-out is in place to ensure that immunity applicants can only be required to contribute an amount up to the harm caused to their own direct and indirect purchasers.\(^{93}\) The Damages Directive did not define what is meant by relative responsibility for harm and this is left for Member States to decide.\(^{94}\) Notably, the Damages Directive did not specify a limitation period for contribution claims, meaning that this too will be a matter to be decided at a national level.

As long as they have not led an infringement,\(^{95}\) coerced other undertakings to participate in an infringement or previously been found to infringe competition law,\(^{96}\) small and medium-sized enterprises (SMEs) also gained protection from joint and several liability.\(^{97}\) Absent these circumstances, SMEs are liable only to their own direct and indirect purchasers, provided that their market share was below 5 per cent at some point during the infringement and that applying normal joint and several liability rules would irretrievably jeopardise their economic viability.\(^{98}\)


\(^{90}\) Article 11(1), Damages Directive.

\(^{91}\) Article 11(4), Damages Directive.

\(^{92}\) Article 11(5), Damages Directive.

\(^{93}\) Article 11(5), Damages Directive.

\(^{94}\) Recital 37, Damages Directive does provide that relevant criteria for assessing contribution to harm will include turnover, market share or role in the cartel.

\(^{95}\) Article 11(3)(a), Damages Directive.

\(^{96}\) Article 11(3)(b), Damages Directive.

\(^{97}\) Article 11(2), Damages Directive.

\(^{98}\) Article 11(2), Damages Directive.
These changes represent a novel development for many jurisdictions, including the UK, France, Germany and the Netherlands, and could complicate the recovery process for contribution claimants.

XV  FUTURE DEVELOPMENTS AND OUTLOOK

The UK formally ceased to be a Member State of the EU on 31 January 2020. Attention now turns to the negotiation of a new relationship between the UK and the EU. Up to this point, the UK has been one of the most important jurisdictions within Europe for private enforcement actions and claimant firms have expressed confidence that it will remain so. The UK’s ongoing status as a centre for private competition law enforcement will to a significant extent depend, however, on whether claimants will be able to continue to rely on infringement decisions issued by the Commission as a basis for founding a follow-on claim in the UK courts.

The terms of the withdrawal agreement provide that the whole body of EU law will (in effect) continue to apply to and in the UK until the end of the transition period (i.e., 31 December 2020, unless extended pursuant to the agreement). Accordingly, the Commission will maintain jurisdiction over investigations initiated before the end of that period and claimants will be able to rely on EU law (and the relevant Commission decisions) to initiate private competition law proceedings before the UK courts. At present, a continuation of this arrangement appears unlikely, but the nature and extent of future co-operation remains unclear. Practically, however, it is likely that claimants would still be able to initiate claims based on breaches of EU competition law (and rely on the relevant Commission decisions) if these claims are framed as foreign tort claims.

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

Another area of interest is the work that the EU is doing in relation to class actions, particularly in relation to the Draft Representative Actions Directive, discussed in Section VII above.

Finally, the upward trend in private competition law activity across the EU is likely to continue and may even be further bolstered by the increased availability of direct litigation funding (including from non-traditional sources, such as private equity houses). These higher levels of activity should in turn lead to further clarification of the relevant law at both the EU and Member State levels.
Chapter 2

ARGENTINA

Miguel del Pino and Santiago del Rio

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

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

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

The enforcement authority’s members will be appointed by the Executive Power after a pre-selection process carried out by a qualified jury composed of the Ministry of Production, the National Treasury Procurer and members of the legislative branch, a representative of the National Academy of Law and a representative of the Argentine Association of Political Economy. At the time of writing, there has been significant progress as the National Competition Authority is going through the selection process for its members.

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

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

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

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

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

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

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

a. price fixing or resale price maintenance;

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

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

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

e. practices that affect goods and services markets through agreements to limit or control the investigation or development of new technologies, or goods production or the provision of services; or practices that hamper investment into the production of goods or the provision of services;

f. conditions that tie the sale of goods to the purchase of other goods or to the use of a service, and conditions that tie the provision of a service to the use of another service or the purchase of goods;

g. conditions that tie a purchase or sale to an undertaking not to use, purchase, sell or supply goods or services produced, processed, distributed or commercially exploited by third parties;

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

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

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

k. predatory pricing; and

l. the simultaneous participation of a person in relevant management positions in two or more companies that are competitors.

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

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

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

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

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

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

One of the most important changes introduced by the Antitrust Law was the chapter devoted to damages.

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

Furthermore, a specific provision (Section 65) regulates the scenario posed with regard to leniency applicants, in the sense that they ‘may be exempted or their liability reduced’ as regards damages and fines as set out in that very specific chapter. The very same section sets out an exemption to said rule for the following cases: as regards its direct or indirect buyers or suppliers; and any other injured parties only when the full reparation of the damages of the conduct could not be obtained from the other companies involved in the same anticompetitive conduct.
Likewise, the Antitrust Commission issued Guidelines for the Analysis of Cases of Exclusionary Abuse of Dominance in May 2019. These relate only to unilateral exclusionary abuses of dominance, as they are the most frequent ones, with the aim of providing guidelines for what may be considered as infringement of the Antitrust Law and to help decisions become more predictable.

This year, the Antitrust Commission also initiated a series of high-profile investigations involving different companies. Among these is the 'notebook case', a scandal that was unveiled during 2018 and entailed an organised corruption scheme that included the delivery of bribes to several people, including politicians and many businessmen who were granted large public contracts.

An investigation was initiated against 52 construction companies and two chambers – the Argentine Construction Chamber and the Contracting Firms’ Argentine Chamber – for allegedly committing anticompetitive conduct by entering into and coordinating public bids related to public works between 2005 and 2015.

### III EXTRATERRITORIALITY

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

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

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

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

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IV STANDING

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

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

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

V THE PROCESS OF DISCOVERY

In the current civil Argentine procedure, there is no preliminary stage. Thus, a claimant cannot request from a counterparty information related to facts that are essential to develop the purpose and characteristics of his or her claim, or to develop his or her strategy and defence. It is in the court’s sole discretion to admit or reject the production of any evidence, including documents of any nature.

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

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

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

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

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

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

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

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

VI USE OF EXPERTS

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

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

VII CLASS ACTIONS

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

Considering the lack of a law regulating this kind of action, the Argentine Supreme Court,6 in a leading case in this matter, held that there are three categories of rights: individual rights, rights with a collective impact that concern collective assets, and rights with a collective impact that concern individual but homogeneous assets.

This third category – rights with a collective impact that concern individual but homogeneous assets – is constituted by personal or property damage resulting from conduct

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6 Case Halabi, Ernesto c/ PEN - Ley 25.873 - Dto 1563/04 i/ Amparo Ley 16.986.
that damages the environment or competition, or the rights of users and consumers and those of discriminated persons, consisting of a single or continuous act that cause harm to all the members of the group.

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

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

One of the most renowned cases regarding cartels in Argentina has been the Cement case, in which six major cement-producing companies were accused of agreeing to allocate markets nationwide for almost 20 years. The Antitrust Commission’s investigation began in 1999, when a disgruntled employee supposedly revealed to a newspaper that the cement companies were exchanging information and agreeing to divide the market. While the source of the article was never revealed, it was used as a starting point for the Antitrust Commission’s investigation. According to the findings of the Antitrust Commission, the alleged exchange of confidential detailed market information was performed via the Association of Portland Cement Manufacturers (APCM). After a raid on the APCM premises, the Antitrust Commission found records of real-time software that was used to exchange current commercial records of the cement companies.9

This finding, as well as evidence of meetings in hotels between representatives of four of the companies, led the Antitrust Commission to discover the existence of a cartel that exchanged confidential and sensitive information about the cement market and that fixed prices in some areas.10 The fine imposed on 25 July 2005 by the Antitrust Commission and the Secretary of Trade totalled 309,729,289 Argentine pesos and was confirmed by the Argentine Supreme Court in August 2013.

Based on this anticompetitive conduct, the Consumer Protection Association of Mercosur, a consumer association, filed a class action against the cement companies for the damage caused by the cartel. The Association claimed to represent a global class that primarily involved all the consumers, another class that involved all indirect consumers, and finally a sub-class of indirect consumers that involved all persons that had acquired new or recently built buildings, or that had requested a third party (e.g., architects, engineers or building contractors) to construct a building or structure using cement.11

The Argentine Supreme Court considered that the initiators of a collective process must provide an objective, certain and easily verifiable definition of the class they wanted to represent. The members of the class should be effectively identified so as to facilitate the

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8 id.
9 id.
10 id.
11 Argentine Supreme Court of Justice, Asociación Protección Consumidores del Mercado Común del Sur el Loma Negra Cía Industrial Argentina SA y otros dated 10 February 2015.
Court checking the existence of the relevant class as well as determining who its members are. Furthermore, the plaintiff must present the reasons for which the denial of the class action would affect the rights of the represented class.

The Argentine Supreme Court considered these requirements not fulfilled by the Consumer Association, and the suit was dismissed.

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

If the injured party can prove that the damage arose from an offence against it and from conduct expressly prohibited by law, then the victim can claim for compensation for actual injuries. The injured party is entitled to claim for actual profits during a given preceding period to be taken for the calculation of the average or normal profit of the injured party. Once the court has determined the monthly or yearly average profit, this figure will be projected over a period to be determined by the court (e.g., six months or one year). The length of time will depend on the specific case and lies within the discretion of the court.

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

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

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

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

The most relevant precedent for a private party seeking damage compensation results from an anticompetitive behaviour previously investigated and punished by the Antitrust Commission.
Commission. Such was the situation in YPF/Auto Gas. The original conduct investigated by the Antitrust Commission was the practice of exporting a large amount of liquid petroleum gas (LPG) at prices that were lower than those charged for LPG in Argentina by YPF, the national gas company, which was controlled by private funds at the time of the alleged wrongful conduct. Further, YPF’s export contracts prohibited the re-importing of LPG into Argentina. The Antitrust Commission concluded that this conduct was harmful to the general economic interest, and ordered YPF to cease its price discrimination between the domestic and export markets and to eliminate the prohibition on the re-importing of LPG. Additionally, it imposed a fine of 109,644 million pesos on YPF. The decision was upheld by the Argentine Supreme Court.

Based on this case, a private company claimed that it had been affected by YPF’s anticompetitive conduct. Auto Gas based its claim on the abuse of dominant position of YPF having had a twofold effect: an undue increase in prices and a diminishment in the quantities of LPG that were commercialised by Auto Gas. When analysing the case, the court left in record that it would not analyse YPF’s anticompetitive conduct, since that had already been analysed and sanctioned by the Antitrust Commission and ratified by the Argentine Supreme Court. Thus, it considered that the existence of the conduct had already been proved, as well as the fact that it had been performed by means of deceit. The analysis was therefore focused on whether there had been damage to Auto Gas and whether it had been caused by the already proven act performed by YPF.

Regarding the damage caused by the abuse of dominant position, Auto Gas considered that it consisted of two items.

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

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

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

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12 Argentine Supreme Court of Justice on 11 October 2018, Auto Gas SA c/ YPF SA y otro s/ ordinario.
XI PRIVILEGES

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

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

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

XII SETTLEMENT PROCEDURES

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

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

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

XIII ARBITRATION

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

XIV INDEMNIFICATION AND CONTRIBUTION

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

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

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

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

It remains to be seen if the members of the National Competition Authority will finally be appointed and how this authority will apply the Antitrust Law, particularly taking into account that a new administration took office on 10 December 2019.

Furthermore, during the upcoming year, it will be interesting to see how the above-mentioned high-profile investigations will develop, whether they will give rise to damage claims and whether any company will apply to the leniency programme.

13 Section 827 et seq. and Section 1751 of the Civil and Commercial Code.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

It has been two years since the legislative framework supporting private antitrust enforcement rights in Australia (and Australian antitrust law generally) underwent significant reform. The amendments were expected to increase the ease with which private antitrust follow-on proceedings can be pursued following regulatory enforcement action; however, they remain largely untested. This may soon change as two high-profile private antitrust actions, both likely to test at least some of these amendments, were filed in 2019.

One of these cases is a class action commenced in the Federal Court of Australia by lead plaintiff J Wisbey & Associates Pty Ltd, an importer of dental equipment, on behalf of Forex customers, against five major investment banks – UBS, Barclays, Citibank, Royal Bank of Scotland and JP Morgan – alleging the banks engaged in cartel conduct in the foreign exchange market between 2008 and 2013. The banks allegedly manipulated foreign exchange rates by artificially increasing the cost of buying certain currencies and artificially decreasing the price received when selling certain currencies. The proceedings were commenced following regulatory investigations overseas and admissions made to US and UK regulators by the banks.

Dialogue v. Instagram and Facebook was also commenced in the Federal Court of Australia in 2019. Dialogue, a company specialising in social media, reportedly alleges that Instagram and Facebook engaged in unconscionable conduct and misuse of market power after Instagram and Facebook withdrew Dialogue’s products’ access to those platforms, including Dialogue’s Instagram scheduling tool, SKED Social. This case is similar to Unlockd v. Google, which was commenced in the Federal Court of Australia in 2018. Unlockd sought an injunction preventing Google from withdrawing its services from the Google Play Store and terminating the supply of Garmin’s Ad Mob Service to Unlockd globally. Those proceedings were discontinued by Unlockd in late 2018, reportedly on the basis that Unlockd was unable to secure funding to pursue its claim against Google. Interestingly, it has been reported that the Australian Competition and Consumer Commission (ACCC) intends to commence proceedings against Google in relation to the conduct.

This is consistent with the ACCC’s recent focus on the increasing market power of digital platforms. In July 2019, the regulator handed down its final report of its Digital Platforms Inquiry, which includes recommendations that the merger provisions of the Competition and Consumer Act \(^2\) (CCA) be amended to include additional factors when determining

1 Tom Bridges is a partner at Webb Henderson. The author acknowledges the valued assistance of Bronwen Peberdy, a lawyer at Webb Henderson, in the preparation of this chapter.
2 Competition and Consumer Act 2010 (Cth).
whether a merger would substantially lessen competition and require large digital platforms to provide advance notice of acquisitions of any business with activities in Australia. The Australian government’s response to this report is expected to be handed down in early 2020.

Another major focus of the ACCC continues to be cartel conduct. In October 2019, the ACCC released its Immunity and Cooperation Policy for Cartel Conduct – October 2019, which is intended to strengthen and clarify the process of applying for immunity as part of its strategy to encourage businesses and individuals to disclose cartel behaviour. It is expected that any increase in enforcement action as a result of such disclosures will lead to increases in private antitrust follow-on litigation. In addition, there have been a number of criminal prosecutions under Australia’s criminal cartel regime in 2019, including the largest ever criminal fine imposed under the CCA of A$34.5 million, after Japanese shipping company Kawasaki Kisen Kaisha Ltd pleaded guilty to criminal cartel conduct in 2018.

It is also worth noting that a third private antitrust action was commenced in the Federal Court of Australia in 2019, B&K Holdings v. Garmin. B&K alleged that Garmin misused its market power by engaging in predatory pricing and exclusive dealing. The case was dismissed by consent in November 2019 following the failure of an application for summary judgment by Garmin.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

Under Section 86(1) of the CCA, the Federal Court of Australia has jurisdiction to hear all civil proceedings arising under the CCA. Under Section 163 of the CCA, the Federal Court also has jurisdiction to hear prosecutions for criminal offences under the CCA. The Federal Circuit Court has jurisdiction to hear misuse of market power cases and matters arising under industry codes registered under the CCA, but cannot make an award for damages greater than A$750,000 under Section 86AA of the CCA. Private enforcement proceedings commenced or heard in the federal courts are subject to the Federal Court Rules 2011 (Federal Court Rules). The CCA also confers limited jurisdiction for private antitrust enforcement on the several courts of Australian states, although in practice claims under the CCA are more commonly pursued in the Federal Court.

3 Federal Court of Australia Act 1976 (Cth).
While a framework exists for private enforcement actions, including by making use of provisions in the CCA that allow for follow-on proceedings (discussed further in Section X), such private enforcement actions are not common in Australia. This is likely due to the difficulties in assessing damage suffered as a result of anticompetitive conduct, the high cost of conducting proceedings in the Federal Court and potentially a lack of effective compensation mechanisms such as treble damages, which in other jurisdictions are perceived to create greater incentives for private litigation.

III EXTRATERRITORIALITY

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

The extraterritorial effect of the CCA’s prohibitions against cartel conduct and the extraterritoriality provisions set out in Section 5 of the CCA were examined in *Norcast SârL v. Bradken Limited*, where the court found that cartel conduct in the form of bid-rigging did not need to occur in Australia or relate to an Australian market for the court to have jurisdiction over the conduct in question. In that case, it was sufficient that the corporations involved in the bid-rigging had practical links to Australia and that one of the participants was an Australian corporation. However, the application of the *Norcast* decision will likely be called into question in future cases brought under the new cartel conduct provisions introduced in 2017 on account of the requirement that the conduct has an effect on trade or commerce within, to or from Australia.

Section 5 of the CCA was amended in 2017 so that private parties are no longer required to seek ministerial consent before relying on extraterritorial conduct in private competition law actions. The amendment removed a potentially cumbersome roadblock to private litigants when seeking redress for harm suffered as a result of a contravention of the CCA.

IV STANDING

The CCA permits a person (including a corporation) to seek damages, declarations that all or part of a contract is void, divestitures and other remedies if he or she has suffered loss or damage, or is likely to suffer loss or damage, as a result of conduct committed in contravention of Part IV of the CCA. Any person can seek an injunction in relation to a contravention or proposed contravention of Part IV of the CCA, other than in relation to a breach of the prohibition on anticompetitive mergers and acquisitions.

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

V THE PROCESS OF DISCOVERY

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

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

a the person reasonably believes that he or she may have the right to obtain relief from a prospective defendant;

b the person has made reasonable inquiries but does not have sufficient information to decide whether to commence proceedings;

c the prospective defendant is likely to have documents that are directly relevant to the question of whether the person has the right to obtain relief from the prospective defendant; and

d the documents will assist with making the decision as to whether to bring proceedings.

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

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

However, there are limitations on the ability of a private litigant to obtain documents from the ACCC in proceedings to which the ACCC is not a party. In July 2009, the CCA was amended to enhance the protection afforded to information given in confidence to the ACCC that relates to a breach, or possible breach, of a cartel prohibition (protected cartel information). As a result of the amendments, the ACCC is not required to produce to a court or tribunal, or to give discovery or produce to a person, a document containing protected cartel information, or to disclose protected cartel information to a court or tribunal, except by leave of the court or tribunal.

5 Federal Court Rules 2011, Rule 20.11.
6 Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008, Explanatory Memorandum, 87, [7.1].

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VI USE OF EXPERTS

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

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

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

VII CLASS ACTIONS

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

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

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

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7 See, for example, Federal Court of Australia, Practice Note GPN-EXPT.
VIII CALCULATING DAMAGES

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

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

IX PASS-ON DEFENCES

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

X FOLLOW-ON LITIGATION

There are currently no limitations on follow-on claims for private actions against parties who have been subject to public enforcement action. While the ACCC has an immunity policy for self-reporting cartelists that can grant immunity from criminal prosecution and ACCC-initiated civil proceedings for cartel conduct, this immunity cannot be granted in respect of private enforcement actions for the same cartel behaviour.

As discussed in Section I, under Section 83 of the CCA, findings of fact and admissions made in earlier proceedings, including proceedings brought for contraventions of cartel conduct prohibitions, are prima facie evidence of those facts or admissions in later proceedings for damages or compensation orders. This now extends to allow admissions of fact made by a party in the earlier proceeding to be used as prima facie evidence of those facts in later proceedings. A corollary of this development is that it may adversely impact the ACCC’s ability to resolve enforcement proceedings with private parties by consent, given that a consent-based outcome would not avoid the risk of admissions being relied upon in follow-on claims.
Australia

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

XI PRIVILEGES

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

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

XII SETTLEMENT PROCEDURES

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

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

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

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

8 Jarra Creek Centra Packing Shed Pty Ltd v. Amcor Ltd.
9 Wright Rubber Products Pty Ltd v. Bayer AG [No. 3].
10 De Brett Seafood Pty Ltd v. Qantas Airways Ltd.
11 Section 6 of the Civil Dispute Resolution Act 2011 (Cth).
12 Section 33V of the Federal Court Act.
The Federal Court has developed its own criteria for approving class action settlements.\textsuperscript{13} The parties will usually need to persuade the court that the proposed settlement is fair and reasonable having regard to the claims made on behalf of group members bound by settlement; and the proposed settlement has been undertaken in the interests of group members, as well as those of the representative applicant, and not just in the interests of the representative applicant and the defendant.

XIII ARBITRATION

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

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

XIV INDEMNIFICATION AND CONTRIBUTION

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

It remains to be seen whether the recent developments in Australian antitrust law, including the 2017 reforms to the CCA and the ACCC’s increased enforcement action against cartel conduct, will lead to an increase in private antitrust follow-on litigation. The commencement of the \textit{J Wisbey & Associates v. UBS & Ors} class action, a private antitrust follow-on action as a result of international enforcement action, may be a sign of things to come. Further, given both the increasing significance of data and the ability to extract value from data in the Australian economy and the growing market power of digital platforms such as Google and Facebook, it can be expected that private antitrust actions such as \textit{Unlockd v. Google} and \textit{Dialogue v. Instagram}, may become more common in the near future.

\textsuperscript{13} Federal Court of Australia, Practice Note GPN-CA.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

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

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

Following these judgments, the Austrian Supreme Court in May 2018 asked the CJEU whether lenders that provided publicly subsidised funding to customers of the Escalator cartel (such as housing and building cooperatives) may claim damages (from increased loan and funding requirements) from the cartel members. On 12 December 2019, the ECJ published the respective decision. Therefore, although private antitrust litigation today plays a pivotal role in Austrian antitrust practice, and Austrian courts are also actively shaping the law on a European level (by referring such important questions to the CJEU), final decisions in major proceedings often experience substantial delays owing to numerous upfront disputes over procedural matters.

1 Bernt Elsner and Dieter Zandler are partners and Marlene Wimmer-Nistelberger is a senior associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.
2 OGH 8 October 2008, 16 Ok 5/08.
3 OGH 26 May 2014, 8 Ob 81/13i.
4 OGH 2 August 2012, 4 Ob 46/12m.
5 OGH 29 October 2014, 7 Ob 121/14a.
6 Judgment Kone and Others v. ÖBB Infrastruktur AG, C-557/12, ECLI:EU:C:2014:1317.
7 Judgment Bundeswettbewerbsbehörde v. Donau Chemie and Others, C-536/11, ECLI:EU:C:2013:366.
8 OGH 17 May 2018, 9 Ob 44/17m; the case is registered in the case register of the CJEU under C-435/18, Otis et al. v. Land Oberösterreich et al.; opinion of AG Juliane Kokott, 29 July 2019; judgment Otis et al. v. Land Oberösterreich et al., C-435/18, ECLI:EU:C:2019:1069..
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) implementing the EU Damages Directive (Directive)⁹ became effective on 1 May 2017 with some provisions entering into force retroactively.

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

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

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

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

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III EXTRATERRITORIALITY

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

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

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

IV STANDING

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

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

However, inter alia, the causal link between the infringement and the loss is also questioned at the EU level. As mentioned in Section I, the ECJ had to decide whether lenders that provided publicly subsidised funding to customers of the *Escalator* cartel may claim damages. According to the judgment, Article 101 TFEU provides that damages can

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10 Section 24(2) KartG; cf OGH 27 February 2006, 16 Ok 49/05; OGH 23 June 1997, 16 Ok 12/97.
12 ibid. Article 8(1): ‘provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.’
13 Section 99 Law on Court Jurisdiction (JN).
16 OGH 17 October 2012, 7 Ob 48/12b (ruling).
17 The OGH in this decision asked the trial court to establish the necessary facts with regard to umbrella pricing: OGH 7 Ob 121/14a.
18 Opinion of AG Kokott, *Otis et al. v. Land Oberösterreich et al.*; C-435/18, esp. recital 47 et seq.
also be claimed by entities that were not participants in the affected market. Therefore, this includes lenders who provided subsidised loans to the customers of the cartel infringers. The damage to them consists of the loss of the use of the higher loan amounts during the loan period, since they would have been unable to invest these amounts or repay existing loans during this period.

V THE PROCESS OF DISCOVERY

Effective rules on the disclosure of evidence apply to all PADCs in which the action initiating the proceedings is filed after 26 December 2016.

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

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

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

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

A party to the proceedings may also apply for disclosure of documents contained in the files of competition authorities (the European Commission, NCAs). However, certain documents – namely information prepared for the proceedings before the competition authority, information prepared during the proceedings by the authority and submitted to the parties, and settlement submissions that were withdrawn – may only be disclosed once
the competition authority has completed its proceedings (Section 37k(3) KartG). Leniency statements and settlement submissions are not themselves subject to disclosure (Section 37k(4) KartG). 19

So far, no published case law exists that applies the new rules on disclosure of evidence. It can be expected that courts will face a number of exciting and difficult questions when dealing with such a new instrument, previously unknown to the Austrian legal system. In particular, the proportionality test, required for the assessment of every disclosure request, will be quite challenging, as the relevant evidence subject to the disclosure request will normally (with the exception of cases specified in Section 37j(7) KartG) not be inspected by the court, which will then have to base its assessment solely on the assertions of the parties. Due to the lack of experience with these provisions, injured parties who have joined criminal proceedings as private parties may prefer to obtain access to certain documents via the criminal file, which may contain the respective documents as well. However, this only applies to cases of bid-rigging.

According to standing case law before the KaWeRÄG 2017 came into force, the Supreme Court acted exclusively as a legal instance, which was widely criticised as market definition is a question of fact, not law. Therefore, results of expert reports were verifiable only to a very limited extent by the Austrian Supreme Court. However, the new Section 49(3) KartG provides that appeals may now also be based on the fact that the file reveals considerable reservations as to the correctness of decisive facts on which the cartel court based its decision. Furthermore, a recent decision of the Austrian Supreme Court sheds some light on the interpretation of this Section and draws parallels to case law regarding a quite similar provision in the Austrian Criminal Procedure Act (StPO). 20

VI USE OF EXPERTS

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

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

To establish loss and to calculate the quantum of damages, as well as the causal link between an infringement and such damages, parties can also instruct private experts and try to introduce their findings as evidence in the court proceeding. In addition, parties may also try to call their private expert as an expert witness. However, private experts appointed by the parties do not substitute court-appointed experts, and courts may disregard the findings of a

19 This provision (implementing Article 6(6) of the Directive) will likely be subject to legal challenges, as arguably it conflicts with the CJEU’s decision in Donau Chemie, which determined that a general exclusion without any balancing of interest is contrary to the principle of effectiveness. According to the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims of damages from infringements of Article 101 or Article 102 TFEU are designed and applied in such a way that they do not make it in practice impossible or excessively difficult to exercise the Union right to full compensation for harm caused by an infringement of Article 101 or Article 102 TFEU.

20 OGH 12 July 2018, 16 Ok 1/18k.
party-appointed expert simply by relying on the findings and opinion of a court-appointed expert. Private party experts’ findings reports also do not have the same evidential value as reports of court-appointed experts (Section 292 ZPO).

VII CLASS ACTIONS

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

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

To our knowledge, there is no published case law in Austria that examines the potential of an Austrian-style class action in PADC proceedings.

VIII CALCULATING DAMAGES

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

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

23 Kodek in Neumayer, p. 9.
24 The applicable statutory default interest is 4 per cent (Section 1000(1) General Civil Code (ABGB)), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).
25 OGH 15 May 2012, 3 Ob 1/12m; see Csoklich, 185; Reischauer in Rummel (ed), ABGB 3rd edition (2007), Section 1293 ABGB Paragraph 2a; Karner in Kozioł/P Bydlinksi/Bollenberger (eds), ABGB, 4th edition (2014), Section 1293, Paragraph 9.
Austria

Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damage due to an antitrust infringement (i.e., the injured party has to prove the ‘first euro’ of its damages). However, for cartels between competitors, the new Section 37c(2) KartG contains a presumption that the cartel caused damage, thus already allowing an estimate if such presumption cannot be rebutted.

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

IX PASS-ON DEFENCES

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

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

X FOLLOW-ON LITIGATION

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

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

28 OGH 8 Ob 81/13i; see Kodek, footnote 26.
XI PRIVILEGES

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

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

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

XII SETTLEMENT PROCEDURES

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

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

**XIII ARBITRATION**

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

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

**XIV INDEMNIFICATION AND CONTRIBUTION**

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

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

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


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

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

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

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

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

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

In 2019, private antitrust litigation in Belgium continued to follow the same trends as in 2018. There were no significant developments in 2019 as to the private damages actions before Belgian courts.

In the private damages actions relating to the European Trucks antitrust case brought in Belgium, two interim judgments designating an expert have been rendered.

Though a development in the Cambridge Analytica data scandal was expected at the beginning of November 2019, the first hearing before the Commercial Court of Brussels has now been set for 2 March 2020. The Cambridge Analytica data scandal centred around a privacy breach by Facebook in March 2018, whereby the political consultant Cambridge Analytica was able to access personal data of Facebook users. This data was subsequently used to influence elections in various countries. In the aftermath of this scandal, Test Aankoop filed a claim before the Commercial Court of Brussels in June 2018, claiming at least €200 of damages for each Facebook user that had been the victim of the privacy breach. Considering that around 33,000 people joined the action, this case could potentially lead to Facebook facing a damages claim of €6.6 million in total.

In 2019, there were also no significant developments in the European Lifts and Escalators case. This case dates back to 2007, when the European Commission found that four elevator and escalator companies (Kone, Otis, ThyssenKrupp and Schindler) had participated in a cartel. In June 2008, the Commission initiated a follow-on damages case before the Brussels Commercial Court to recover the damage it had suffered following the infringing conduct of the elevator companies. The Commercial Court dismissed the Commission’s claim because of the lack of evidence on the Commission’s side.2 Subsequently, the Commission lodged an appeal before the Brussels Court of Appeal (i.e., the Market Court) whereby the latter ordered the four companies to disclose documents from the Commission’s file on 28 October 2015 by interim judgment. The four companies appealed this judgment of the Court of Appeal before the Belgian Supreme Court. The Belgian Supreme Court dismissed the appeal against the interim judgment of the Brussels Court of Appeal and referred the case back to that Court on 22 March 2018. The case is currently still pending before the Brussels Court of Appeal.

1 Frank Wijckmans is a partner, Maaike Visser is counsel, Karolien Francken is a senior associate and Monique Sengeløv and Manda Wilson are junior associates at Contrast.

2 The judgment of 24 November 2014 of the Brussels Commercial Court can be consulted via the following link: https://ec.europa.eu/competition/national_courts/cases/143115/143115_1_3.pdf.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition enforcement in Belgium generally consists of four different types of actions. First, injured parties may seek cease-and-desist orders. These actions represent the majority of private enforcement actions brought under Belgian law. Cease-and-desist orders will generally be based on Articles XVII.1 et seq. of the Code on Economic Law (CEL). These Articles relate to a specific procedure to obtain cease-and-desist orders from the president of the Commercial Court competent in the matter of unfair trade practices. It is settled case law that competition law infringements are considered to fall within the scope of the notion of unfair trade practices as set out in Article VI.104 CEL. Second, it is also possible to request an interim remedy from the president of the competent court to obtain urgent relief.³ Contrary to cease-and-desist orders, this judgment will only result in temporary relief, and not in a judgment on the merits.⁴ A third category of private enforcement actions available to claimants are private damages actions. These are dealt with in more detail below. Finally, competition law defences might also occasionally arise in contractual disputes.⁵

With regard to the third category of (recovery) damages actions, a specific set of rules was made available as of 22 June 2017 to those persons that wish to claim damages on account of having suffered harm following an infringement of competition law.⁶ With the act of 6 June 2017 (Implementation Act), the Belgian legislator transposed the Private Damages Directive⁷ regarding actions for damages into the Belgian legislative framework. This was done by inserting a new Title 3, ‘The action for damages for infringements of competition law’, in Book XVII, ‘Particular judicial procedures’, of the CEL. Although private damages actions were already possible prior to the transposition of the Private Damages Directive on the basis of general tort principles,⁸ Article XVII.72 CEL now explicitly provides that any natural or legal person who has suffered harm due to an infringement of competition law has the right to claim and to obtain full compensation for that harm, in accordance with the general tort principles under Belgian law. The Implementation Act provides a number of new substantive and procedural rules that facilitate the bringing of private damages actions by lessening the burden of proof on claimants. This is achieved through the introduction of various presumptions and by making access to evidence easier. At the same time, the Implementation Act also extends the scope of the Belgian class action regime to infringements of European competition law that can be brought before the Brussels courts.⁹

Private damages actions can be brought by any natural or legal person, irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether there has been a prior finding of an infringement by a competition

³ In accordance with Article 584 Belgian Judicial Code, the claimant will have to prove that the action requires urgent relief.
⁴ Article 1039 Judicial Code.
⁵ In this respect, the nullity of the contract can be requested on the basis of Article 1184 Belgian Civil Code or a declaratory judgment can be sought on the basis of Article 18 Judicial Code.
⁶ The Implementation Act applies both to infringements of Article 101 and Article 102 Treaty on the Functioning of the European Union (TFEU), as well as to their counterpart under Belgian law, Article IV.1 and Article IV.2 CEL.
⁷ Directive 2014/104/EU.
⁸ Article 1382 Civil Code.
⁹ Article XVII.37, 33° CEL; Article XVII.35 CEL stipulates that the courts of Brussels will have jurisdiction to hear actions for collective redress.
authority. A decision by a competition authority establishing a competition infringement is therefore not a prerequisite. Both standalone and follow-on actions for damages are available under Articles XVII.71 CEL to XVII.91 CEL.

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

For private damages actions brought under general tort law, the limitation period is five years following the day on which the claimant became (or should reasonably have become) aware of the harm suffered and of the identity of the person liable for such harm, or in any event 20 years from the occurrence of the facts that caused the harm. Article XVII.90 CEL provides, however, that the limitation period is five years after the day on which the infringement of competition law has ceased and the injured party knows (or should reasonably have known) of the infringement, the damage that was suffered and the identity of the infringer. To determine the start date of the limitation period, it will not be sufficient that the claimant is aware of the damage and the wrongdoing. The injured party must also have (reasonable) knowledge of the fact that the wrongdoing constitutes an infringement of competition law. Additionally, the limitation period will be interrupted if a competition authority takes action to investigate or brings proceedings for an infringement of competition law until a final infringement decision is taken. Such period will be suspended in respect of the parties that are or were involved in an amicable settlement. For cease-and-desist actions, the limitation period is one year after the termination of the cause of action.

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

10 Article XVII.73 CEL.
11 The provisions of the Judicial Code will apply.
12 Article 2262 bis Judicial Code.
13 In the event of a single and continuous infringement, the infringement shall only be deemed to have ceased on the day on which the last infringement ended.
15 Article XVII.90 §2 CEL.
16 Article XVII.91 CEL.
17 Article XVII.5 CEL.
III EXTRATERRITORIALITY

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

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

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

The jurisdiction of the Belgian courts to hear private damages actions is established according to EU Regulation 1215/2012. Pursuant to Article 4(1) of this Regulation, Belgian courts have jurisdiction when the defendant has its domicile or usual residence in Belgium at the time proceedings are initiated. In cases where proceedings are initiated against multiple defendants, it is sufficient for one of the defendants to have its domicile or usual residence in Belgium (Article 8(1) EU Regulation 1215/2012). The claimant can also bring a private antitrust litigation before the Belgian courts if the event giving rise to the harm or the harm itself occurred in Belgium (Article 7(2) EU Regulation 1215/2012). Finally, pursuant to Article 26 of EU Regulation 1215/2012, a defendant can agree to appear before a Belgian court even if the court is not competent.

IV STANDING

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

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18 Decision of the Belgian Competition Authority No. 2013-I/O-06 of 28 February 2013 in case MEDE-I/O-08/0009.
19 Decision of the Dutch Competition Authority of 16 December 2010 in case 6306.
Both direct and indirect purchasers\textsuperscript{21} may have standing – as alleged injured parties – to bring an action for damages\textsuperscript{22} against infringers\textsuperscript{23} of competition law.\textsuperscript{24} Direct and indirect purchasers benefit from the rebuttable presumption that the cartel infringement caused harm.\textsuperscript{25} Indirect purchasers of goods or services affected by an infringement of competition law benefit from a rebuttable presumption that direct buyers passed on their overcharge.\textsuperscript{26}

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

The ordinary provisions of the Judicial Code will apply to assess the standing of the claimant. A claimant needs to have the capacity of holding the right invoked in the claim and must have an acquired, personal and immediate legal interest when filing the claim. The claimant can act if its rights are harmed or under serious threat of being harmed.\textsuperscript{27} Given the requisite personal interest, claims cannot be filed in the general interest.\textsuperscript{28} Individual claimants that have suffered personal harm are not prevented from grouping their claims in a single summons, with any damages being awarded to each claimant separately. It is also conceivable that various individual claims are assigned to a single person.

Consumer associations and public interest groups have standing to bring an action for collective redress for infringements of competition law provided they comply with the applicable rules to act as a group representative.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{21} Direct purchasers are defined as ‘a natural or legal person who acquired, directly from an infringer, products that were the object of an infringement of competition law.’ (Article I.22.20° CEL.) Indirect purchasers are defined as ‘a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products that were the object of an infringement of competition law, or products containing them or derived therefrom.’ (Article I.22.21° CEL.)
\item \textsuperscript{22} An action for damages is defined as ‘an action under Article XVII.72 by which a claim for damages is brought before a court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim’ (Article I.22.3° CEL).
\item \textsuperscript{23} Infringers are defined as ‘an undertaking or association of undertakings which has committed an infringement of competition law’ (Article I.22.2° CEL).
\item \textsuperscript{24} Infringement of competition law is defined as ‘an infringement of Article 101 or 102 TFEU and/or Article IV.1 or IV.2’ (Article I.22.1° CEL). Article IV.1 and IV.2 CEL are the Belgian equivalents of Article 101 and 102 TFEU. In a recent preliminary ruling, the European Court of Justice found that persons not acting as suppliers or customers in the market affected by the cartel, must be able to request compensation for loss resulting from the fact that, as a result of that cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and, consequently, were unable to use that difference more profitably. The European Court pointed out that it will be for the national court to determine whether the applicant had the possibility of making more profitable investments and, if that is the case, whether the applicant adduces the evidence necessary for the existence of a causal connection between that loss and the cartel at issue. Judgment 12 December 2019, Otis GmbH and Others v. Land Oberösterreich and Others, C-435/18, ECLI:EU:C:2019:1069, Paragraphs 32-33.
\item \textsuperscript{25} Article XVII.73 CEL: ‘Cartel infringements are presumed to cause harm. The infringer shall have the right to rebut that presumption.’
\item \textsuperscript{26} Article XVII.84 CEL, see Section IX.
\item \textsuperscript{27} Articles 17 and 18 Judicial Code.
\item \textsuperscript{28} See Section VII.
\item \textsuperscript{29} Article XVII.39 CEL.
\end{itemize}
V THE PROCESS OF DISCOVERY

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

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

When assessing the request for document production, the court must balance the legitimate interests of the parties and assess the proportionality of the request. Article XVII.74 CEL provides in particular that the court should take into account before ordering the disclosure the factual relevance, the costs of disclosure (in particular with relation to third parties) and whether the requested documents might hold any confidential information. To the extent that one of the parties is required to disclose documents holding confidential information, Article XVII.75 CEL grants the judge the power to order additional measures to ensure the confidential treatment of this information, such as allowing for the submission of non-confidential versions, having an expert draft a non-confidential summary or limiting the access to a select number of persons. In addition, Article XVII.76 CEL also provides that a (third) party that is ordered to disclose documents may submit written comments and be heard by the court, if the court gives him or her permission to do so, irrespective of whether the documents contain confidential information. In this respect, the European Commission has also prepared a draft communication to support national courts when dealing with requests to disclose confidential information in private enforcement actions. The European Commission has indicated that it will carefully review the guidance received from targeted stakeholders during the consultation this year before finalising the communication.

With regard to the information kept in the file of a national competition authority, specific rules were likewise introduced that facilitate access. In summary, the documents kept in the file of the national competition authority are divided into three categories: blacklisted

31 Consideration 16 of the Private Damages Directive.
documents, grey-listed documents and white-listed documents (a residual category). With regard to documents that are blacklisted (i.e., leniency statements and settlement submissions), the Belgian courts cannot order disclosure. 33 The national judge can only verify whether the documents do in fact fall within this category. 34 With regard to the documents on the grey list, disclosure will only be possible as of the moment the competition authority has closed its proceedings. The grey list concerns the documents prepared with the specific purpose of being used for the proceedings of the competition authority, information drafted by the competition authority and sent to the parties during the proceedings, and settlement submissions that have been withdrawn. 35 For the residual category (white list), production may be requested at any time during the proceedings, provided of course that the conditions required for the production of documents are met. 36

In any event and irrespective of the category of documents, the court will be required to assess the proportionality of an order to disclose documents from the file of the competition authority. Moreover, the court is obliged to consider whether the request is sufficiently specific, whether it is part of a claim for damages and whether it does not detract from the effective enforcement of competition law. 37 The competition authority will be asked to provide written comments on the proportionality of the request. 38 The disclosure can only be ordered from the competition authority to the extent that no (third) party is reasonably able to provide the requested evidence. 39 Under no circumstances will the disclosure request provide the parties with access to the internal documents of the competition authority or letters exchanged between competition authorities. 40

In addition, the use of evidence obtained through access to the file of the national competition authority is restricted. Parties are prohibited from using the documents listed on the black list that were obtained through access to the file of a competition authority in a damages action. 41 The same goes for documents listed on the grey list until the proceedings have been closed by the competition authority. 42 In the event that such evidence is put forward, the court will deem the evidence inadmissible. 43

Under general procedural law, strict sanctions apply to parties and third parties not complying with the court’s instructions on document production. In this respect, the court may impose a compensation or penalty payment if parties or third parties do not produce the required documents. 44 In addition, since the entry into force of the Implementation Act, the court will be able to impose on (third) parties or their legal representatives a fine ranging from €1,000 to €10 million, depending on the specific circumstances of the case when they fail to comply with the rules set out above relating to the production of documents, the

33 Article XVII.79. §2 CEL, in accordance with Article XVII.79. §4 CEL, this protection will, however, only be granted to those parts containing the leniency declaration or the settlement proposal.
34 Article XVII.79. §3 CEL.
35 Article XVII.79. §1 CEL.
36 Article XVII.79. §5 CEL.
37 Article XVII.78. §1 CEL.
38 Article XVII.78. §2 CEL.
39 Article XVII.77. §2 CEL.
40 Article XVII.77. §1 CEL.
41 Article XVII.80. §1 CEL.
42 Article XVII.80. §2 CEL.
43 Article XVII.80 CEL.
44 Article 882 Judicial Code.
confidentiality of documents or the use of information gathered via the discovery process. Moreover, the court is also allowed to draw inferences that are detrimental to the party that breached the above rules. For example, the court will be able to establish that a discussion point has been proven or that claims and defences are rejected in whole or in part, or to order payment of the costs of the proceedings. Finally, the Belgian procedural rules also allow for parties to produce witnesses or to seek an order that some witnesses be heard. A cross-examination of the witnesses is, however, not allowed.

VI USE OF EXPERTS

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

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

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

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

VII CLASS ACTIONS

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

In general, actions for collective redress will be governed by the same provisions as private enforcement actions, with only two exceptions. First, it is not possible to invoke a passing-on defence in collective redress actions, and second, the court is not able to suspend the proceedings if the parties engage in consensual dispute resolution negotiations. The procedural organisation of the class action is characterised by some particular points. To start, it is not possible for the injured parties to bring the collective action themselves. The

45 Article XVII.81. §1 CEL.
46 Article XVII.81. §4 CEL.
47 Article 915 et seq. Judicial Code.
48 Article XVII.35 CEL: ‘The Brussels courts have exclusive jurisdictions to hear actions for collective redress’.
49 Article XVII.36, 1° CEL juncto Article XVII.37.1° (a) and 33° CEL.
50 Article XVII.70 CEL.
collective claim must be brought by a group representative. Only consumer associations and public bodies that meet the conditions listed in Article XVII.39 CEL may act as such a group representative. The very specific nature of these criteria has de facto resulted in only the Belgian consumer protection organisation Test Aankoop being able to initiate collective actions for damages.\footnote{I Claeys and M Van Nieuwenborgh, ‘De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?’, TBH 2018, 2, (119) 138.}

The Belgian rules do not provide a certification stage. The first stage in an action for collective redress consists of assessing the admisibility of the claim.\footnote{Article XVII.42 CEL.} The group representative must state its choice for the opt-in or the opt-out formula, and provide a reasoning as to why the proposed system should be applied.\footnote{Article XVII.43. §2 CEL.} Article XVII.43 CEL provides that the court will subsequently have to decide on the admisibility of the action within two months and determine the term for customers to exercise their option rights. The law provides furthermore for a mandatory negotiation phase that starts immediately after the decision of the court on the admisibility of the action.\footnote{Article XVII.45 CEL.} Following the final decision of the court, a court-appointed administrator will be assigned with the task of paying the compensation to the members of the group under the court’s supervision.\footnote{Article XVII.57 CEL–Article XVII.62 CEL.} Future amendments to these rules may be expected as a European legal framework for collective redress is currently being negotiated at the European level.\footnote{Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)), available at: https://www.europarl.europa.eu/doceo/document /A-8-2018-0447_EN.html.}

Other specific Belgian legislation exists that may provide a legal basis for collective actions. In this respect, a collective interest action exists for injunctive relief against practices that harm consumer interests. It will not be possible for these organisations to recover damages for their members, but only for themselves to the extent that their own personal interests have been harmed. Finally, it is also possible under Belgian law to consolidate private damages actions when they are interconnected such that it is deemed appropriate to assess them together.\footnote{Article 30 Belgian Civil Code.} From a substantive perspective, these actions will, however, remain individual actions.

VIII CALCULATING DAMAGES

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

52 Article XVII.42 CEL.
53 Article XVII.43. §2 CEL.
54 Article XVII.45 CEL.
55 Article XVII.57 CEL–Article XVII.62 CEL.
57 Article 30 Belgian Civil Code.
The damages that can be sought are purely compensatory in nature. The Belgian courts are not entitled to award punitive or treble damages.

Article XVII.73 CEL includes a rebuttable presumption that a cartel infringement causes harm. Book XVII does not, however, quantify the presumed harm. It is up to the claimant to prove the amount of damage that it has suffered. This is a costly and fact-intensive process that requires complex economic modelling. The claimant can use any method it finds appropriate to calculate the damages. It is the court that will ultimately decide upon the adequate level of compensation. The European Commission has provided the courts and the parties with tools to assist them with the quantification of the damages. The courts have the option to request the assistance of the Belgian Competition Authority to determine the quantum of the harm. Courts also heavily rely upon expert reports to determine the amount of damages, even though the reports themselves are not binding on the court. If the court is unable to determine the amount of the damages in an accurate way, it has the discretionary power to award compensation \textit{ex aequo et bono} (i.e., based on a good faith assessment). The Commercial Court of Ghent effectively used its discretionary power in the \textit{Honda} case. The judge decided that it was excessively difficult to determine the amount of damage suffered, given that the facts dated back more than 20 years. The judge awarded the claimants €20,000 each, based on an \textit{ex aequo et bono} assessment.

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

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

**IX PASS-ON DEFENCES**

Pursuant to Article XVII.83 CEL, the defendant may invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. Hence, following the transposition of the Private

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


Damages Directive, it is clear that the defendant has a right to invoke a passing-on defence (as a defensive tool or shield). Article XVII.70 CEL provides as an exception that defendants in an action for collective redress cannot invoke a passing-on defence.

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

The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant and third parties. Given that the burden of proof is placed on someone who will in fact not hold the necessary evidence, the defendant has the ability to reasonably request access to the relevant information in accordance with the rules on the disclosure of evidence. Where a passing-on defence is raised, it will be up to the claimant to demonstrate not to have passed on the overcharge to its own customers.

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

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

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

Article XVII.85 CEL transposes Article 15 of the Private Damages Directive, relating to actions for damages by claimants from different levels in the supply chain in a passing-on context. Where actions for damages are introduced by claimants from different levels of the supply chain, the court can take due account of any of the following: (1) actions for damages that are related to the same infringement of competition law, but that are brought

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63 Article I.22.17° CEL.
64 Article XVII.74 and following CEL.
65 Article XVII.83 CEL.
by claimants from other levels in the supply chain; (2) judgments resulting from actions for damages as referred to in point (1); and (3) relevant information in the public domain resulting from the public enforcement of competition law.68

In accordance with Article 16 of the Private Damages Directive and following a public consultation, the European Commission has issued guidelines for national courts on how to estimate the share of the overcharge that was passed on to indirect purchasers and final consumers in August 2019.69 These guidelines are meant to provide practical guidance to national courts and stakeholders by reference to the applicable legal context, the relevant economic theory and quantification methods specifically in the passing-on context.

X FOLLOW-ON LITIGATION

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

That being said, Article XVII.86, Section 2 CEL does provide that an infringer that received full immunity and SMEs that fulfil three specific and cumulative conditions can only be held liable for the amount of harm caused to their own direct or indirect customers.70 In the event, however, that a claimant would not be able to obtain full compensation from the other infringers, the recipient that received full immunity or an SME will still be held fully liable.71 When a settlement is reached between the injured party and an infringing party, the injured party will only be able to address its remaining claim for compensation to the non-settling co-infringers.72

Furthermore, a number of presumptions will apply to follow-on actions, depending on which competition authority has taken the decision establishing a competition law infringement. In the scenario that the decision was taken by the Belgian Competition Authority or the Brussels Court of Appeal, an irrefutable presumption that an infringement took place will exist and the fault will be established.73 Although the CEL does not mention decisions taken by the European Commission, the same irrefutable presumption will apply on account of Article 16 Regulation No. 1/2003, which grants the same binding nature to

69 Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, O.J. 9 August 2019, 267, 4, online available via https://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf.
70 The three cumulative conditions are at any time during the infringement the SME had a market share below 5 per cent; the economic viability of the SME could be jeopardised and cause its assets to lose all their value; and the SME cannot have been the leader or coercer of the infringement, and is not a repeat offender.
71 Article XVII.86. §2 and §3 CEL.
72 Article XVII.86. §2 and §3 CEL.
73 Article XVII.88. §1 CEL.
74 Article XVII.82. §1 CEL.
decisions from the European Commission as to decisions rendered by a national competition authority. Decisions adopted by a national competition authority other than the Belgian Competition Authority will only serve as prima facie evidence that an infringement of competition law has occurred, and the court will have to assess the decision together with any other evidence provided by the parties.

An important question is the scope of the binding nature of a decision and of the presumptions based on the decision. For instance, will the binding nature and the presumption extend only to the infringers themselves or also to their parent companies? In this respect, the Commercial Court of Brussels has explicitly confirmed that a decision of the European Commission does not qualify as evidence of a fault attributable to a party that is not an addressee of the decision. The Court stipulated that the binding nature of a decision only extends to the infringements and the infringing parties identified in the decision. This cannot be extended to other facts or parties. This is supported by the Private Damages Directive itself, which states explicitly that the ‘effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction’.

In Skanska the European Court of Justice addressed this question. It found that the concept of an ‘undertaking’ has the same meaning in private enforcement actions as it does in public enforcement by the European Commission or the national competition authorities. This equivalence has some important consequences. For example, a broad interpretation of this judgment could result in a parent company being held liable under national civil law for the competition law infringements of its subsidiary. Furthermore, this judgment will also impact the M&A practice as it introduces the concept of ‘economic continuity’ for private enforcement actions. This implies that a company that takes over and continues the activities of another company can be required to pay damages arising from the latter’s earlier competition law infringements. Civil liability for a competition law infringement will now adhere to the activities of an ‘undertaking’ rather than to a specific legal entity.

XI PRIVILEGES

The principle of attorney–client privilege is widely recognised in Belgium. The following documents are covered by attorney–client privilege: correspondence between a client and an attorney, internal documents that are prepared exclusively for the purpose of obtaining external legal advice and internal documents summarising or disseminating external legal advice. Similarly, correspondence by in-house lawyers and their employers is also covered by legal privilege, provided that the in-house lawyers are members of the Belgian institute of in-house lawyers. In 2010, the European Court of Justice decided that communications

76 Article XVII.82. §2 CEL.
78 Consideration 34 of the Private Damages Directive.
81 Article 5 Act of 1 March 2000 establishing an institute for in-house lawyers.
to and from in-house counsel are not protected by legal professional privilege in the context of a European Commission investigation. Legal professional privilege for in-house lawyers therefore only applies to proceedings before the Belgian authorities, and not when the Belgian authorities assist the European Commission in an investigation.

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

The Implementation Act introduced the potential to obtain evidence from the file of the competition authorities. If certain conditions are fulfilled, the courts can order the disclosure of the file. Certain documents can only be disclosed after the competition authority has closed its investigation or has taken a decision. Certain documentation of the file of the competition authority can never be disclosed, such as leniency applications. The CEL has thus significantly facilitated the disclosure of the file of the competition authority compared to prior practice.

XII SETTLEMENT PROCEDURES

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

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

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

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

In the majority of cases, settlements are kept confidential.

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83 Article 8 European Convention on Human Rights.
84 Article XVII.75 CEL.
85 Articles XVII.77-78 CEL.
86 Article XVII.79 CEL.
87 Article XVII.45, Section 1 CEL.
88 Article XVII.47 CEL.
XIII ARBITRATION

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

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

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

The interplay between arbitration clauses and private damages actions remains an outstanding issue. To date, there is no guiding (Belgian) case law. Given the increasing trend for private damages actions and the growing emphasis on alternative dispute resolution, the Belgian courts are expected to provide guidance on this outstanding issue in the near future.

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

XIV INDEMNIFICATION AND CONTRIBUTION

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

As stated above, Article XVII.86 CEL provides for two exceptions to the principle of joint and several liability: where the infringer has received full immunity, and for SMEs that fulfil three specific and cumulative conditions. For these two categories of infringers, the contribution will be limited to the amount of harm caused to its own direct or indirect

89 Arbitration is governed by Articles 1676 to 1723 Judicial Code.
90 Article XVII.91 CEL.
91 Article XVII.89 CEL.
94 More information on the Brussels School of Competition can be found at http://bsc.brussels/.
95 Article XVII.86 CEL.
customers. When a claimant is not able to retrieve full compensation from the other co-infringers, the recipient that received full immunity or an SME may be held liable, so as to ensure that the injured party receives full compensation.

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

The transposition of the Private Damages Directive has facilitated private damages action in Belgium. For example, the Implementation Act alleviated the burden of proof of the claimant and facilitated access to evidence. Furthermore, the class action regime in Belgium is now applicable to infringements of European competition law.

Even though these legislative changes encourage private damages actions, Belgium is not on the short list for bringing such cases. However, a steadily increased number of claimants are bringing private damages actions before the Belgian courts, particularly by means of follow-on actions for cartel infringements.

While the number of private damages actions in Belgium is steadily increasing, Belgian judges will be faced with specific challenges that are to be dealt with de novo as they will require departing from the classic litigation culture. The following challenges come to mind.

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

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

96 Article XVII.87 CEL.
97 Article XVII.86 CEL.
98 Article XVII.87. §1 CEL.
99 Article XVII.87. §2 CEL.
100 Article XVIII.88. §1 CEL.
101 Article XVII.88. §3 CEL.
A third development that will be monitored is the extent to which judges will depart from the classic application of the rules on evidence held by third parties (the classic application being established under Article 877 Judicial Code). The CEL allows for broader discovery requests in accordance with the stipulations of the Private Damages Directive.

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

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

It remains to be seen how the above challenges will be handled before the Belgian courts.
Chapter 6

BRAZIL

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I Overview of Recent Private Antitrust Litigation Activity

Historically, Brazilian antitrust practice has relied on public enforcement. As a consequence, private antitrust litigation activity has been very incipient in Brazil. In recent years, however, some turning points have contributed to enhancing debates regarding private antitrust enforcement. These turning points, an outline of judicial precedents and a local legislative framework summarise the current status of Brazilian private competition enforcement.

The former Competition Act already set forth that injured parties could revert to the judiciary branch to defend their individual or collective interests, to cease anticompetitive practices and seek redress of losses and damages, regardless of an administrative process, which would not be prevented nor stayed by the filing of a lawsuit. This same provision is reproduced in Article 47 of the current Competition Act.

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

In 2010, CADE innovated by recommending that a copy of a cartel decision (in the Industrial Gases cartel case) be sent to potentially injured parties with the purpose of enabling and encouraging them to seek recovery for damage caused by the anticompetitive conduct. Therefore, from 2010 CADE has encouraged victims to file follow-on claims in Brazil for damages caused by cartels.

It was in 2016, however, that the fiercest discussions about private antitrust litigation activity and its balance with local public enforcement occurred, when a landmark decision from Brazil’s Superior Court of Justice (STJ) ordered CADE to disclose confidential documents originating from a leniency agreement (2016 STJ decision).

1 Cristianne Saccab Zarzur is a partner, Marcos Pajolla Garrido is a senior associate and Carolina Destaillleur Bueno is an associate at Pinheiro Neto Advogados.
2 Former Competition Act, Law No. 8,884 of 1994.
3 Competition Act, Law No. 12,529 of 2011.
The 2016 STJ decision relied on the following assumptions: the documents originating from a leniency agreement could support claims for compensation; the legal framework for leniency programmes only provided for administrative and criminal immunity (and not civil immunity); and there is a mandatory rule of publicity for acts of the Brazilian public administration. Therefore, the STJ’s rationale was that keeping the documents obtained under a leniency programme as confidential and extending such status to the civil sphere, even after the end of CADE investigations, would perpetuate the harm to third parties and, by extension, give leniency applicants a benefit that is not backed by law.

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

In addition, following appeals filed by CADE in connection with the 2016 STJ decision, in 2018, the court clarified that, as a general rule, documents obtained under a leniency agreement could only be made available after a final ruling by CADE and shall not include business secrets and commercially sensitive information.

Finally, in 2018, CADE Resolution 21/2018 was enacted regulating the procedures for the access to documents and information from administrative proceedings commenced by CADE to investigate anticompetitive practices, especially those arising from leniency agreements, settlement procedures and dawn raids. In 2019, CADE issued Ordinance No. 869/2019, which, in connection with Resolution 21/2018, establishes the procedures for the access of documents from administrative proceedings.

All these measures represent relevant developments to promote private antitrust litigation in Brazil. In 2018, CADE was subject to a peer review by the Organisation for Economic Co-operation and Development (OECD), which found that fundamental elements of a successful private enforcement legislative framework are in place in Brazil, although there are still obstacles for the creation of a private litigation culture, under which private actions would be a consequence of public enforcement.6

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

Private lawsuits can be brought regardless of the existence of an administrative decision on an anticompetitive practice, and even before an administrative proceeding itself is instated (stand-alone litigation). In addition, in case a private claim is filed as a result of an administrative proceeding (follow-on litigation), both proceedings will develop independently.

Both individuals and corporations can be sued, either individually or collectively. Private antitrust lawsuits can also take the form of individual claims or collective actions.

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

Finally, as described in Chapter I above, there were relevant developments in the legislative framework for private antitrust enforcement in Brazil in recent years. Resolution No. 21/2018 and Ordinance No. 869/2019 set important rules that discipline the procedures for the disclosure of documents obtained by CADE in the context of its administrative investigations. Additionally, Bill of Law No. 11,275/2018 (former Senate Bill of Law No. 283/2016) includes relevant mechanisms to foster private enforcement. Bill of Law No. 11,275/2018 is currently under consideration by the Constitution, Justice and Citizenship Commission at the Senate and it is expected to be approved by the President soon. Additionally, Bill of Law No. 11,275/2018 (former Senate Bill of Law No. 283/2016) includes mechanisms to foster private enforcement, such as double reimbursement for losses suffered due to breaches of the economic order, as well as the statute of limitation suspension for private antitrust actions, while the investigation is ongoing before CADE. Bill of Law No. 11,275/2018 is currently under consideration by the Constitution, Justice and Citizenship Commission at the Senate and it is expected to be approved by the President soon.

III EXTRATERRITORIALITY

As established in Article 2, the Competition Act applies (without conflicting with the conventions and treaties to which Brazil is a signatory) to any anticompetitive conduct that is fully or partially performed in Brazil, or that produces or may produce effects locally. Therefore, foreign entities responsible for anticompetitive conduct abroad, if somehow causing effects within the Brazilian territory, could in principle be sued locally, either by CADE or through a national judicial authority.

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

IV STANDING

Private antitrust litigation can take the form of individual enforcement actions or collective actions (class actions or public civil actions).

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

a. the Public Prosecutor’s Office;

b. the Public Defender’s Office;

7 The Law governs public class actions for, inter alia, damage caused to the environment, consumers or historical patrimony.
Moreover, private enforcement claims can be taken to state or federal courts in connection with private suits for damages filed by individuals or companies (or by institutions that legally have standing for public class actions) aggrieved by anticompetitive practices. Notwithstanding this extensive list of eligible persons, a possible deterrent to private competition lawsuits following CADE’s conviction of antitrust conduct (follow-on litigation) is the cost (both financial and other costs) of litigating in Brazil. For instance, defeated parties must pay court costs and expenses, plus statutory attorneys’ fees, totalling as much as 10 to 20 per cent of the value of the claimed damages (except in public class actions). In addition, from filing a claim until a final decision is rendered, a lawsuit may take 10 to 15 years on average, during which time legal costs will accrue to both litigants. Within this context, Bill of Law No. 11,275/2018 mentioned above contains provisions that aim to speed up judicial claims by allowing CADE decisions to ground the concession of evidence-supported relief.

V THE PROCESS OF DISCOVERY

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

The judge can order (on his or her own initiative, or at a litigant’s request), among others, that:

- documents be produced by the litigants themselves or by third parties;
- government entities provide certifications or records of an administrative proceeding if so necessary to prove an allegation; or
- specific evidence be put forward by a litigant.

Regarding (a), for instance, if a party refuses to show a document, a presumption against it on the question of fact can be raised. In Brazil, as a general rule, the burden of proof lies with the accuser and may be shifted solely in some specific cases (e.g., the concept of a reverse burden of proof is applied to consumers, and especially if these are legally, economically or technically vulnerable or if the specificities of a case could render it impossible or excessively difficult for a given party to produce evidence). It is worth noting that the production of evidence can entail significant costs for the parties, either individually or jointly.

Regarding (b), CADE is also subject to this provision, but has expressly raised concerns that private enforcement litigation demanding access to such type of evidence may pose risks for the future of successful leniency programmes. CADE Resolution 21/2018 provides for the specific situations in which documents produced through investigations conducted by the authorities may be disclosed to third parties interested in seeking their rights through private antitrust claims. In order to provide more safety to companies that have collaborated with CADE, Ordinance No. 869/2019 also defines the procedures for the disclosure of documents established by Resolution 21/2018.
Ordinance No. 869/2019 establishes that (1) regarding administrative proceedings ruled by CADE’s Administrative Tribunal, the Reporting Commissioner in the case will determine in the judgment of the case which documents shall then be disclosed, granting interested parties (including defendants and claimants) the right to question this decision and (2) regarding administrative proceedings that are still under analysis by the authority or that have occurred before Resolution 21/2018, access to documents should be exceptional and analysed on a case-by-case basis.

Finally, in cases in which the underlying anticompetitive conduct has already been analysed and convicted by CADE, there is no common ground among the different local judicial authorities on the weight of evidence granted to CADE’s decision. The general understanding is that CADE’s decision should be taken as relative evidence, since an administrative decision can be reviewed by a court. In practice, CADE’s decisions have been taken into consideration in private litigation cases. On the other hand, three trial courts and the Minas Gerais State Court of Appeals have ruled that CADE final decisions are ‘unequivocal evidence’ of an antitrust violation, granting injunctions to displace the collusive equilibrium and halt overcharging. Bill No. 11,275/2018 in turn contains a provision acknowledging that CADE’s final decision can be used to support the concession of evidence-supported relief by the judge.

VI USE OF EXPERTS

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

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

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

VII CLASS ACTIONS

In Brazil, individuals and companies with individual homogeneous rights arising from an anticompetitive conduct may rely on class actions to go to court, represented by the persons defined in Section IV. In these cases, although the representation is collective, reparation of damages will be individual.

Class actions are governed by several laws and regulations, such as the Brazilian Consumer Protection Code and the Public Class Actions Law. According to the OECD Peer Reviews of Competition Law and Policy for Brazil, state and federal prosecutors’ offices have been responsible for the majority of civil suits seeking collective redress, most of which have been related to consumers’ rights complaints.

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8 Peixoto, Bruno Lana and Da Silva, Ludmilla Martins. ‘Recovery actions for cartel damages: state of affairs and challenges for the next five years’. Brazilian Antitrust Law (Law No. 12,529/11): 5 Years (2017).
According to research carried out by Giovana Vieira Porto\(^9\) and based on data collected by the Brazilian Institute for Competition, Consumer Affairs and International Trade Studies (IBRAC), class actions outnumber individual enforcement actions in private antitrust litigation.

**VIII CALCULATING DAMAGES**

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

One of the main findings of a research conducted by Giovana Vieira Porto\(^10\) is that the criteria adopted by trial and appellate courts in calculating damages currently lack uniformity.

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

- **a** the use of experts in the award calculation;
- **b** the difference between the price paid by consumers and the price that was effective before the anticompetitive conduct, doubled;
- **c** an average of the profit made during the anticompetitive conduct;
- **d** the amount to be set at the award calculation stage; and
- **e** the values stated in an expert report during the discovery phase.

For its part, moral damage (pain and suffering) is mostly calculated by examining:

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

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

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

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\(^10\) ibid.
IX PASS-ON DEFENCES

The Consumer Protection Code states that a clause precluding, exonerating or otherwise alleviating the obligation to indemnify for product and service defects is void, and further imposes joint and several liability on the manufacturer, builder, importer or assembler. Therefore, the existence of a direct relation between the defendant and the injured party is not mandatory – final consumers may sue suppliers of intermediate goods engaged in anticompetitive conducts in indirect purchaser cases, for instance. In Brazil, it still under discussion whether a pass-on defence assertion would be accepted before a Brazilian court as an argument to exclude the obligation to indemnify. Indeed, defendants can and do argue that the cartel overcharges were transferred down the value chain, although the chances of success of pass-on defences are questionable.

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

X FOLLOW-ON LITIGATION

Although the existence of an administrative procedure is not a condition for private litigation in Brazil, private claims may occur as a consequence of an administrative procedure (follow-on litigation). In these cases, civil and administrative proceedings will be independent.

Although CADE’s decision is not binding in the judiciary branch, it may be an important piece of evidence in a judicial decision in a private claim. In the first follow-on litigation involving a global cartel case, direct purchasers of compressors for refrigeration filed a lawsuit that was ultimately ruled on by the STJ in 2016 (as already stated, the decision compelled CADE to disclose documents obtained under a leniency agreement and was further clarified in 2018 through establishing that disclosure should occur after a final ruling by CADE’s Tribunal). The disclosure of documents by CADE for private claims has been widely discussed in recent years and clarified by Resolution 21/2019 and Ordinance No. 869/2019.

The fact that the parties to a lawsuit can challenge every piece of evidence, even when it has been produced by CADE within an administrative proceeding, can also be a significant obstacle to the development of private enforcement in Brazil, as in practice it means having to re-litigate the existence of a cartel. As a result, in an attempt to foster private litigation, Bill No. 11,275/2018, includes a provision that acknowledges that CADE’s final decisions have relevance to court decisions in related private litigation.

XI PRIVILEGES

Attorney–client privilege and other related aspects arising from the attorney–client relationship are regulated by the Brazilian Bar Association Statute and its regulations.¹¹

The Brazilian Bar Association Statute and its regulations apply to all Brazilian lawyers. As a rule, attorneys are assured of their right to protect and have a duty of not disclosing information received within the context of an attorney–client relationship. This privilege covers every piece of oral or written information in physical or electronic format, which

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¹¹ Brazilian Bar Association Statute, Law No. 8,906 of 1994.
renders it inviolable. It also extends to an attorney’s office, files, data, mail, email and other communications. In this respect, there is a controversy concerning whether the attorney–client privilege is applicable to both external attorneys and in-house counsel, or only to external attorneys. Although the prevailing opinion of jurists has been that there is no limitation to the privilege based on this, some public authorities may have a contrary opinion in practice.

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

**XII SETTLEMENT PROCEDURES**

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

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

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

**XIII ARBITRATION**

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

Under Law No. 9,307 of 1996, arbitration revolves around disposable economic rights, which means that the relationship has to be financially based. Since an antitrust discussion involves both economic and constitutional rights, it is hard to ascertain whether antitrust claims are arbitrable in Brazil.

Anticompetitive conduct can harm both society as a whole as well as the companies and individuals directly affected by it. The damage inflicted upon society refers to the collective rights of free competition and free enterprise, which constitute inalienable rights and which cannot be referred to arbitration. However, the damage inflicted upon companies and individuals that have suffered a measurable loss may indeed be subject to arbitration.12

One of the advantages of arbitration is that the parties may have their dispute settled confidentially by a trustworthy arbitrator (instead of a judge). In addition, it is probable that an arbitral decision will be more precise and faster than a court ruling. Arbitration has been debated in the context of Bill of Law No. 11,275/2018, and whether its adoption could for

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instance allow for a reduction in potential damages to be paid by defendants who accept the mechanism in favor of procedure celerity. Some of the settlement agreements recently homologated by the authority’s administrative tribunal already include this provision.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Article 47 of the Competition Act, those harmed by an anticompetitive conduct may resort to the judiciary for redress of their losses. However, there are obstacles that might hinder indemnification and discourage plaintiffs from seeking redress in court, such as:

- the high costs and time-consuming process of litigation;
- possible retaliation from cartel members, which are likely to be the plaintiff’s main suppliers;
- procedural difficulties in proving the conduct, a causal relationship and the ensuing damage; and
- difficulties in calculating damages and compensation.

Due to the above obstacles, there may not be enough incentives for victims to seek indemnification against cartelists. As a consequence, there have still only been a handful of lawsuits to that end. Nevertheless, CADE is keen to encourage lawsuits as a powerful mechanism to fight cartel schemes. Leniency agreements do not reach the civil sphere, focusing instead on the criminal and administrative spheres. As a result, companies signing such agreements are not protected against civil lawsuits, which may encourage individuals to pursue indemnification claims against companies that engage in anticompetitive conduct (serving, by extension, as a deterrent to anticompetitive practices).

XV FUTURE DEVELOPMENTS AND OUTLOOK

CADE continues to focus on deterrence of anticompetitive conduct in Brazil, especially on cartels. In recent years, these efforts have included relevant measures to promote private litigation as a complementary tool to public enforcement, and include:

- the Guidelines issued by the Seprac providing methods to quantify damage caused and advantages taken by undertakings as a result of a cartel;
- Resolution 21/2018, which aims to regulate access to documents obtained by the authorities and to foster private antitrust litigation;
- Bill of Law No. 11,275/2018, which provides for a set of very important mechanisms that should foster private antitrust litigation and is expected to be a landmark that will complete the Brazilian legal framework for combating cartels; and
- Ordinance No. 869/2019, which defines the procedures for the disclosure of documents established by Resolution 21/2018.

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13 As provided above, there is a controversy on whether alternative dispute resolutions such as arbitration apply to cases of private competitive enforcement.
The country still lacks a strong private litigation culture,¹⁵ and there are relevant challenges related to litigation, costs, procedural difficulties, economic complexity of the discussions, lack of expertise at the judiciary branch and potential risks of retaliation. Nevertheless, CADE is clearly seeking to align with other more mature jurisdictions as regards private competition enforcement.

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Supreme Court clarifies price-fixing class actions

In 2019, the Supreme Court of Canada delivered the most significant Canadian competition law decision in several years in Pioneer Corp v. Godfrey. Godfrey concerned an alleged price-fixing conspiracy in the market for optical disk drives. In its decision, the Supreme Court resolved many open questions in Canadian competition law jurisprudence.

First, the Court in Godfrey held that in order to certify a price-fixing class action by indirect purchasers, class counsel need only present evidence at the certification hearing of a credible or plausible expert methodology demonstrating that loss passed through to the indirect purchaser level generally. It is not necessary for class counsel to put forward expert methodology to demonstrate injury to each individual member of the class.

Second, the Court held that in order for a trial judge to employ the aggregate damages provisions of class proceedings legislation, the trial judge would need to be satisfied either that all class members suffered a loss, or that the trial judge is able to distinguish between those class members that did, and did not, suffer loss, to avoid providing compensation to individuals that suffered no loss.

Third, the Court determined that ‘umbrella purchasers’ are able to assert a viable cause of action against members of a price-fixing conspiracy. Umbrella purchasers are purchasers that did not buy a price-fixed product from an alleged conspirator, either directly or indirectly (that is, as part of a vertical distribution chain); they bought it from firms that are not part of the conspiracy or through distribution chains descending from those firms. Class counsel typically argue that umbrella purchasers have a claim against conspirators because the alleged conspiracy created an umbrella of supra-competitive prices, enabling non-cartel members to raise prices, causing their customers to pay an overcharge. The Supreme Court has now opened the path for such claims to proceed to be tested on the evidence at trial.

Fourth, the Court held that the Competition Act does not constitute an exhaustive ‘complete code’ for plaintiffs who have suffered injury in a price-fixing action. Instead, it remains open for plaintiffs to also assert common law or equitable causes of action for the price-fixing conduct, such as claims of common law conspiracy or unjust enrichment.

Fifth, the Court held that the statutory two-year limitations period to commence a civil action contained in the Competition Act is subject to, and can be extended by, the principle of discoverability.

1 David Vaillancourt and Michael Binetti are partners at Affleck Greene McMurtry LLP.
2 2019 SCC 42.
ii Worldwide class gets green light

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

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

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

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

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

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

On the facts of *Airia*, the Court of Appeal found that the Ontario Court did have jurisdiction, and also rejected an argument that Ontario was *forum non conveniens*. In 2018, the Supreme Court denied leave to appeal the decision of the Court of Appeal.

iii Class counsel cannot discover Bureau investigator

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

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

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

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

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

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

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

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

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

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

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

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8 RSC 1985, c C-34.
9 Section 45.
10 Section 47.
11 Section 52.
Importantly, unilateral conduct by firms with market power, such as abuse of dominance, exclusive dealing, tied selling and refusal to deal, are not subject to criminal sanction. In fact, they are not even prohibited unless they cause a substantial lessening or prevention of competition, in which case the Competition Tribunal can prohibit the conduct. Agreements between competitors that are not hardcore cartels and price maintenance are subject to the same treatment.

Section 36 of the Competition Act creates a civil cause of action for damage caused by breaches of the criminal provisions of the Competition Act. To succeed, the plaintiff must prove that the defendant committed a criminal offence under the Competition Act, and that he or she suffered damage caused by the criminal offence. The standard of proof is on a balance of probabilities.

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

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

Actions under Section 36 are subject to a two-year limitation period that commences on the last day on which the offence was engaged in, or from the day on which criminal proceedings were finally disposed of. This two-year limitations period is subject to the principle of discoverability, and will not run so long as the conduct remains undiscovered by the plaintiff.

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

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12 Section 79.
13 Section 77.
14 Section 77.
15 Section 75.
16 Section 36 is also available to recover damages caused by violations of orders made under the Competition Act by the Competition Tribunal or a court. Indirect purchaser class actions under this branch are unlikely. Section 36 provides in part as follows:

**Recovery of damages**

36. (1) Any person who has suffered loss or damage as a result of
(a) conduct that is contrary to any provision of Part VI, or
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

18 Moreover, rules against collateral attacks on the result of proceedings that are concluded would likely bar any attempt by a person convicted of a criminal offence under the Competition Act to establish that no offence was, in fact, committed.
22 Pro-Sys Consultants Ltd v. Microsoft Corporation, 2013 SCC 57.
23 Pioneer Corp. v. Godfrey, 2019 SCC 42 at Paragraphs 76–78.
Section 36 actions can be brought in the superior courts of any province, as well as the Federal Court of Canada.\textsuperscript{24} They can be structured as class actions under the class proceedings statutes or rules in most Canadian provinces, as well as the Federal Court. In Ontario, for example, the Class Proceedings Act, 1992 (CPA)\textsuperscript{25} provides for certification of class actions, and several other provinces have similar legislation.\textsuperscript{26} Historically, plaintiffs typically started at least three class actions for each case: one in Quebec, for a class of consumers and small businesses; one in British Columbia, for British Columbia consumers and businesses; and a national class in Ontario covering Ontario and the rest of the country. In 2018, British Columbia changed from being an opt-in class action regime for out-of-province class members to being an opt-out jurisdiction for such class members. It remains to be seen whether this changes the filing strategy among the plaintiff class action bar going forward.\textsuperscript{27}

Ontario’s class action legislation is similar to (and indeed, modelled on) Rule 23 of the US Federal Rules of Civil Procedure. In contrast to Rule 23’s requirement that the common issues predominate over individual issues, however, the CPA sets a lower threshold, requiring that a class proceeding be ‘the preferable procedure for the resolution of the common issues’.\textsuperscript{28} The court considers the proposed class action in light of the three goals of class actions:

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

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26 The following provinces have class proceedings legislation similar to Ontario’s: British Columbia (Class Proceedings Act, RSBC 1996, c 50), Alberta (Class Proceedings Act, SA 2003, c C-16.5), Saskatchewan (Class Actions Act, SS 2001, c C-12.01), Manitoba (Class Proceedings Act, CCSM c C130), Quebec (Code of Civil Procedure, RSQ, c C-25, Book IX), New Brunswick (Class Proceedings Act, RSNB 2011, c 125), Nova Scotia (Class Proceedings Act, SNS 2007, c 28), and Newfoundland and Labrador (Class Actions Act, SNL 2001, c C-18). The Federal Court rules allow class actions within the court’s limited jurisdiction. In Western Canadian Shopping Centres v Bennett Jones Verchere, [2001] 2 S.C.R. 534, the Supreme Court ruled that a class action could be brought even in the absence of class action legislation. Although Quebec was the first province to enact class action legislation, in 1978, its legislation limits the plaintiff classes to individuals and small corporations or associations (fewer than 50 employees).

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

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

Certification
\begin{itemize}
  \item 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
  \begin{itemize}
    \item (a) the pleadings or the notice of application discloses a cause of action;
    \item (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
    \item (c) the claims or defences of the class members raise common issues;
    \item (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
    \item (e) there is a representative plaintiff or defendant who,
    \begin{itemize}
      \item (i) would fairly and adequately represent the interests of the class,
    \end{itemize}
  \end{itemize}
\end{itemize}
judicial economy, access to justice and behaviour modification. The importance of the common issues in relation to the claim as a whole is a factor in this analysis. If resolution of the common issues would not significantly advance the litigation, and individual trials for each class member would be required, the action will not be certified.

III EXTRATERRITORIALITY

Price-fixing class actions potentially raise two different jurisdictional issues. The first is whether the court has jurisdiction over the claim. Courts have generally held that if an international price-fixing conspiracy has caused losses in Canada, Canadian courts have jurisdiction.

Courts in most Canadian provinces will take jurisdiction over matters that have a ‘real and substantial connection’ with that province. The party asserting that the court should assume jurisdiction has the burden of identifying the connecting factors that link the subject matter of the action to the jurisdiction. Certain connecting factors are considered presumptive: that is, if they exist, the court will have jurisdiction. These presumptive factors are:

a. the defendant is domiciled or resident in the province;
b. the defendant carries on business in the province;
c. the tort was committed in the province; and
d. a contract connected with the dispute was made in the province.

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

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The test in Manitoba (Section 4), Alberta (Section 5), Saskatchewan (Section 6) and Newfoundland & Labrador (Section 5) is almost identical to CPA Section 5, except that these three statutes add whether or not the common issue predominates over issues affecting only individual prospective class members’ (or similar) after the equivalent of CPA Section 5(1)(c). The impact of this additional language has yet to be considered judicially, but it is unlikely to have much effect on the test. The British Columbia Class Proceedings Act expressly makes whether the common issues predominate over individual issues a factor in determining whether a class proceeding would be preferable (Section 4(2)(a)). The test in Quebec has the lowest threshold of all: there is no preferable procedure or predominance requirement; it is enough that there are common issues: Code of Civil Procedure, Article 1003(a).


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

32 Club Resorts Ltd v. Van Breda, 2012 SCC 17. This rule applies in Canada’s common law provinces and territories.
However, these factors are merely presumptive, and do not preclude an action against a foreign defendant that never had any business presence in the jurisdiction if the defendant allegedly participated in a conspiracy that impacted the jurisdiction, a British Columbia court recently confirmed. 33

Because of the presumptive factors, and the court's consideration of the impact of the conduct, it is generally difficult for defendants to be successful on a jurisdictional challenge. However, in an April 2015 decision, two defendants successfully had a price-fixing claim dismissed against them for lack of jurisdiction. The judge found insufficient evidence showing a connection to Ontario, including insufficient evidence that the defendants did business in Ontario or were parties to the conspiracy, or that the product at issue would have made its way through the normal channels of trade to Ontario. 34

Quebec has codified a similar set of connecting factors that allow its courts to assume jurisdiction. 35

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

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

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

c the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out are provided, thereby serving to enhance the real and substantial connection between absent foreign claimants and Ontario. 36

The second jurisdictional issue goes to the criminal offence under the Competition Act that serves as the basis for a claim. The offence of conspiracy under Section 45 is complete as soon as a prohibited agreement is reached. Implementation of the agreement is not one of the elements of the offence; nor are the effects of the agreement on competition. Where a price-fixing conspiracy is entered into outside Canada, it is at least arguable that the offence took place outside Canada, and thus outside of the reach of Canada's criminal law jurisdiction, which is territorial in nature. 37 The presence of Section 47 of the Competition Act, which makes it an absolute liability offence for Canadian subsidiaries to implement conspiracies entered into by their foreign parents, reinforces this argument. Against this, Canadian courts now take an expansive approach to criminal jurisdiction. 38 The question of whether a price-fixing conspiracy entered into outside Canada by foreign entities is an offence in Canada under Section 45 has yet to be determined.

Parties wishing to contest jurisdiction are required to bring their jurisdiction motions promptly, as their participation in any further steps in the proceeding (such as responding to the certification motion) will constitute attornment. 39

34 2015 ONSC 2628.
35 Civil Code of Quebec, CQLR c C-1991, Article 3148.
36 2017 ONCA 792 at Paragraph 107.
37 Criminal Code, RSC 1985 c C-46, Section 6(2) provides that no one shall be convicted of an offence outside Canada.
Because class actions have a preclusive effect against potential plaintiffs, the question of whether a court validly assumes jurisdiction over the entire plaintiff class also arises. It is well established that a class in, say, Ontario, can include plaintiffs from other Canadian provinces, even on an opt-out basis. Ontario’s Class Proceedings Act expressly allows this, and other Canadian provinces will enforce any judgment arising out of the Ontario proceedings. Where a plaintiff class is proposed that includes members from outside Canada, the question becomes more difficult.

IV STANDING

i Standing with respect to criminal practices or breach of orders

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

The Supreme Court of Canada has recently made clear that indirect purchasers have standing to sue and seek damages in price-fixing cases, subject to the caveat that indirect purchasers must be able to prove that they have actually suffered loss or damage as a result of the complained-about conduct. 40 A class member cannot recover damages merely based on the fact that there has been a price-fixing conspiracy, and that somewhere down the distribution chain the class member purchased a good that contained the price-fixed component. 41 Proof of loss is required for each member of the class in order to recover damages after trial. 42 This is typically done by way of expert economic evidence, as discussed below.

Similarly, umbrella purchasers – those class members who purchased goods in a price-fixed market but from a non-conspirator that was able to raise its own prices because of the conspiracy – have a viable cause of action against conspirators, subject to being able to make out on the evidence at trial that the goods they purchased were indeed priced supra-competitively as a result of the conspiracy. 43

ii Standing with respect to non-criminal restrictive trade practices

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

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

41 ibid.
42 Pioneer Corp. v. Godfrey, 2019 SCC 42 at Paragraphs 112–121.
43 Pioneer Corp. v. Godfrey, 2019 SCC 42 at Paragraphs 76–78.
V THE PROCESS OF DISCOVERY

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

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

Recently, in Imperial Oil v. Jacques, the Supreme Court held that plaintiffs in a price-fixing class action were permitted to obtain as part of the production process wiretap evidence obtained by the Competition Bureau in the course of the Bureau’s criminal price-fixing investigation. This decision will make it easier for plaintiffs to obtain information disclosed to a criminal defendant in the Crown brief in follow-on price-fixing class actions. However, plaintiffs do not have carte blanche to obtain production of the entire investigatory file of the Bureau, and the Bureau has stated that it will oppose such requests.

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

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

Other Canadian jurisdictions, such as Alberta, have a more expansive right of discovery covering multiple corporate representatives, which is more in line with the American deposition process.

Oral discovery of non-parties is typically available only with leave of the court. Members of the Competition Bureau investigatory team are not obligated to attend discoveries in follow-on civil litigation to answer questions about criminal investigations under the Competition Act.
The process of discovery is similar for matters before the Competition Tribunal. Parties in proceedings before the Tribunal are required to make documentary production and participate in oral discovery. 49

VI USE OF EXPERTS

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

In class actions, experts are used at the certification stage, and also at trial. On the certification motion, the plaintiff bears the burden of demonstrating some basis in fact to show that the alleged criminal conduct caused harm down to each purchaser level encompassed by the proposed class. 50 This is typically done by way of economic modelling and proposed methodologies by an expert economist.

On the certification motion, the plaintiff’s expert does not need to actually quantify the overcharge paid by indirect purchasers: the quantification of the overcharge is done at trial with a full evidentiary record. Rather, on certification the expert must present a methodology that establishes that the overcharge has been passed down through the distribution chain to the indirect purchaser level. 51 On the certification motion, the expert’s methodology must only offer a realistic prospect of establishing loss on a class-wide basis. At trial, class members are required to prove loss in order to obtain recovery. 52

Defendants on a certification motion have a high hurdle in refuting a plaintiff expert’s methodology, and will only succeed if they are able to show that the plaintiff expert’s methodology is implausible. The Supreme Court has held that on the certification motion, it is not the role of the certification judge to resolve conflicts between experts, which makes it difficult (although not impossible) for defendants to succeed in an economist-versus-economist battle at certification. 53

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

In proceedings before the Competition Tribunal, complex economic evidence is tendered by both sides geared at demonstrating the effect on competition (or lack thereof)

49 Competition Tribunal Rules, SOR/2008-141, Sections 60–64.
51 ibid.
53 Pro-Sys Consultants Ltd v. Microsoft Corporation, 2013 SCC 57 at Paragraph 126.
concerning the reviewable practice at issue in a given proceeding. The Tribunal itself is also empowered to appoint independent experts to assist it regarding ‘any question of fact or opinion relevant to an issue in a proceeding’.

VII CLASS ACTIONS

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

i Requirements for certification

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

a. the pleadings disclose a cause of action;

b. there is an identifiable class of two or more persons;

c. the claims of the class members raise common issues;

d. a class proceeding is the preferable procedure for the resolution of the common issues; and

e. there is a representative plaintiff who can fairly and adequately represent the interests of the class, and a workable plan for advancing the proceeding.

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

ii Notice

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

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

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

55 Class actions are permitted to proceed in jurisdictions without class action legislation under local rules of court.
When one or more defendants in an action settle with the plaintiff, a notice of settlement will be published in advance of the settlement approval hearing to permit people to consider the settlement and allow a class member to object to the settlement. Objectors may make submissions in writing or at the hearing. While objectors may make submissions, they do not gain party status with accompanying rights of appeal. Settlements must be approved by the court, which must satisfy itself that a settlement is fair, reasonable and in the best interests of the class.

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

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

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

Plaintiffs’ claims for damages under Section 36 of the Competition Act are often accompanied by claims grounded in tort based on breaches of the Act. These claims permit, in principle, the recovery of punitive damages as well as damages through restitutionary principles. The Supreme Court has confirmed that such equitable and common law claims may be pursued alongside Competition Act damages.

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

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

IX PASS-ON DEFENCES

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

X FOLLOW-ON LITIGATION

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

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

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

62 Section 36(1).
63 Section 36(2).
Private actions are commonly structured as a class action under provincial class proceedings statutes. Private actions can be structured as class actions in any of Canada’s 14 legal jurisdictions (10 provinces, three territories and the Federal Court), although each jurisdiction has its own particular rules.

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

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

XI PRIVILEGES

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

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

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

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

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

a. the communications must originate in a confidence that they will not be disclosed;
b. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
c. the relation must be one that in the opinion of the community ought to be sedulously fostered; and
d. the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.67

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

XII SETTLEMENT PROCEDURES

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

Settlements of class actions require court approval (with some exceptions).68 With respect to class actions, the settlement process usually occurs in two stages: certification as against a party for the purpose of settlement and notice to class members regarding the settlement hearing, and approval of the settlement agreement itself. Objectors, including non-settling defendants and class members, can make submissions at each stage, and can voice their concerns about the fairness or reasonableness of the agreement or to ensure that certain protections are included within the order to appropriately protect their interests.

There is generally close judicial scrutiny of class action settlement agreements in Canada, and Canadian courts have not hesitated to refuse to provide their approval if they deem an agreement to be unfair.69 While provincial legislation does not specify criteria for approving a settlement, the test at common law is whether the settlement is ‘fair, reasonable and in the interests of all those affected by it’.70

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

68 In Ontario and Quebec, prior court approval, even prior to certification, is required for a proposed class action to be settled or discontinued. The same is true for actions commenced in Federal Court. In the other statutory jurisdictions, court approval is required only after certification has been granted.
69 For example, the Ontario Superior Court recently refused to approve a settlement agreement between Quiznos franchisees, the defendant franchisers and food supplier, Good Food Service Inc, finding that the scope of the release was too broad given the nominal amount of damages.
the likelihood of recovery or success if the case were litigated;
b the amount and nature of discovery or investigation;
c the terms and conditions of the settlement;
d recommendations of counsel;
e future expense and likely duration of litigation;
f recommendations of neutral parties or experts;
g the number and nature of objections from class members;
h the presence of good-faith bargaining; and
i the absence of collusion. 71

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

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

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

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

In the case of private antitrust cases, plaintiffs’ counsel have argued that civil defendants should not be permitted to make claims for contribution and indemnity. While no court has specifically dealt with this issue, and despite the provisions specifically permitting such claims in the various rules of court, the argument for denying contribution and indemnity is premised on the fact that where conduct complained of is covered by the criminal provisions of the Competition Act, and because in the criminal context defendants are not permitted to claim contribution and indemnity among themselves, then the same rule should apply in civil

courts. Differing burdens of proof between civil and criminal acts will have to be considered by the courts if this issue is decided, along with the fact that private competition claims also allege various common law torts, such as the tort of civil conspiracy, which obviously does not rise to the level of criminal conduct in and of itself.

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Supreme Court’s 2019 decision in *Godfrey* provided significant clarity on many outstanding issues in Canadian price-fixing jurisprudence. In effect, the Supreme Court removed or curtailed many of the arguments typically used by defendants in resisting certification. It is expected that certification will be seen as less of a hurdle to class counsel in future. Prior to *Godfrey*, most certification decisions were hard-fought, and settlements generally followed shortly thereafter. It remains to be seen whether defendants in a post-*Godfrey* environment will focus less on contesting certification and more on pushing cases through to documentary and oral discovery, perhaps ultimately leading to the first price-fixing class action trial decision.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation in England and Wales continued to grow in 2019, with a number of significant new claims being brought, and a number of important judgments. The year 2019 could also be characterised as something of a waiting period. The parties to a number of proceedings have been waiting for the Supreme Court to hear two important appeals in relation to different aspects of claims, both arising from the credit card interchange fee litigation: in the claims brought by major retailers on the subject of infringement and quantum, and in the collective consumer claims on the subject of the correct approach to the certification of a collective action. The antitrust community generally has also been waiting for developments in the Brexit saga, to learn what is to be the future relationship between EU and UK antitrust law and litigation. We expect 2020 to provide greater clarity on all of these questions.

A key development in 2019 was the judgment of the Court of Appeal in BritNed v. ABB. This followed the 2018 judgments in the High Court, in the first case to result in an award of competition damages.

BritNed claimed around €180 million in damages for losses suffered by its interconnector cable project, a 1,000MW undersea electricity cable connecting the GB and Dutch systems. BritNed procured the cable element of the interconnector from ABB. In April 2014, the European Commission issued a decision in the Power Cables case, fining international manufacturers of high-voltage power cables €302 million for taking part in a cartel that shared markets and allocated customers between them from 1999 to 2009. ABB was the successful immunity applicant, and did not appeal against the Commission’s decision.

The judge at first instance awarded damages on two heads. Firstly, he concluded that the effect of the cartel was to insulate ABB from inefficiencies in its own product. Had there been a properly competitive environment, ABB would have faced technical solutions from others involving less copper and perhaps less insulation. This ‘baked-in inefficiency’ resulted in an overcharge, corresponding to the cost of the additional copper that ABB would have absorbed to retain the bid. The appropriate measure of this overcharge was 15 per cent of the cost of the copper. This amounted to some €7.5 million. Secondly, the judge found an overcharge in the form of a saving in ABB’s costs resulting from the cartel, amounting to a further €5.5 million. The judge later reduced the total figure to €11.7 million, reflecting the risk of overcompensation due to BritNed’s regulatory arrangements.

1 Peter Willis and Jonathan Speed are partners at Bird & Bird LLP.
3 BritNed Development Ltd v. ABB [2018] EWHC 2616 (Ch) and [2018] EWHC 2913 (Ch).
The judge rejected BritNed’s claim for compound interest, on the basis that higher funding costs had been incurred by BritNed’s parents rather than by BritNed itself. However, he awarded simple interest to BritNed.

Both parties appealed to the Court of Appeal, which gave its judgment on 31 October 2019. The Court allowed ABB’s cross-appeal in relation to cartel savings, finding that the High Court had made an error of law and that BritNed’s damages award should be reduced. The Court emphasised that damages should be based on BritNed’s actual loss, rather than on ABB’s savings. The Court emphasised that ‘there is nothing in the EU jurisprudence which suggests that damages in a follow-on case should be other than compensatory.’ The Court also dismissed BritNed’s appeal, upholding the ‘broad brush’ approach to calculating damages used by the judge. The Court of Appeal also noted that the presumption of harm contained in the Competition Damages Directive provided no assistance in this case – first because the claim predated the entry into force of the Directive and second because it was ‘hard to see how such a presumption could have assisted BritNed, given the need for its loss to be quantified and the generous approach adopted by English law to difficulties of proof’. The Court also refused BritNed permission to appeal to the Supreme Court.

The judgment of the Court of Appeal is significant as the BritNed judgment in the High Court was the first time that a cartel follow-on damages claim had gone to trial on the merits, so this was the first appeal. The judgment examines in detail the correct approach for the assessment of cartel damages and usefully refers to relevant EU and UK jurisprudence underpinning principles of competition damages claims. It will no doubt be an important guide for future claims in the English courts. Key conclusions flowing from the judgment include the principle that damages should be compensatory in nature, not punitive, that no lower standard or reversed burden of proof should apply in follow-on damages claims and that a ‘broad brush’ approach, involving elements of estimation and assumption, should be used when assessing quantum.

In 2019, the Court of Appeal also made an important ruling on the subject of collective competition claims, throwing a lifeline to the prospects of this form of action after they were severely damaged by the Competition Appeal Tribunal’s (CAT) refusal to issue collective proceedings orders in the first two applications. In July 2017, the CAT in Walter Hugh Merricks CBE v. Mastercard refused to issue a collective proceedings order (CPO) in a claim involving credit card multilateral interchange fees. The proposed class included all persons who had, between 22 May 1992 and 21 June 2008, bought goods or services from businesses selling in the UK that accepted Mastercard (and who also satisfied a couple of other conditions). The value of the claim was stated to be £14 billion. The CAT had concerns about the breadth of the class: there would be so many variations in the extent of pass-through that it would not be an issue common to all members of the class. The CAT was also concerned about the methodology for calculating the compensation to which each member of the class would be entitled: it would inevitably result in significant under- or overpayment to any given member of the class. The CAT also provided guidance on the proposed funding arrangements.

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It refused leave to appeal on the basis that a judgment refusing a collective proceedings order was not a judgment ‘as to the award of damages’ for the purposes of Section 49(1A)(a) of the Competition Act 1998, which lists those categories of judgment capable of appeal. However, the Court of Appeal held in November 2018 that it was capable of appeal, and issued its judgment on the substance in April 2019.

The Court of Appeal held that the CAT had erred in law by adopting the wrong approach to the assessment of evidence and the strength of the case on pass-on. The Court of Appeal found that class representatives need only demonstrate that the claim has a ‘real prospect of success’ at the certification stage. The class representative was required simply to establish that the expert methodology was capable of assessing the level of pass-on and that the necessary data for that methodology was likely to or did exist at trial. The Court of Appeal concluded that the CAT had been too vigorous in probing into the detail of the pass-on data at the certification stage and that it had effectively conducted a mini-trial. The Court of Appeal also noted that certification is a continuing process and so a CPO can be varied or revoked at a later stage if there is insufficient data to calculate pass-on.

The Court of Appeal also found the CAT had erred in its approach to distribution. The CAT had refused certification on the basis that the aggregate award must be distributed on a compensatory basis and must reflect the actual loss suffered by individuals. However, the Court of Appeal found that a loss-based method of distribution is not expressly required by the CAT’s procedural rules and rather that damages could be awarded in the aggregate by reference to the loss suffered by the whole class, given that the losses suffered by individual members of the class might not be readily calculable (the ‘top-down’ approach). The Court of Appeal also found that distribution was a matter to be determined by the trial judge.

In July, Mastercard was given permission to appeal to the Supreme Court, which will hear the appeal in May 2020, providing a degree of certainty as to the correct approach to be taken at the certification stage.

The CPO applications in two claims for damages resulting from the trucks cartel are currently adjourned, in respect of the eligibility question, pending the Supreme Court judgment in Merricks, as are other claims in respect of London transport fares. Two further issues arising from the truck cartel claims, the question of whether the funding arrangements are unlawful ‘damages based agreements’ and the question of the adequacy of the funding arrangements, were the subject of a judgment of the CAT in October 2019. The CAT concluded that the claimants’ litigation funding agreements were not damages-based agreements (DBAs) pursuant to Section 58AA Courts and Legal Services Act 1990 and therefore not subject to the requirements of the DBA Regulations. The CAT concluded that, following further amendments to the agreements between the parties, the funding arrangements did not prevent either of the two class representatives from being authorised as a class representative and acting in the interest of the class members. The CAT was satisfied that the litigation funders had taken responsibility for compliance with the ALF Code. The CAT refused the truck manufacturers permission to appeal on the DBA issue.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

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

Meanwhile, the High Court had become one of the most popular forums in Europe for competition damages claims following cartel decisions of the European Commission. Claims in the High Court are brought under the common law jurisdiction of the Court, generally as claims for breach of statutory duty. They were subject to the standard six-year limitation period under the Limitation Act 1980. However, the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 have now implemented the relevant provisions of the Competition Damages Directive. They inserted Section 47F into the Competition Act 1998, which in turn introduced a new Schedule 8A to the Act. Paragraphs 17 to 26 of Schedule 8A set out the new rules on limitation periods. They differ in a number of important respects from the general rule in England and Wales, set out in the Limitation Act 1980. The general rule under the Limitation Act 1980 is that the limitation period starts when the cause of action accrued. However, where the defendant deliberately concealed from the claimant any fact relevant to the claimant’s right of action, the limitation period does not start to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. For competition claims, while Paragraph 19 introduces rules

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8 Although there have also been attempts to characterise such claims as various forms of conspiracy – with varying degrees of success.
that are very similar to those set out in the Directive (under which time does not start to run
until the claimant first knew or could have known of certain specified facts relating to the
infringement), it also introduces the other key requirement of the Directive: namely, that the
limitation period does not start until the infringement has ceased. In its judgment in Arcadia
v. Visa\(^9\) in 2015, the Court of Appeal held that a claim by retailers in respect of losses resulting
from credit card interchange fees was out of time in respect of losses suffered before 2007
(six years before the date of the claim) because sufficient facts to allow the claimants to plead
their claim were available to them before that date. The Court of Appeal concluded that the
Directive did not have retrospective effect, but it appears that had it done so, the entirety of
the claim might still have been in time (because the infringement continued until less than
six years before the date on which the proceedings were started). As such, Paragraph 19(1)(a)
has potentially far-reaching effects. Paragraphs 20 to 25 set out a number of situations in
which the limitation period is suspended, including while an investigation by a competition
authority is ongoing, while a consensual dispute resolution process is in progress and while
collective proceedings are pending.

In 2015, the provisions of Chapter 2 of Part 3 of the Consumer Rights Act 2015 entered into
force. They amended Sections 47A and 47B, and introduced Sections 47C to 47E and 49A to 49E,
of the Competition Act 1998. They introduced a number of refinements to proceedings before the CAT. First, Section 47A extended the jurisdiction of the CAT to permit stand-alone as well as follow-on claims, addressing one of the key concerns about the previous arrangements. However, Section 47A provided only a partial fix, because there remains some doubt as to whether it provides for stand-alone claims for infringements occurring before 1 October 2015. Secondly, Section 47E aligned limitation periods in the CAT with those in the High Court. Thirdly, Section 15A of the Enterprise Act 2002 provided for fast-track competition claims where one of the parties is a small or medium-sized business and the claim is relatively straightforward.\(^10\) Fourthly, Section 47B introduced collective competition damages claims. These were intended to resolve the obstacles faced by small claimants bringing claims individually. Section 47B introduced the possibility of both opt-out and opt-in collective proceedings (where all those falling within an identified class of potential claimants are included in the claim unless they opt out, or where the claim is brought on behalf only of those claimants who have expressly chosen to participate, respectively). In both cases, the claim is brought on behalf of the claimants by a representative.

The CAT must certify a collective claim before it proceeds. The certification process considers the suitability of the class representative who brings the claim on behalf of the class. The CAT Rules set out a number of factors that the CAT must take into account in assessing the suitability of the representative, including whether he or she will act adequately and fairly in the interests of the class, and whether there is a conflict of interest. In practice, the CAT has also considered the level of remuneration of the representative, and the arrangements with the funders.\(^11\)

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\(^10\) See, e.g., Socrates v. Law Society [2017] CAT 10, the first fast-track claim. A number of others have followed.

\(^11\) In Merricks v. Mastercard in Section I.
The CAT must also consider whether the claims ‘raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings’ (Section 47B(6) Competition Act 1998). This is the central issue in the ongoing Merricks v. Mastercard proceedings, now on appeal to the Supreme Court following the overturning by the Court of Appeal in 2019 of the CAT’s refusal to issue a collective proceedings order.

III EXTRATERRITORIALITY

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

In practice, one of the key battlegrounds in private enforcement in the English courts has been the extent to which foreign defendants can be sued in the English courts for losses resulting from international cartels. This issue remained the subject of litigation before the English courts in 2018, addressed both in the judgment of the Court of Appeal in iiyama (see Section I), on the subject of the circumstances in which purchases of cartelised products outside the EU can be said to fall within the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), and in Vattenfall v. Prysmian. In the latter, the High Court rejected an application to strike out another claim following the Commission’s High-Voltage Cable cartel decision, on the basis that there was a realistic prospect that the UK anchor defendants had knowingly implemented the cartel through sales of the cartelised products and the provision of support in respect of the sale of cartelised products. The judgment usefully develops the principles established some years previously in Cooper Tire and Rubber v. Dow and others and KME Yorkshire and others v. Toshiba Carrier and others.

IV STANDING

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

V THE PROCESS OF DISCOVERY

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

The basic principle in English litigation is that each party must carry out a reasonable search for material currently or previously under its control that supports or is adverse to its case. It must disclose those documents by exchange of lists to the other party and then, subject to exceptions for privilege, must provide copies of those documents and allow the other party to inspect any original documents. 18 In follow-on private competition claims in the English courts it is very common for the parties to seek disclosure of specific categories of documents, for example documents provided to competition authorities, at an earlier stage than would usually be the case. The judgment in National Grid v. ABB 19 provides a good example of this. There is also scope for the parties to request further information from each other in relation to issues set out in their pleadings. In addition, it is possible, subject to certain conditions, to obtain disclosure from third parties. The parties will also have to exchange detailed witness statements setting out the evidence that their witnesses will rely on at trial and upon which they will be cross-examined. There is no deposition process pretrial in English proceedings.

VI USE OF EXPERTS

The use of expert economic evidence is almost universal in private competition enforcement proceedings. Other experts are also often brought in, particularly in abuse of dominance cases, to testify as to the operation of a particular market or other technical issues. 20

Although expert economists generally submit their reports when the proceedings are well advanced, it is common to involve them from the outset to provide initial advice on the scope and shape of a claim. Expert economists have also appeared in the collective

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18 Civil Procedure Rules, Part 31.
20 See for example the useful description of the expert witnesses relied on in paragraphs 47 to 49 of Streetmap EU Limited v. Google Inc and others [2016] EWHC 253 (Ch).
proceedings order hearings giving evidence as to whether there are sufficient common issues as between the members of the class of prospective claimants to justify certifying the collective proceedings.

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

**VII CLASS ACTIONS**

As explained in Sections I and II, collective proceedings for competition damages claims may be brought before the CAT. Collective proceedings are subject to certification by the CAT. If properly formulated, collective proceedings allow a much wider range of victims of anticompetitive activity to claim damages for their loss. Bringing individual claims would simply not be feasible for the value of loss typically suffered by an individual consumer. It is clear that there is a tension between increasing the efficiency of collective proceedings by framing a class as widely as possible, thereby increasing the number of members of the class, and ensuring that the class is not so wide that the issues in the claims are no longer common to all of the members of the prospective class. This tension should be relieved, at least in part, by the forthcoming judgment of the Supreme Court in *Merricks v. Mastercard*, referred to in Section I above. There are a number of other mechanisms for class actions available in the courts of England and Wales, including group litigation orders (GLOs) and representative actions (which are comparatively rarer than GLOs).

**VIII CALCULATING DAMAGES**

Damages in private competition claims are intended to compensate for the loss resulting from an infringement of competition law. Nearly all competition damages claims to date have settled, with little or no visibility of the basis or extent of any damages agreed. However, the calculation of competition damages will typically involve an assessment of the counterfactual or ‘but for’ position: that is, what prices would have prevailed in the absence of the infringement. To assess what would have happened in the absence of a cartel, prices before and after the cartel period, prices of other comparable products, prices of raw materials or components, and the level of profitability of the cartel members will all be taken into account to build up a picture of the but for price. There will also generally be an assessment of the losses resulting from any reduction in sales resulting from increased prices, as well as of the run-off effect of the time taken for prices to return to a non-cartelised level after the end of the cartel. In *Sainsbury’s v. Mastercard*, the CAT assessed the overcharge as the difference

21 First used in the High Court in *Streetmap v. Google* [2016] EWHC 253 (Ch); a hot-tub arrangement was also employed in the CAT in *Socrates v. Law Society*, see footnote 16.

22 See Section I and footnote 11.
between the MIFs paid and the bilateral interchange fees that would have been paid in the
counterfactual situation. In BritNed v. ABB, the Court of Appeal in 2019 set out important
principles about the primarily compensatory nature of competition damages.

There is no provision for multiple damages as seen in the United States, for example.
Exemplary or punitive damages are also not available. However, in contrast to the position
in the United States, interest on damages runs from the date when the loss was suffered.
This may be many years before payment of any damages, and interest can therefore be a very
significant component of any award.

IX PASS-ON DEFENCES
There is no pass-on defence in English law. The impact of any pass-on is assessed as part
of the assessment of loss generally. The rules implementing the EU Competition Damages
Directive set out the treatment of pass-on in claims by both direct and indirect purchasers (see
Section I). Paragraphs 8 to 11 implement the provisions of Articles 12 to 15 of the Directive
that set out rules relating to overcharges, underpayments and pass-on. They provide that, if
the claimant was an indirect purchaser, once it has established that there was an overcharge
or underpayment to a direct purchaser, the burden of proof lies on the defendant to prove
that it was not passed on to the claimant. They also provide that the burden of proof lies on
the defendant to prove that any overcharge or underpayment to the claimant was passed on
to the claimant’s customers. The English courts have already considered this latter aspect of
pass-on, 23 but Schedule 8A Competition Act 1998 is useful in its treatment of pass-on to an
indirect purchaser claimant.

X FOLLOW-ON LITIGATION
By virtue of the principle first set out in the Masterfoods judgment of the European Court of
Justice, 24 and then codified in Article 16 of Regulation 1/2003, national courts may not take
decisions ‘running counter to the decision adopted by the Commission’. They must also ‘avoid
giving decisions which would conflict with a decision contemplated by the Commission in
proceedings it has initiated’. In the English courts, in National Grid v. ABB, for example, this
principle was interpreted to mean that while the trial should not be fixed until three months
after all appeals by the defendants against the Commission’s decision had been determined,
the parties should proceed with the exchange of pleadings, disclosure and other preparatory
steps. A similar approach has been adopted in other cases since then.

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

23 Most recently in the credit card appeals: see footnote 11.
24 Case C-344/98 Masterfoods Ltd v. HB Ice Cream Ltd. ECLI:EU:C:2000:689.
XI PRIVILEGES

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

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

XII SETTLEMENT PROCEDURES

Most competition damages claims before the English courts settle – some at an early stage and some at trial – with the result that there have only been two final judgments awarding damages in competition damages claims to date. Settlement is encouraged. Part 9 of Schedule 8A Competition Act 1998 implements the rules in the Competition Damages Directive on settlements, providing for the value of claims to be reduced by a settling infringer’s share of the loss. It also prohibits non-settling defendants from seeking a contribution from the settling defendant, so an early settling defendant that settles for less than its share of any overall damages pot cannot then be required to indemnify defendants that settle or are ordered to pay a higher proportion later. This seems likely to incentivise early settlement.

XIII ARBITRATION

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

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28 Microsoft Mobile OY (Ltd) v. Sony Europe Ltd & Others [2017] EWHC 374 (Ch).
XIV INDEMNIFICATION AND CONTRIBUTION

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

XV FUTURE DEVELOPMENTS AND OUTLOOK

A key development that is certain to affect competition litigation in the English courts is Brexit. Estimates of its impact vary considerably, and are heavily dependent on the future relationship between the UK and the EU. The advantages of litigating in the English courts are sufficiently significant that claimants and their lawyers are likely to seek to continue to bring their claims in London. What legal routes are available to them will depend on the longer-term trade relationship between the UK and the EU. As things currently stand, the UK is due to leave the EU on 31 January 2020, but there will be a transitional period until 31 December 2020, during which EU law will continue to apply to the UK. For now at least, private enforcement of EU antitrust law in the UK will continue as at present.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The level of private antitrust litigation activity has remained relatively low in France as compared to a number of other EU Member States, although it is rising. The transposition at the end of 2017 of EU Directive 2014/104 on follow-on actions, which led to the creation of a comprehensive set of rules specifically dealing with damages claims in relation to anticompetitive practices and which significantly improved the position of claimants in France, has paved the way for an increase in the number of actions though this increase is yet to be seen. Note, however, that it is always difficult to have an accurate view of the actual level of activity since, as in most countries, claims for damages resulting from a competition law infringement are often settled before the final decision without the details of such settlements being publicly reported. However, a number of actions initiated in the wake of several cartel cases, in particular in the retail goods sector, have recently been taken to court and more unsettled claims may follow.

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

Claims following an infringement decision have progressively increased but stand-alone actions remain frequent. This is despite the fact that many of them are dismissed for lack of sufficient evidence or legal basis. Regarding follow-on claims, it is interesting to note a growing tendency for public entities victims of anticompetitive practices to seek redress, leading to increased litigation activity before administrative courts.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The legislative framework for private antitrust enforcement in France has been recently further modified through the adoption of Ordinance 2017-303 and Decree 2017-305 of 9 March 2017 implementing EU Directive 2014/104 on actions for damages for infringements of competition law provisions. The Ordinance and the Decree have introduced new sections² in the French Commercial Code specifically dealing with damages actions resulting from anticompetitive practices.

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1 Thomas Oster is a partner at Bird & Bird.
2 Articles L 481-1 et seq. and R 481-1 et seq. of the Commercial Code.
These provisions intend to help the victims of anticompetitive practices to seek redress. They provide that individuals or companies are liable for the harm they have caused as a result of their involvement in anticompetitive practices. The competitive practices concerned include anticompetitive agreements and abuses of dominant position prohibited by French and EU competition law, and also certain types of infringements that are specific to French law, such as abuse of economic dependency, the granting of exclusive importation rights in French overseas territories or abusively low pricing.

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

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

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

### III EXTRATERRITORIALITY

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

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

### IV STANDING

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

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

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

V THE PROCESS OF DISCOVERY

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

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

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

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

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

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

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

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

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

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

VII CLASS ACTIONS

A specific class action procedure related to competition and consumer law infringements has been adopted by the Law of 17 March 2014 (Hamon Law) and is set forth in the French consumer code.\(^3\) Class actions are possible to repair the individual harm caused by the infringement of competition law provisions to consumers placed in an identical or similar situation. They can only be initiated by authorised consumers’ associations.

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

- \(a\) having been in existence for a period of at least one year;
- \(b\) demonstrating that the organisation carries out effective public activity in defence of the interests of consumers;
- \(c\) if purported to be a national organisation, having a membership of at least 10,000 members; and
- \(d\) being independent from any form of professional activities.

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

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

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

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

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

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

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

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

VIII CALCULATING DAMAGES

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

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

French law provides that the compensation may include:

a the loss resulting from the overcharge (subject to the absence of passing on to the downstream purchaser) or from a lower price paid by the infringer;

b the loss resulting from the loss of volume of products sold in the case of a partial or total passing on of the overcharge;

c the loss of chance; and

d moral damage.

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

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

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

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

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

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

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

**X  FOLLOW-ON LITIGATION**

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

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

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

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

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

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

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

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

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

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

XII SETTLEMENT PROCEDURES

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

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

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

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

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

XIII ARBITRATION

Parties who do not wish to bring their case before a court may resort to arbitration or mediation to resolve disputes involving competition law issues. The Paris Court of Appeal confirmed that, although arbitrators do not have the power to impose fines for infringements of competition law, they can decide upon the consequences of such infringements and, in particular, award damages.4

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

XIV INDEMNIFICATION AND CONTRIBUTION

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

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

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

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

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

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

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

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

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

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

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

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

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

Although this more favourable legal environment for claimants has not led to a dramatic increase in private enforcement in France to date, it is expected that follow-on claims will become more and more common in the coming years. Indeed, awareness of the potential for possible private action has increased not only within companies but also within the legal community, with claim-funding companies also becoming more active in the French market. In the case of EU-wide cartels, French companies tend to bring actions before foreign courts, such as UK or Dutch courts, which are still viewed as more claimant-friendly, in part due to discovery rules. Measures have, however, been taken to increase the attractiveness of French courts as suitable litigation forums with the appointment of specialised judges and the creation of an international chamber within the Paris Court of Appeal allowing for part of the proceedings to be held in English.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

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

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

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

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

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

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

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

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

\(^1\) Juan Carlos Castillo Chacón is a managing partner and Natalia Callejas Aquino is a partner at Aguilar Castillo Love, SRL.

\(^2\) Constitution of the Republic of Guatemala, Article 130.

\(^3\) Decree No. 2-70, Commerce Code, Article 361.
selling any product at a price below its cost with the purpose of limiting free competition in the local market; and

causing scarcity of a basic-need product through its export without a permit issued by a competent authority when required. 4

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

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

Guatemala is still in the process of approving its first Competition Law, and Congress has not finalised the approval proceedings necessary to send the bill to its final phase of approval before the executive branch of the government.

On 17 May 2016, the Bill for Antitrust Law (Bill No. 5074) was submitted before Congress for its approval.

A general outline of the Bill is as follows:

a purpose and general provisions;

b free competition defence;

c competition advocacy;

d the Superintendency of Competition;

e administrative procedure;

f infringements, sanctions, measures and prescription;

g reforms; and

h final provisions and transitory norms.

On 4 November 2016, the Congressional Commission on Economy and Foreign Trade issued a judgment on Bill No. 5074 in which it rendered a favourable resolution on the Bill being discussed in Congress. The procedure of incorporating the Bill as law is still pending the approval of Congress of the whole Bill and the final sanctioning of the Bill by the Executive Branch.

On 30 November 2016, Congress approved the Competition Law for final discussion. Although this does not provide for final approval of the law, it does obligate Congress to review the final draft of the law and sanction its approval.

On 9 March 2018, the Congressional Commission on Economy and Foreign rendered a favourable opinion on Bill No. 5074.

On 10 April 2018, Bill No. 5074 was heard for the first debate by Congress.

All references made hereafter related to Bill No. 5074 may be subject to change in light of future amendments that could be approved by Congress during final discussions of the Bill.

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4 Decree No. 17-73, Criminal Code, Articles 340–341.
III EXTRATERRITORIALITY

As a general principle, Guatemalan law applies only within the territory of Guatemala. However, Bill No. 5074 includes a provision that states that the Competition Law will apply to all acts originated outside the territory of Guatemala that have effects in the territory of Guatemala.

IV STANDING

The Commerce Code states that any person harmed by unfair competition, any trade association or the Attorney General’s office may bring an unfair competition action in ordinary tribunals that oversee civil and commercial matters.

In addition, Bill No. 5074 grants standing to:

a. the Superintendency of Competition, which is an autonomous state entity that will oversee the defence and promotion of free competition, and the prevention, investigation and sanctioning of anticompetitive practices. Any person with knowledge of an anticompetitive activity may inform the Superintendency of these acts;

b. public officials and government employees; and

c. accountants and auditors.

V THE PROCESS OF DISCOVERY

As a general principle, Guatemalan law does not provide for discovery. However, Bill No. 5074 allows for an investigation to be initiated by the Superintendency of Competition prior to requesting the starting of an administrative procedure. Investigation by the Superintendency may involve, but is not limited to, verification visits, interviews with economic agents and requests for information and documents.

This investigation process may be initiated by the Superintendency once a competent judge has granted authorisation to the Superintendency to do so.

VI USE OF EXPERTS

Guatemala has not approved legislation that regulates the use of experts in matters specifically related to competition or antitrust. However, as a general rule, the Civil and Commercial Procedure Code allows the use of experts as proof to be rendered within a trial. Experts are designated by each party during a trial, and the judge appoints a third expert in the event of discord. Experts must personally accept to act as such, and must deliver a written opinion to the presiding judge.

VII CLASS ACTIONS

Class action suits are not regulated in Guatemala.

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5 Decree No. 2-89, Judiciary Branch Law, Article 5.
VIII CALCULATING DAMAGES
Compensatory damages are cognisable under Guatemalan law; however, they must be proven by the harmed party. These damages are calculated according to the losses suffered by the damaged party and the profits that were lost by the rights holder as a direct result of the action.

Punitive damages are not awarded in either civil or criminal proceedings. Attorneys’ fees and costs may be included in a final judgment rendered by a judge to be paid by the losing party.

IX PASS-ON DEFENCES
There are currently no limitations imposed beyond an initial sale.

X FOLLOW-ON LITIGATION
There is currently no legislation that provides any limitations on private actions or awards against parties who have been subject to a public enforcement action or immunity.

XI PRIVILEGES
Under the Code of Professional Ethics, there is an obligation to keep professional secrecy and recognise attorney–client privilege. There is no objective parameter to determine the extent to which courts in Guatemala recognise this right that attorneys must maintain professional secrecy; however, judges tend to respect this right.

Our Criminal Code foresees the breach of professional secrecy as a crime that is sanctionable with six months’ to two years’ imprisonment or a fine.\footnote{Decree No. 17-73, Criminal Code, Article 223.}

Information or documents produced to governmental authorities, unless categorised as reserved information or classified information, are deemed public and should therefore be accessible to the public upon formal written request.

Confidential information is defined in law as all information that either by constitutional mandate or by express provision in law has restricted access, or information that has been delivered by an individual person or a legal entity with the guarantee of confidentiality.

Reserved information is defined in law as all information whose access is temporarily restricted due to a provision in law.

XII SETTLEMENT PROCEDURES
Guatemalan law does not provide specific settlement procedures for competition and antitrust matters. Guatemalan law only regulates the applicability of settlement agreements either through a separate agreement or through a petition presented before a judge.

For a settlement agreement to be valid, the following requirements must be met:
\begin{itemize}
  \item[a] parties must have legal capacity to dispose of that which is the object of the settlement;
  \item[b] the issues on which the settlement is taking place are either dubious or contentious;
  \item[c] parties must promise to assign or give something reciprocally; and
\end{itemize}
if the settlement is being carried out through a proxy, this person must have special powers not only to settle but to perform all acts and agreements derived from the settlement, if necessary.

**XIII ARBITRATION**

Guatemala has not approved competition or antitrust legislation regulating specific procedures such as arbitration and alternative disputes. However, arbitration and conciliation procedures are available for all matters in which a dispute mechanism can be freely chosen.

The current provisions drafted in Bill No. 5074 do not provide information as to whether alternative dispute mechanisms or arbitration will be allowed.

**XIV INDEMNIFICATION AND CONTRIBUTION**

There are currently no limitations set forth on seeking indemnification or contributions from third parties, co-defendants and cross-defendants. At this time, we do not know if the future law to be approved by Congress will introduce any limitation to those effects.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

As previously mentioned, Congress is in the process of approving Guatemala’s first competition law, Bill No. 5074. There is no date specified for the approval of the Competition Law.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Competition Commission of India (CCI),2 established under the Competition Act 2002 (Competition Act), has only been discharging its enforcement functions for the past 10 years,3 yet it has had a significant impact on India’s competition regulatory framework, considering that conduct of enterprises (publicly or privately owned, multinationals or small and medium-sized enterprises) across various sectors has been indiscriminately scrutinised and, where needed, penalised.

The Competition Act has had a ground-breaking impact on a wide gamut of enterprises (companies, associations, partnership firms, individuals) operating through different mediums (online, brick and mortar) in different levels of markets (manufacturers, wholesalers, distributors, retailers). The past year has seen important developments both on the legislative as well as the judicial front.

On the legislative front, the Competition Law Review Committee (Committee) constituted by the Ministry of Corporate Affairs (MCA) to review the Competition Act, Competition Rules and Competition Regulations in view of the changing business environment issued a report in July 2019 recommending amendments in the regulatory architecture of the CCI, function of the CCI, definitions provided in the Competition Act, sections relevant to anticompetitive agreements, inquiry procedure and penalty, unilateral conduct by dominant enterprises, combinations, and competition advocacy. The Committee also made recommendations on how competition law should deal with technology and new age markets.4 One of the recommendations of the Committee regarding a Green Channel route for certain combinations has already been implemented by the CCI by way of amendment to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (CCI Combination Regulations).5 The CCI further amended the CCI Combination Regulations to increase the amount of fee payable along with the notice in Form I to 2 million rupees and Form II to 6.5 million

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1 Avaantika Kakkar and Anshuman Sakle are partners at Cyril Amarchand Mangaldas.
2 The CCI acts as the market regulator for prevention and regulation of conduct having an adverse effect on competition in India.
3 Notification dated 15 May 2009 issued by the Ministry of Corporate Affairs.
Interestingly, the CCI has invited public comments on a proposed draft amendment to the CCI Combination Regulations regarding the purchase of shares pursuant to a public bid or a stock exchange that would allow the acquirer to notify the CCI after the acquisition of the shares.\(^6\)

Additionally, the CCI has also recently undertaken an amendment to the Competition Commission of India (General) Regulations 2009 (CCI General Regulations) so as to include in the information or reference filed by the informant details of litigation or disputes pending between the informant and parties before any court, tribunal, statutory authority or arbitrator involving the subject matter of the information. The amendment allows the CCI to disclose the identity of the informant where it is expedient for the purposes of the Act after giving the informant an opportunity to be heard. It has put a time limit of 30 days to appeal to the CCI from the receipt of the order passed by the Director General (DG) rejecting the request to treat a document as confidential. The amendment also brings changes to the fee payable for filing information under clause (a) of sub-section (1) of Section 19 of the Competition Act.\(^8\)

The CCI conducted a market study on e-commerce in India that aimed to gather qualitative information and insights from market participants and covered mobile phones, electric appliances, lifestyle products, groceries, hotels and food order and delivery within its scope. The stakeholders in the study included retailers, manufacturers, online marketplace platforms, service providers and payment systems. The CCI issued the interim observations of the market study; however, the final market study has not been released yet.\(^9\)

Besides the above legislative developments, last year witnessed various important decisions passed by the Supreme Court of India (Supreme Court), high courts and the CCI. The Supreme Court decided certain important cases on substantive issues under the Competition Act that provide important guidance for the CCI in its functioning.

In *Competition Commission of India v. JCB India Ltd. and Ors.*,\(^{10}\) the Supreme Court vacated the order of injunction by a single judge of the Delhi High Court regarding the powers of search and seizure given to the DG under Section 41(3) of the Competition Act. The Delhi High Court held that an authorisation by the Chief Metropolitan Magistrate to search does not authorise the DG to carry out seizure or any other activity. The Supreme Court overturned the finding of the High Court on interpretation of Section 240A of the Companies Act 2013 stating that unless seizure is authorised, a mere search would not be

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sufficient for the purposes of the investigation. The Supreme Court stated that the blanket ban imposed by the High Court on using the seized material was not warranted and remitted the petition back to the High Court.

In a significant decision regarding predatory pricing, the Supreme Court dismissed an appeal filed by Uber India Systems Pvt. Ltd. (Uber) and upheld the order of the Competition Appellate Tribunal (COMPAT) directing the DG to conduct an investigation into allegations against Uber for abuse of dominance.\(^\text{11}\) The Supreme Court relied on clause (ii) of Explanation (a) to Section 4 of Competition Act to state that if Uber operated at a loss for the trips it made, it would affect Uber's competitors or the relevant market in Uber's favour establishing *prima facie* dominance. For abuse of dominance, the Supreme Court stated that as long as Uber in a dominant position imposes unfair prices, including predatory pricing, abuse of dominance is also applied.

The Delhi High Court in Mahindra & Mahindra Ltd. & Ors. v. Competition Commission of India & Anr.,\(^\text{12}\) held that the CCI is a quasi-judicial tribunal when issuing final orders, directions or penalties. The High Court decided on the constitutionality of certain provisions of the Competition Act. The High Court held that Section 22(3) of the Competition Act is void as it gave a casting vote to the chairperson of the CCI, which is against the principle of equal weight for decisions of each participant of a quasi-judicial tribunal. In this judgment, the High Court also held that the presence and participation of a judicial member is necessary when adjudicatory orders are made by the CCI. Currently, an appeal is pending in this case at the Supreme Court.\(^\text{13}\)

This point regarding presence and participation of a judicial member was clarified through another order of the Delhi High Court wherein the court held that while the presence of a judicial member is required, the CCI is not precluded from performing its adjudicatory functions until the judicial member is appointed by the central government.\(^\text{14}\) The court also relied on Section 15 of the Competition Act to state that the orders passed by the CCI cannot be called into question on account of any vacancy or defect in the constitution of the CCI.

The Delhi High Court issued another significant decision in Competition Commission of India v. Grasim Industries Ltd.,\(^\text{15}\) regarding the investigative powers of the DG. The court held that the DG was within the scope of its powers in submitting a report on alleged violations of Section 4, although the direction issued by the CCI under Section 26(1) of the Competition Act was with reference to information pertaining to violation of Section 3(3) of the Act.

In M/s Rajasthan Cylinders & Containers Ltd. v. Competition Commission of India,\(^\text{16}\) the High Court dealt with the challenge to non-compliance criminal proceedings initiated by the CCI under Section 42(3) of the Competition Act. The court decided not to interfere

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\(^{13}\) Mahindra and Mahindra Limited v. Competition Commission of India & Anr., Special Leave Petition (Civil) No. 10346/2019, order dated 29 April 2019.


with the proceedings, stating that such proceedings can be initiated by the CCI if there is non-compliance with orders or directions, including non-compliance with an order to pay a penalty whether issued by the CCI or the DG. The court also did not accept the double jeopardy argument in the criminal proceedings by distinguishing between civil penalty under Section 43 and criminal proceedings under Section 42(3) for failure to comply with orders or directions of the CCI.

Other relevant decisions of the Delhi High Court include holding that the DG’s report is non-binding on the CCI\(^{17}\) and that interest is required to be paid on the penalty imposed by the CCI for the period for which the penalty was stayed after the stay is lifted as the interest on such penalty is a statutory levy.\(^{18}\)

The Supreme Court upheld the decision of the High Court of Judicature in Bombay in \textit{Competition Commission of India v. Bharti Airtel Limited & Ors},\(^{19}\) clarifying that the principles of law laid down in the judgment apply to \textit{in personam} disputes between the parties and set aside the impugned order of Telecom Regulatory Authority of India (TRAI) by stating that it first needs to render a finding on the disputes before the CCI can investigate it.\(^{20}\)

In discharging its functions, the National Company Law Appellate Tribunal (NCLAT), has also rendered some important decisions. NCLAT dismissed an appeal against an order of the CCI under Section 26(1) dismissing a request for interim relief under Section 33 in a case involving bid-rigging in a tender for textbook printing as the process of printing had already commenced.\(^{21}\)

The NCLAT, recently, concluded hearing and reserved judgment in an appeal filed by All India Online Vendors Association against an order of the CCI holding that no case of contravention of Section 4 was made against Flipkart India Private Limited.\(^{22}\)

Currently, NCLAT is also hearing an appeal\(^{23}\) against an order passed by the CCI where Google was found to have abused its dominant position and a penalty of 1.35 billion rupees was imposed on it (by the CCI). During the pendency of the appeal, NCLAT has passed an interim order\(^{24}\) staying the operation of the CCI order in certain respects subject to Google depositing 10 per cent of the penalty imposed by the CCI.

Further, the CCI itself revealed its evolution by continuing to pass various orders imposing penalties on enterprises for indulging in anticompetitive activities in violation of Section 3 (anticompetitive agreements having an appreciable adverse effect on competition in India) and Section 4 (abuse of dominant position) of the Competition Act.


\(^{22}\) \textit{All India Online Vendors Association v. Competition Commission and Ors.}, Competition Appeal (AT) No. 16 of 2019, order dated 14 August 2019.

\(^{23}\) \textit{Google LLC & Ors v. Competition Commission of India & Ors}, Competition appeal (AT) 18/2018.

\(^{24}\) \textit{id.}, order dated 27 April 2018.
The CCI passed the third leniency order in the case of a cartel fixing prices of zinc-carbon dry cell batteries in India.\(^{25}\) Panasonic Energy India Co Limited received a 100 per cent reduction in the penalty under Section 46 of the Competition Act, whereas Godrej and Boyce Manufacturing Co Limited was fined approximately 8.5 million rupees without any reduction in penalty. The CCI passed another leniency order in *In Re: Cartelisation in the supply of Electric Power Steering Systems*\(^{26}\) wherein the first applicant, NSK Limited, Japan, received a 100 per cent reduction in the penalty and the second applicant, JTEKT Corporation, Japan, received a 50 per cent reduction in the penalty. The CCI imposed a penalty on 51 LPG cylinder manufacturers for bid-rigging in tenders floated by Hindustan Petroleum Corporation Ltd\(^{27}\) and three information technology enterprises for bid-rigging in tenders floated by Pune Municipal Corporation.\(^{28}\)

The CCI recently passed a significant *prima facie* order under Section 26(1) regarding the determination of the relevant market in a case involving *MakeMyTrip India Pvt. Ltd and Oaravel Stays Private Limited*.\(^{29}\) The CCI stated that in platform markets, where there may be different sets of consumers, the consumers for which the relevant market is being defined must be identified. As the consumers in this case were the hoteliers, the market analysis was carried out from the perspective of hoteliers.

Among other orders of the CCI dismissing any information filed at the prima facie stage under Section 26(2) of the Competition Act, the order regarding that alleged the formation of a cartel between multiplex cinema theatre groups is notable.\(^{30}\) The CCI reiterated that alleged parallel conduct by itself does not amount to concerted practice and more factors need to be shown by the informant to trigger an investigation by the DG.

So far this year, the CCI has passed eight orders imposing penalties for anticompetitive conduct.\(^{31}\) In addition to the above, various inquiries have been initiated by the CCI against enterprises in the following sectors:


\(^{27}\) *In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd.*, Suo Motu Case No. 1 of 2014, order dated 9 August 2019.


India

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust actions are governed by the Competition Act\textsuperscript{38} and the regulations framed therein.\textsuperscript{39} The provisions of the Competition Act do not bar the application of any other law.\textsuperscript{40} However, the Competition Act expressly bars the civil courts from accepting any suits or proceedings in respect of any matter that the CCI or NCLAT is empowered to determine, which, in the case of NCLAT, includes compensation applications by aggrieved parties.\textsuperscript{41}

Section 19(1) read with Section 26(1) of the Competition Act empowers the CCI to initiate inquiries (through investigation by the DG) into anticompetitive agreements or abuse of dominant position of an enterprise either on its own motion or upon receipt of information from any person, consumer or their associations or trade association or on reference from central or state government or a statutory authority.\textsuperscript{42}

Although there is no legislative no provision in this regard, the High Court of Delhi by way of a decision\textsuperscript{43} has held that the CCI has an inherent power to recall or review (based on certain specified grounds) an order passed by the CCI under Section 26(1) of the Competition Act initiating an investigation.

The Competition Act empowers the DG to investigate contraventions when directed by the CCI upon formation of a prima facie view. In this regard, the Competition Act grants the DG with certain powers\textsuperscript{44} such as summoning and enforcing attendance if any person and examining him on oath, requiring discovery or production of documents, receiving evidence on affidavit, issuing commissions for the examination of witnesses or documents,

\begin{itemize}
  \item \textsuperscript{32} Mt Maa Metakani Rice Industries v. State of Odisha, Case No. 16 of 2019, order dated 1 November 2019.
  \item \textsuperscript{33} Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd., Case No. 14 of 2019, order dated 28 October 2019.
  \item \textsuperscript{34} Air Works India (Engineering) Private Limited v. GMR Hyderabad International Airport Limited, Case No. 30 of 2019, order dated 3 October 2019.
  \item \textsuperscript{35} Matrix Info Systems Private Limited v. Intel Corporation, Case No. 05 of 2019, order dated 9 August 2019.
  \item \textsuperscript{36} Mr. Shravan Yadav v. Volleyball Federation of India, Case No. 01 of 2019, order dated 7 August 2019.
  \item \textsuperscript{37} In re: Alleged anticompetitive conduct by Maruti Suzuki India Limited (MSIL) in implementing discount control policy vis-à-vis dealers, Suo Moto Case No. 01 of 2019, order dated 4 July 2019.
  \item \textsuperscript{38} Section 53N, Competition Act, 2002.
  \item \textsuperscript{39} Section 64, Competition Act, 2002.
  \item \textsuperscript{40} Section 62, Competition Act, 2002.
  \item \textsuperscript{41} Section 61, Competition Act, 2002.
  \item \textsuperscript{42} Section 19(1), Competition Act, 2002.
  \item \textsuperscript{43} Google Inc v. Competition Commission of India & Ors, 2015 (150) DRJ 192. (The CCI has preferred SLP (C) 13716-17/2017 against this order before the Supreme Court, which is currently pending. The Supreme Court has issued a notice on the appeal as well as an application for condonation of delay, but no other interim order has been passed).
  \item \textsuperscript{44} Section 41, Competition Act, 2002.
\end{itemize}
carrying out search and seizure operations (or dawn raids). However, DG’s powers, though wide are supposed to be exercised with caution. In 2016, COMPAT set aside the order of the CCI observing that the DG as well as CCI should not be blinded by the statement made by parties during investigation and veracity of such statements must be independently tested by DG and CCI. At the conclusion of an inquiry, the CCI can pass an order under Section 27 of the Competition Act, inter alia, imposing a penalty on the contravening enterprise. In the interim, Section 33 of the Competition Act empowers the CCI to pass interim orders restraining alleged anticompetitive conduct until the inquiry is concluded or further orders are issued. As per a leading decision of the Supreme Court interpreting Section 33, this power has to be exercised by the CCI ‘sparingly and under compelling and exceptional circumstances’. Additionally, the CCI, while recording a reasoned order in this regard, inter alia: 

- should record its satisfaction (which has to be of a much higher degree than the formation of a prima facie view under Section 26(1) of the Competition Act) in clear terms that an act in contravention of the stated provisions has been committed, and continues to be committed or is about to be committed; 
- should, as a necessity, issue an order of restraint; and 
- from the record before the CCI, show that it is apparent that there is every likelihood of the party to the lis suffering irreparable and irretrievable damage, or there is a definite apprehension that it would have adverse effect on competition in the market.

The CCI also has the power to impose a lesser penalty, in enforcement proceedings, where ‘full, true and vital disclosures’ are made by a person cooperating with a cartel investigation.

An application for compensation (arising from findings of CCI or findings of NCLAT) can be made before NCLAT under Section 53N of the Competition Act. Furthermore, an application can be made to NCLAT under Sections 42A and 53Q(2) for recovery of compensation from any enterprise for any loss or damage shown to have been suffered as a result of the contravention of the orders of the CCI or NCLAT.

At present, NCLAT has six compensation applications pending before it that have been filed by parties under Section 53N of the Competition Act. However, NCLAT is yet to render a final view on those applications.

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45 See footnote 8. 
46 Lupin Ltd & Ors v. CCI & Anr, appeal No. 40/2016, I.A. No. 152/2016, order dated 7 December 2016 (appeal preferred by CCI pending before the Supreme Court). 
47 Section 33, Competition Act, 2002. 
49 Section 46, Competition Act, 2002 (r/w CCI Lesser Penalty Regulations). 
The limitation period for an appeal before NCLAT is prescribed by the Competition Act. Section 53B provides that any person aggrieved by a CCI order can file an appeal before NCLAT within 60 days of the communication of the order’s issuance. Further, an appeal can be made to the Supreme Court of India against the orders passed by NCLAT within 60 days of the communication of the order passed by NCLAT. Since the Competition Act is silent on the limitation period applicable to filing of an application for compensation, the doctrine of laches would prohibit the parties from bringing an action after an unjustifiable and unreasonable delay. However, if the information filed by the informant is in the nature of a continuing violation, the limitation period would not bar the filing of such information.

III EXTRATERRITORIALITY

Article 245(2) of the Constitution of India provides that no law made by the Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation. Further, Section 32 of the Competition Act provides the CCI with the power to inquire into activities having an adverse effect on competition in India, even though the enterprise or party is outside India or the practice arising out of an anticompetitive agreement or abuse of dominant position has taken place outside India. Section 18 of the Competition Act, implicitly, also empowers the CCI to enter into any memorandum of understanding (MoU) or arrangement with any agency of any foreign country, with the prior approval of the Central Government. Additionally, the Competition Act exempts agreements that relate exclusively to the production, supply, distribution or control of goods or the provision of services for export. The issue of the extraterritorial jurisdiction of the CCI was a subject of dispute in the inquiries initiated against Google Inc by the CCI. Although not giving any specific finding on this aspect, the CCI seems to have imposed a penalty based on the sales of Google Inc (along with that of its Indian subsidiary) from their India operations. Additionally, the CCI in a number of cases has made parent companies parties to proceedings before the CCI, and in certain cases has called foreign officials for the recording of their statements.

51 Section 53A specifies the orders passed by the CCI against which an appeal before NCLAT would be maintainable.
52 Section 53T, Competition Act, 2002.
53 See Prabhakar v. Joint Director Sericulture Department and Ors, 2015(10)SCALE114, paragraph 36.
54 Kingfisher Airlines Limited, a company incorporated and registered under the provisions of the Companies Act, 1956 and Dr Vijay Mallya v. Competition Commission of India through its Secretary (Ministry of Company Affairs, Government of India), The Director General, Competition Commission of India, MP Mehrotra, Indian Inhabitant and Union of India (UOI) through Secretary, Ministry of Company Affairs [2011]100CLA190 (Bom).
55 Section 3(5)(ii), Competition Act, 2002.
57 Biocon Limited & others v. F. Hoffmann-La Roche AG & Ors, case 68/2016, order dated 21 April 2017 (opposite parties have challenged the initiation of inquiry before the High Court of Delhi); Kaveri Seed Company Limited, Ajeet Seeds Private Limited & Ankur Seeds Private Limited v. Mahyco Monsanto Biotech (India) Limited & Ors, case No. 37, 38, 39 of 2016, order dated 9 June 2016 (opposite parties have challenged the initiation of inquiry before the High Court of Delhi).
Interestingly, in a recent case, the CCI held that an alleged anticompetitive agreement did not have an appreciable adverse effect on competition in India because almost the entire quantities of the goods in question were being exported.

**IV STANDING**

The Competition Act allows any person to give information to the CCI regarding an alleged contravention, the proceedings are not considered to be a private dispute and the informant’s role is generally considered to be a medium of information for the CCI. When information is filed under Section 19(1)(a) of the Competition Act and the CCI is of the opinion that a prima facie case of contravention of the Competition Act is made out, an investigation could be directed irrespective of whether an informant withdraws at a later stage. The identity of the informant can also be kept anonymous during the investigation, and the CCI has done so in various cases.

However, more clarity is required regarding the position on the locus or the standing of an informant under the Competition Act. In a case pertaining to trade associations, COMPAT recognised that internal rivalry between different sections of a trade association can lead to the filing of motivated information that the CCI should be wary about. Likewise, in another case, COMPAT also acknowledged that business rivalry can influence competitors to make untrue allegations before the CCI, requiring the CCI to take a careful approach.

Any aggrieved party having suffered loss or damage in India (either because of anticompetitive activities or non-compliance with the CCI or NCLAT order) may file an application before NCLAT or the Supreme Court for compensation. Further, an enterprise (including a person, government or an association) may file an application (in the prescribed manner) before NCLAT for an award of compensation by establishing the loss or damage suffered by it.

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59 Nirmal Kumar Manishani v. Ruchi Soya Industries Ltd & Ors, case No. 76/2012, order dated 28 June 2016 (order is currently under challenge in W.P.(C) 3922/2017 before the High Court of Delhi).
60 The Board of Control for Cricket in India v. The Competition Commission of India and Ors, appeal No. 17 of 2013 and I.A. No. 26 of 2013, order dated 23 February 2015.
63 Footnote 8.
64 Schott Glass India Pvt Ltd v. Competition Commission of India through its Secretary and M/s Kapoor Glass Private Limited, appeal No. 91, 92/2012, order dated 2 April 2014.
65 See footnote 8.
66 Section 53N, Competition Act, 2002.
V THE PROCESS OF DISCOVERY

The Competition Act does not provide for any pretrial discovery procedures. Any evidence collected by the DG of the CCI and used while preparing the investigation report is placed before the CCI and then made available to all the concerned parties, subject to the legitimate claim of confidentiality.67

Although the CCI has the power to regulate its own procedures, it must be guided by the principles of natural justice.68 Section 36(2) of the Competition Act empowers the CCI as well as the DG69 to exercise the same powers as are vested in the Civil Court under the Civil Procedure Code in respect of discovery and production of documents, requiring evidence on affidavit, issuing commissions for the examination of witnesses or documents and requisitioning of any public record or document or copy of such record or document from any office subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872 (the Evidence Act). During the investigation, DG can seek information or documents and summon and conduct examination of parties including witnesses or third parties (i.e., parties that are not party to the case) on oath. The Evidence Act governs the admissibility of evidence including pre-existing evidence under Section 19(1), evidence from experts under Section 36(3), 36(4) and 36(5) and evidence from search and seizure procedure under Section 41(3). Categories of evidence admissible can be documentary, oral, economic and financial analysis.

The CCI (General) Regulations, 2009 also contain provisions on confidentiality,70 inspection of documents,71 taking of evidence,72 issue of summons73 and commissions for the examination of witnesses or documents.74 Further, there are several cases that are pending adjudication before the high courts on the issue of powers of the DG in relation to the rights of the parties during the process of investigation.75

VI USE OF EXPERTS

The CCI may call upon experts from the fields of economics, commerce, accountancy international trade or from any other discipline as it may deem fit for the purpose of conducting an inquiry.76 It may also engage an expert to assist it in the discharge of its functions.77

68 Section 36(1), Competition Act, 2002.
69 Section 41(2), Competition Act, 2002.
70 Regulation 35, CCI (General) Regulations, 2009.
71 Regulation 37 and 50, CCI (General) Regulations, 2009.
72 Regulation 41, CCI (General) Regulations, 2009.
73 Regulation 44, CCI (General) Regulations, 2009.
74 Regulation 45, CCI (General) Regulations, 2009.
75 See NTN Corporation v. Competition Commission of India and Anr, W.P.(C) 3051/2016, High Court of Delhi; Sumitomo Electric Industries Ltd v. CCI, W.P. (C) 9894/2017, High Court of Delhi; Toyo Element Industry Co, Ltd v. CCI, W.P. (C) 9884 of 2017, High Court of Delhi; Miyamoto Electric Horn Co Ltd v. CCI & Anr, W.P. (C) 6492/2017, High Court of Delhi; NOK Corporation v. CCI & Anr, W.P.(C) 11628/2016, High Court of Delhi; Toyota Industries Corporation v. CCI, W.P.(C) 3177/2017, High Court of Delhi.
76 Section 36(3), Competition Act, 2002.
77 Section 17(3), Competition Act, 2002 and Regulation 52, CCI (General) Regulations, 2009.
The CCI has also framed regulations to govern the procedure for its engagement.\textsuperscript{78} In this regard, the CCI has empanelled institutions and agencies with the CCI for conducting surveys or undertaking economic analysis of markets, or both. Additionally, the CCI has also empanelled institutions for the assessment of select upcoming or existing economic legislation and policies made by the Parliament, state legislature, ministries, departments of the central and state governments, and statutory authorities, from a competition perspective.\textsuperscript{79} Based on the assessment, the CCI may suggest, if necessary, appropriate modifications in the economic legislation or the policy.

\section*{VII CLASS ACTIONS}

Section 19(1)(a) of the Competition Act empowers the CCI to inquire into alleged contraventions of provisions specified in Sections 3(1) or 4(1) either on its own motion or on receipt of information from any person, consumer, or their association or trade associations.\textsuperscript{80} In terms of compensation applications to be filed under Section 53N, Subsection (4) thereof clearly allows one or more persons to file an application for the benefit of other interested persons. Therefore class actions can be taken by consumer associations, trade associations, a body of individuals, a cooperative society, a Hindu undivided family, non-governmental association or any trust. Class actions can also be taken under Section 53N(4) of the Competition Act whereby one or more persons on behalf of numerous persons with the same interest in filing a class action can file an application with the permission of NCLAT, on behalf or for the benefit of all the interested persons.

\section*{VIII CALCULATING DAMAGES}

Section 27 of the Competition Act empowers the CCI to pass orders that include penalties after conducting an inquiry into agreements that are in violation of Section 3 or conduct that is in violation of Section 4 of the Competition Act. The CCI also has the power to impose a lesser penalty if full and vital disclosure is made by a lesser penalty applicant in case of a cartel.\textsuperscript{81}

Penalties can also be imposed if the orders\textsuperscript{82} or directions issued by DG and the CCI\textsuperscript{83} are not complied with. Any person or enterprise may file an application before NCLAT for recovery of damages.\textsuperscript{84} An application for claiming damages can be filed before NCLAT under Sections 53N (in an appeal arising from findings of the CCI or NCLAT), 42A (for recovery of damage suffered by the plaintiff) and 53Q(2) (damage suffered due to inability

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{79} https://www.cci.gov.in/competition-assessment (last accessed on 17 December 2018).
\item \textsuperscript{80} There have been several cases where the CCI has initiated an investigation on receipt of information filed by associations, e.g., Builders Association of India v. Cement Manufacturers' Association & Ors, case No. 29/2010, order dated 31 August 2016 (appeal filed by opposite parties pending before NCLAT); Belaire Owners' Association v. DLF Limited, HUDA & Ors, case No. 19/2010, order dated 12 August 2011 (appeal preferred by opposite party pending before Supreme Court).
\item \textsuperscript{81} Section 46, Competition Act, 2002 (r/w CCI Lesser Penalty Regulations).
\item \textsuperscript{82} Section 42, Competition Act, 2002.
\item \textsuperscript{83} Section 43, Competition Act, 2002.
\item \textsuperscript{84} Section 42A, Competition Act, 2002.
\end{itemize}
\end{footnotesize}
of the judgment debtor to comply with the CCI orders) of the Competition Act. Though a party needs to demonstrate the damage suffered because of the contravention, it need not re-prove the contravention to obtain compensation.

IX PASS-ON DEFENCES

There is currently no pass-on defence in India. However, Explanation (b) to Section 53N of the Competition Act clarifies that when deciding compensation applications, NCLAT must be concerned with ‘determining the eligibility and quantum of compensation due to a person applying for the same’. Therefore, the pass-on defence may be taken by a respondent to contend that since the applicant has passed on the loss or damage, if any, caused to it, it is not eligible for any compensation.

X FOLLOW-ON LITIGATION

The Competition Act does not provide any explicit limitation prohibiting the initiation of a private action if there has been an enforcement action with respect to the same. However, under Section 61 of the Competition Act, the civil courts’ jurisdiction over any matter which the CCI or NCLAT is empowered to determine (which, in the case of NCLAT, includes compensation applications under Section 53N of the Competition Act by aggrieved parties) is barred.

XI PRIVILEGES

Although the concept of privileged communications is not covered by the Competition Act, the Evidence Act provides for protection of privileged professional communications between attorney and client. While this protection certainly extends to external counsel, it has also been held that a paid or salaried employee who advises his or her employer on all questions of law and relating to litigation (in certain situations) must enjoy the same protection of law as an external counsel. Section 126 of the Evidence Act provides the scope of attorney–client privilege and restricts attorneys from disclosing any communication exchanged with the client or stating the contents or condition of documents in his or her possession. However, this privilege would not apply in situations where a crime or a fraud has been committed during the period of attorney’s engagement by the client.

The privilege applicable under Section 126 of the Evidence Act is extended to the interpreters, clerks and employees of the legal adviser by Section 127 of the Evidence Act. Under Section 128 of the Evidence Act, the legal adviser is bound by Section 126 of the Evidence Act unless the client calls the legal adviser as a witness and questions him or her on the information. Moreover, Section 129 of the Evidence Act provides that no one shall be compelled to disclose to the court any confidential communication that has taken place with his or her legal professional adviser, unless the latter offers him or herself as a witness. Moreover, the application of these provisions to leniency applications is yet to be tested since no case has been decided.
XII SETTLEMENT PROCEDURES

Although there is no express provision under the Competition Act that prescribes the settlement procedure, a decision\(^{85}\) passed by the High Court of Delhi upheld the possibility of settlements between an informant and opposite party regarding an antitrust dispute and held that the basis of information furnished by the informant cannot survive after the informant itself has withdrawn the information and settled the case with the opposite party. However, the decision also held that if, notwithstanding the settlement, the CCI feels that any action is required against the opposite party for anticompetitive conduct, the CCI cannot be barred from doing so. The decision is currently under appeal before a larger bench.\(^{86}\)

XIII ARBITRATION

The Competition Act in India does not empower the CCI or NCLAT to direct the parties to resort to arbitration or any other alternate dispute resolution mechanism. Significantly, the High Court of Delhi in *Union of India v. CCI & Ors*\(^{87}\) held that existence of an arbitration agreement is not relevant for the purposes of competition law proceedings under the Competition Act. The general rule prevalent in India regarding arbitration is that though issues in personam may be arbitrable, rights *in rem* should not be arbitrable. Given the specific provision for adjudication of private antitrust claims by Section 53N of the Competition Act, these disputes may not be termed as arbitrable. However, as yet, there has not been a substantive decision on arbitrability of competition law disputes and more clarity may emerge in the future if such a decision were to be passed.

XIV INDEMNIFICATION AND CONTRIBUTION

Although the Competition Act does not provide for indemnification or contribution from third parties, co-defendants and cross-defendants, such situations could arise in the future, especially where *suo moto* cognisance or investigation by authorities could implead third parties in the same sector.\(^{88}\)

XV FUTURE DEVELOPMENTS AND OUTLOOK

After the current competition law legislation came into operation, the government constituted an expert committee in 2011 to suggest changes to the existing regime. However, the Competition (Amendment) Bill 2012 lapsed before it could be passed by the lower

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87 *Union of India v. CCI & Ors*, 2012 ComplR 187 (Delhi).
India

house of the Parliament. Recently, the Competition (Amendment) Bill 2019 was listed for introduction in the winter session of the Parliament of India held in November and December of 2019. The Bill was not tabled for voting in the winter session. However, on 21 February 2020, the Ministry of Corporate Affairs released the Draft Competition Amendment Bill 2020 for public comments. Thus, the finalisation of the Bill will take some more time.

More amendments may be brought in the Competition Act and the regulations framed thereunder in the future based on the report of the Competition Law Review Committee. The Committee has recommended, among other things, to expressly include hub and spoke cartels in Section 3(3) of the Competition Act, expansion of factors under Section 19(3) for determining adverse effect on competition, under Section 19(6) for determining relevant geographical market and under Section 19(7) of the Act for determining relevant product market, and introducing a defence for protecting intellectual property rights under Section 4 of the Act similar to the defence given in Section 3(5)(i).

The competition law regime in India is undergoing tremendous change and the CCI is actively working with the government as well as governments abroad to achieve its goal of furthering economic development by preventing anticompetitive practices and promoting fair competition. In this regard, in line with its proactive methods, in the past year the CCI has expanded the scope of its investigation into alleged anticompetitive conduct by a leading hospital chain and a leading medical devices company by directing the DG to examine the practices of super specialty hospitals across Delhi in respect of healthcare products and services provided to inpatients.

Antitrust jurisprudence in India continues to develop such as in *Competition Commission of India v. JCB India Ltd and Ors*,, and *Competition Commission of India v. Grasim Industries Ltd*, in relation to the extent of the powers of the DG, but there are regulatory issues that need to be addressed. One of the major issues that require further clarity is the interplay between competition and intellectual property. Although a single judge of the High Court of Delhi decided in favour of the CCI’s jurisdiction to initiate inquiries where alleged anticompetitive conduct may arise following the exercise of intellectual property rights, this continues to be a subject of debate due to the appeal preferred by the opposite party. Overlap between CCI and other sectoral regulators remains another major issue. While the decision by the Supreme Court in *Competition Commission of India v. Bharti Airtel Limited & Ors* represents an important step forward, its implementation and acceptance by other sectoral regulators, apart from TRAI, remains to be seen.

The decision of the Supreme Court in *Excel Crop Care Limited v. Competition Commission of India & Anr* seems to have laid down the foundation for a more transparent,

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90 Competition Commission of India v. JCB India Ltd. and Ors., Criminal Appeal No. 76-77 of 2019 (@ SLP(Crl.) 5899-5900 of 2018), order dated 15 January 2019.
92 Telefonaktiebolaget Lm Ericsson (Publ) v. Competition Commission of India, [LPA 246 of 2016], High Court of Delhi.
93 Excel Crop Care Limited v. CCI & Anr, (2017) 8 SCC 47.
proportionate yet strong competition enforcement in India. A concurring opinion by Ramana J in the above decision clearly highlighted the need to consider various aggravating and mitigating factors before determining the penalty to be imposed for a contravention:

the nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?),
the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc.

The Supreme Court, highlighting the absence of guidelines for the imposition of penalties in India as compared to other jurisdictions, may instruct the CCI to consider issuing guidelines for the imposition of penalties (though none have been issued thus far).

While certain grey areas still remain, the future of competition law regulation in India seems positive, with the CCI adopting a proactive, indiscriminate stance towards promoting competition, and NCLAT, the high courts and the Supreme Court working to ensure that the CCI and the DG pursue their ends in accordance with their powers and duties under the Competition Act.
Chapter 12

ISRAEL

Eytan Epstein, Mazor Matzkevich and Inbal Rosenblum-Brand

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The past decade has been characterised by an increasing number of motions to certify class actions based on alleged global cartels being filed with the Israeli district courts. The initiation of these proceedings is usually made by private practitioners, and the plaintiffs are private consumer organisations or Israeli individuals, while the respondents are foreign companies that have allegedly been parties to global cartels that, according to plaintiffs’ claims, affected the Israeli market and harmed consumers.

The trigger for these motions is largely based on proceedings by enforcement agencies in various jurisdictions with respect to the alleged global cartels. According to these motions, the financial damage suffered by Israeli consumers was caused by the broad impact of the alleged global cartels on the relevant products’ markets in Israel.2

1 Eytan Epstein is a senior partner, Mazor Matzkevich is a partner and Inbal Rosenblum-Brand is an associate at M Firon & Co. The authors also wish to thank advocate Tamar Dolev Green, who co-authored previous editions of this chapter.

2 Thus, in November 2013, a motion to certify a class action with respect to an alleged global cartel in the market of liquid crystal display (LCD) panels for flat screens was filed against five foreign companies (the LCD cartel class action. See Central District Court, class action 53990-11-13 Ḥatslaḥa consumer movement for the promotion of equitable economic society (RA) v. AU Optronics Corporation and others, 27 November 2013, published in Nevo). The motion is based on proceedings in various jurisdictions worldwide, inter alia, in the United States and Europe. In November 2014, a motion to certify a class action was submitted in Israel against six foreign companies – allegedly members of a global cartel in the cathode ray tubes (CRT) and CRT-based products industry (the CRT cartel class action. See Central District Court, class action 10812-11-14 David Merom v. LG Electronic Inc et al., 5 November 2014, published in Nevo). The motion is largely based on criminal and civil proceedings against the companies that took place in the United States, as well as on the European Commission’s decision of December 2012, and the fines that were imposed by it. In May 2015, a motion to certify a class action with respect to an alleged global cartel in the market of lithium batteries was filed against six foreign companies who allegedly were members of the cartel (the lithium battery (LiB) cartel class action. See Central District Court, class action 54288-05-15 Shlomi Talmon v. Samsung SDI Co Ltd et al., 28 May 2015, published in Nevo). The factual basis of this motion is the criminal and civil proceedings that are pending in the United States in connection with the alleged cartel. In January 2016, a motion to certify a class action with respect to an alleged global cartel in the market of refrigeration compressors was submitted against five foreign companies, which had allegedly met to discuss prices and share sensitive market information in an effort to coordinate prices, maintain market shares and recover cost increases (the Compressors cartel class action. See Central District Court, class action 42389-01-16 Ziphberg v. Panasonic Corporation et al., 31 January 2016, published in Nevo). In May 2016, a motion to certify a class action with respect to an alleged global cartel in the market for optical disc drives (ODD) was submitted against eight foreign
Nonetheless, private civil proceedings against foreign entities are subject to the rules of service, including the rules relating to service outside the state as provided in the Civil Procedure Regulations (CP Regulations). Particularly, in the case of a foreign defendant that does not have any presence in Israel, a plaintiff needs the court’s approval to serve its claim outside the jurisdiction.

In the last year, several motions to certify claims as class actions were filed based on restrictive arrangements that had allegedly occurred in Israel. Class action M.D. (minor) v. Ayala Travel & Tours Ltd et al., also known as ‘the delegation to Poland cartel’, concerns an alleged cartel between tourism companies regarding student delegations to Poland conducted to commemorate the Holocaust. According to the claim, the companies allegedly participated in price fixing, bid-rigging and market allocation. The price increase of student expeditions deliberately caused by the cartel enabled tourism companies to make a considerable profit.

Class action Fridman et al. v. Colgate-Palmolive Company et al., involves the plaintiff’s claim that the respondents conducted a restrictive arrangement aimed to thwart the parallel import of Colgate products to Israel. According to the arrangement, Schestowitz (the exclusive importer of Colgate products in Israel) reported to Colgate about attempts of parallel import of Colgate products to Israel, and Colgate in response used these reports to exert pressure on the relevant Colgate product franchise, which depends on it to continue receiving the products, in order to prevent the products from being delivered to the parallel importer.

The past few years have also witnessed several motions to certify class actions alleging excessive pricing by monopolists. This trend was developed following an April 2014 public statement by the Israel Competition Authority (ICA) regarding the prohibition on a monopolist charging excessive prices. The public statement elaborated on the legal and economic tests for estimating whether prices charged by a monopolist are excessive under Section 29A(1) of the Economic Competition Law, which prohibits a monopolist from abusing its dominant position by charging unfair prices. Furthermore, the statement detailed the considerations that would be taken into account by the ICA when deciding to act against a monopolist that charges excessive prices. The statement provided a safe harbour for prices that exceeded the production costs by up to 20 per cent. However, it provided no

4 Tel-Aviv District Court, class action 48001-01-16 M.D. (minor) v. Ayala Travel & Tours Ltd et al., 25 January 2016, published in Nevo.
5 Central District Court, class action 43569-04-19 Fridman et al. v. Colgate-Palmolive Company et al., 18 April 2019, published in Nevo.
6 Draft Opinion on the General Director’s Considerations on the Enforcement of the Prohibition on Charging Excessive Prices by a monopolist, 2016, publication 501055, available in Hebrew on the ICA’s website; Public Statement 1/14 The Prohibition on Charging Excessive Prices by a monopolist, 2014, publication 5006035, available in Hebrew on the ICA’s website.
guidance as to the circumstances in which the price would have been considered excessive. Interestingly, according to the statement, a monopolist that charged more than 20 per cent over its production costs might have been considered to be in breach of the law.

As a result, several class actions were filed against monopolistic companies claiming unfair excessive pricing. For example, in September 2014, an individual farmer who purchased potassium for fertilisation purposes from Dead Sea Works Ltd, one of the world’s largest manufacturers of potassium, submitted a motion to certify a class action against the company at the Central District Court on behalf of all consumers of potassium in Israel. According to the motion, Dead Sea Works abused its dominant position in the potassium market by charging excessive and unfair prices. In April 2016, the Central District Court approved a settlement agreement between the parties. This decision is discussed in detail in Section XII. Moreover, in April 2016, the Central District Court certified a class action against Tnuva, Israel’s largest dairy manufacturer, alleging that Tnuva charged excessive prices for cottage cheese. This decision is precedentary to a great extent as it explicitly recognised, for the first time, excessive pricing as a violation of the Economic Competition Law in Israel. This decision is discussed in detail in Section VII. In addition, in September 2017, the Supreme Court denied the appeal of the gas monopoly (composed of the six largest gas companies in Israel), held that the class action brought against it for excessive pricing should not be dismissed and returned the case to the District Court to decide the motions to certify this class action.

In spite of all of the above, it should be highlighted that, shortly after her nomination in 2016, the current Director General of the ICA, Michal Halperin, expressed her disagreement with the above-mentioned public statement of April 2014, and announced a public hearing and formal reevaluation of the ICA’s policy concerning the prohibition on excessive pricing by monopolies, which was designed to examine the merits, enforceability and effectiveness of that policy. The need for re-evaluation arose due to a vigorous public debate that took place following the publication of the public statement. Indeed in September 2016, the ICA published a new statement regarding the enforcement of the prohibition on excessive pricing by monopolists, replacing the previous public statement. The new policy introduces the main principles of enforcement challenges of unfair prices, and suggests that the ICA will act against firms charging excessive unfair prices only where there is no other competitive remedy available for addressing the underlying problem in the specific market. In principle, the ICA would prefer a structural solution to the specific treatment of prices; however, it will act when prices are significantly higher than the price charged under competitive conditions, and when there are indications that the high price is unfair. Furthermore, according to this policy statement, the ICA will not enforce the prohibition in a market where there is a designated industry regulator supervising the prices set in the market. The policy statement abandoned the safe harbour established in the previous public statement, making it difficult for private plaintiffs to argue a lighter burden of proof of excessive pricing by monopolists. Thus, in class action Tzadok v. Strauss Group Ltd, the District Court rejected the plaintiffs’ motion to

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7 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 5 April 2016, published in Nevo.
8 Supreme Court, civil appeal 9771/16 Nobel Energy and others v. Moshe Nezri and others, 28 September 2017, published in Nevo.
certify a class action, stating that the respondent held limited market power, and there was no significant discrepancy between actual and cost-based pricing. Consequently, the class action was dismissed. In spite of the change in the ICA’s approach, in the past year, the District Court approved two motions to certify claims as class actions on grounds of excessive pricing. In both cases, the Court noted that the respondents have significant market power, and that the prices charged by them were significantly higher than their costs, therefore might be considered excessive prices: in *Gafniel v. CBC Group*, the Court held that CBC Group had abused its monopolistic power in the cola drinks market by charging an excessive price for 1.5-litre bottles of Coca-Cola. In *Israel Consumers Council v. Tnuva*, the Court held that Tnuva had charged excessive prices in the packaged hard cheese market. Appeals submitted by the respondents in these cases are still pending in the Supreme Court.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust enforcement is founded in Section 50 of the Economic Competition Law, under which any act (or omission) that contravenes the provisions of the Economic Competition Law, including instructions or conditions imposed by the Director General, automatically constitutes a tort actionable in terms of the Torts Ordinance. For example, Section 4 of the Economic Competition Law makes it a contravention for any person to be a party to a restrictive arrangement, which may include both horizontal and vertical agreements, including per se illegal price-fixing or market-allocation agreements. Section 29 and 29A of the Competition Law make it illegal for a monopolist to abuse its monopolistic position in the market through, for example, unreasonable refusal to supply or purchase goods or services, price discrimination or charging an unfair price for goods or services. Such contraventions of the Economic Competition Law are thus deemed to constitute a tort for purposes of the Torts Ordinance. Section 71 of the Torts Ordinance empowers a civil court to grant compensatory damages or to make other orders, such as injunctions, in favour of a person who has suffered damage or injury as a result of a tort committed against him or her.

In 2006, the Class Action Law was signed into law. This legislation extracted the provisions regulating class actions from, inter alia, the Economic Competition Law, and set out an independent regime regulating class actions. The Class Action Law regulates, inter alia, the legal requirements for the commencement of a class action such as issues of legal standing, the legal requirements to bring a class action and the relief that may be claimed, including the calculation of damages. The Class Action Law also sets out the court’s powers and authority in its hearing and enforcement of class actions, including its authority to recognise a claim as a class action, to grant a settlement order, and to issue other orders such as in respect of

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11 Central District Court, class action 6179-08-16 *Gafniel v. CBC Group Ltd*, 3 August 2016, published in Nevo.
professional fees and remuneration of the class action representative. The Class Action Law also regulates various other issues, such as prescription and the establishment of a fund to finance class actions that are of social or political significance.

Sometimes, claims alleging anticompetitive conduct are brought both under the Economic Competition Law and the Unjust Enrichment Law. In a decision issued by the Central District Court, which involved a claim of abuse of dominant position, the Court awarded the plaintiff a remedy based on the Unjust Enrichment Law. The Court held that misleading the Patents Registrar in order to prolong a pharmaceutical company’s monopoly and delay the entry of a generic competitor in the market entitled the competitor not only to receive compensation under the antitrust laws, but also entitled it to claim all or part of the monopoly profits under the Unjust Enrichment Law.\textsuperscript{13}

During 2013 and 2014, two laws were enacted aiming to increase competition in the markets generally and in the food sector in particular.

In March 2014, the Law for Enhancement of Competition in the Food Sector\textsuperscript{14} (Food Law) was enacted with the objective of increasing competition in the food sector and consequently bringing price reductions to consumers. Inter alia, the Food Law prohibits a supplier from dictating, recommending or interfering in any way in decisions made by a food and consumption products retailer regarding the price it charges consumers for a product of another supplier or the conditions under which it sells a product supplied by another supplier. Specific prohibitions apply to big retailers and big suppliers based on, inter alia, their sales volumes in the preceding year. In general, a big supplier is prohibited:

\begin{itemize}
\item[a] from interfering in shelves stewardship of a big retailer;
\item[b] from setting prices below cost to the big retailer;
\item[c] from recommending the resale prices of its products; and
\item[d] in the absence of special permission, from subjecting the sale of a product to the acquisition of other products supplied by it.
\end{itemize}

In addition, the law authorises the Director General to publish on the ICA’s website a list of very big suppliers (i.e., suppliers the annual sales of which exceed 1 billion shekels) of which products’ placement must not exceed 50 per cent of the total shelf space available in any one of the big retailer’s biggest stores. The Food Law further regulates geographic competition by retailers. In this respect, the Director General must define, for every big store of a big retailer, its competitive geographic area, in which area the law prohibits the expansion of the big retailer without prior approval of the Director General.

Interestingly, the Food Law also requires big retailers to publish full and updated prices of any product sold in any of their stores on the internet.

Breach of the Food Law is considered an offence under the Consumer Protection Act, and the Director General is in charge of the enforcement thereof. For example, in July 2018, the ICA reached a consent decree with Shufersal Company, the largest supermarket chain in Israel, according to which Shufersal agreed to pay an administrative fine of 9 million shekels for violations of the Food Law.\textsuperscript{15} In addition, in June 2018, the Director General decided to impose a monetary sanction on three supermarket chains for breaching their reporting

\textsuperscript{13} Central District Court, civil case 33666-07-11 Unipharm v. Sanofi, 8 October 2015, published in Nevo.
\textsuperscript{14} Law for Enhancement of Competition in the Food Sector, 5774-2014.
\textsuperscript{15} 2018, publication 501552, available in Hebrew on the ICA’s website.
obligations under to the Food Law. In class action *Michal Avital v. Nogam Cosmetics Ltd et al.*, the plaintiff alleged, among other things, that the respondents acted in violation of the Food Law clause prohibiting a large supplier from intervening in the retail price charged by the retailer for a commodity supplied by the supplier. The plaintiff contended that the respondents violated the said provision by marketing Gillette disposable razors with the alleged misrepresentations ‘4+2 free’ and ‘10+5 free’, and that by doing so reduced competition in the relevant market.

In the absence of a specific reference to private enforcement of this law, private actions may be filed pursuant to the Torts Ordinance [General Version] 1982 (breach of statutory duty).

In addition, in December 2013, the Law for the Promotion of Competition and Reduction of Concentration was enacted, aiming to strengthen competition and break up certain powerful business groups in the Israeli economy. Inter alia, the Law bans groups from owning both financial and non-financial enterprises (any group that owns both types of companies must divest one or the other) and dismantles business pyramids by stating that no group may have more than two tiers of publicly listed companies. The Law also deals with competition considerations relating to allocation of rights in state assets and the requirement to consult with the Director General in certain cases.

### Prescription

Where a civil claim for damages is brought under the Economic Competition Law, the Prescription Act applies. Sections 5(1) and 6 of the Act direct that a claim (not in respect of immovable property) will prescribe seven years from the date on which the cause of action arose. Under Section 8, however, if the plaintiff was unaware of the facts that constituted the cause of action for reasons that were independent of it, and that even using reasonable caution it could not have known, the period of limitation will commence on the day that the facts became known to the plaintiff. Section 89 of the Torts Ordinance directs that the date on which the cause of action arose will be the date on which the relevant act or omission occurred; and that where the act or omission is a continuing act or omission, then the date on which such act or omission ceased will be the date on which the cause of action arose. Specifically, however, where the claim is a claim for damages, including pecuniary damages, caused by a tortious act or omission, then the date on which the claim arose will be the date on which the damage was incurred. However, should such damage only be discovered at a later date, the cause of action arises on this date, subject to a maximum period of 10 years. Since damage is one of the elements of a cause of action brought under the Economic Competition Law, the latter rule of Section 89(2) should apply to such cases, provided that the plaintiff shows a causal link between the argued action (or omission) and the damage.

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16 2018, publications 501532, 501531, 501530, available in Hebrew on the ICA’s website.
19 Section 89(1) of the Torts Ordinance.
20 Section 89(2) of the Torts Ordinance.
In Straus Group et al. v. Carmit Candy Industries Ltd, the Supreme Court considered the question of which day the plaintiff became aware of the facts constituting the cause of action. The case involved an action for damages brought by Carmit, the Israeli distributor of Cadbury, against Strauss Group for alleged abuse of dominant position by exclusionary practices aimed at forcing Cadbury chocolates out of the market. The Court ruled that the day on which the plaintiff became aware of the facts constituting the cause of action was not the date on which Carmit became aware of the defendant’s salespeople’s behaviour and threats to the retailers, but later – when Carmit revealed for the first time that this was part of a strategic decision of the defendant’s management to exclude Cadbury from the market. This information was revealed to Carmit only when the investigation of the ICA against the defendant became public.

The inclusion of a person as a claimant in a class action group has the same effect in terms of tolling the statute of limitations as if that person had issued the summons in the matter. In addition, should the court deny an application for approval, the prescription period of the claim of a person included in the group deriving from that cause of action does not end prior to one year after the date on which the decision on the application for approval becomes final, provided that person’s claim had not been tolled prior to the date on which the application for approval was filed.

### III EXTRATERRITORIALITY

The Economic Competition Law is silent on its extraterritorial reach. In 1999, in accordance with the statutory authority granted under Section 43(a)(1) of the Economic Competition Law to declare that an arrangement is restrictive, the Director General of the ICA determined that such an arrangement existed in the market for selective fragrances. The Director General’s report addressed the issue of the extraterritorial application of the Israeli antitrust legislation. The subject of the investigation of the ICA was an Australian registered company, James Richardson, which held a licence from the Airports Authority to operate a duty-free shop at an Israeli airport. James Richardson held over 30 per cent of the Israeli market in selective fragrances and entered into restrictive arrangements with foreign selective perfume manufacturers to distort competition for selective fragrances in Israel. James Richardson sought, through its restrictive arrangements with the foreign suppliers, to maintain its 30 per cent markdown on imported selective fragrances.

In addressing the extraterritorial application of the Israeli antitrust legislation, the Director General referred to foreign jurisprudence on the issue, in particular the approach of the US and EU authorities, and referred with approval to the use of the effects doctrine in those jurisdictions. The Director General held that the purpose of the Israeli antitrust legislation was to protect competition in Israel, and that such purpose might require the extension of the Israeli legal arm to activities that occur beyond Israel’s borders but have a detrimental effect on competition on the Israeli market. As such, the Director General continued, a restrictive arrangement between foreign parties entered into outside the borders of Israel but the purpose or result of which, in whole or in part, is significant damage to competition on the Israeli market, will fall within the purview of the Israeli Economic

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23 Section 26(a) of the Class Action Law.
24 Section 26(b) of the Class Action Law.
Competition Law. The Director General found support for this position in the wording of the Economic Competition Law itself, which in Section 2(a) defines a restrictive arrangement as ‘an arrangement entered into by persons conducting business according to which one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and the other parties to the arrangement’.

The Director General held that when any of the elements constituting a restrictive arrangement occurs in Israel, this provides the necessary jurisdiction for the application of the Economic Competition Law. Thus, where an arrangement is concluded abroad but may eliminate or reduce business competition in Israel, this is sufficient to establish Israeli Economic Competition Law jurisdiction. The Competition Tribunal addressed this issue for the first time in 2011, when it adopted the Director General’s position. 25

The Director General rendered another interesting decision in September 2013, 26 which declared illegal under Section 43(a)(1) of the Economic Competition Law an international cartel entered into between foreign companies to coordinate bids submitted in tenders for gas insulated switchgears (GIS) in many countries, including in Israel. In his decision, the Director General emphasised that extraterritorial application of antitrust laws can only take place in respect of conduct taking place outside the state borders when there is a clear connection between that conduct and the local market. The Director General indicated that the very fact that bids being submitted in Israel were based on the agreements between the cartel members is an expression of the striking influence of the cartel on the Israeli market, thus justifying the enforcement of Israeli law. 27 The Director General concluded: ‘The restrictive arrangement which is the subject of this declaration was conducted abroad by non-Israeli companies. Nonetheless, its influence over competition in the local market obliges the conclusion according to which the performance of such arrangement breaches the Israeli Competition Law.’

Private civil proceedings against foreign entities are subject to the rules of service outside the state as provided in the CP Regulations. Particularly in the case of a foreign defendant who is not personally present in Israel, a plaintiff needs the court’s approval to serve its claim outside the jurisdiction as a precondition for the court’s jurisdiction over that defendant. 28 The court may grant a motion for service outside of the jurisdiction if a claim falls under one of the categories listed in Regulation 500 of the CP Regulations. Regulation 500

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26 The Director General’s declaration under Section 43(a)(1) regarding a restrictive arrangement between GIS manufacturers, 2013, publication 500473, available in Hebrew on the ICA’s website.
27 The Director General decided not to include in the determination the worldwide cartel members who had never submitted bids in GIS tenders in Israel. The Director General determined that considering the agreement applied to many countries (not just Israel), and there is a satisfactory explanation and competitive reason for these specific companies to refrain from activities in Israel during the period of the cartel (the geopolitical situation during the relevant period), it is difficult to attribute the participation of these companies in the global cartel to an impact on the Israeli market. Therefore, and in light of the terms of the effects doctrine, it cannot be determined that they were a party to a cartel in Israel. ibid., Paragraph 140.
28 Additional methods for serving a foreign defendant under the Civil Procedure Rules are through personal service when a representative of the corporation is present in Israel, or via an agent of the foreign defendant that is located in Israel. An individual or a corporation is deemed to be an agent if it is proved to have strong ties with the foreign defendant.
Israel

stipulates a list of 10 situations in which service outside the jurisdiction will be permitted. 29

The common denominator of the factors detailed in the Regulation is the existence of a link
between the dispute and Israel. For instance, matters in which relief is sought against a party
domiciled in Israel or that concern real estate located in Israel, and matters that concern a
breach of a contract entered into in Israel or breach of a contract that occurred in Israel,
irrespective of where the contract has been made, are recognised.

Up until recently, the most pertinent ground for service outside of the jurisdiction
in antitrust civil claims was set forth in Regulation 500(7) of the CP Regulations, which
requires that the claim be founded on an act or omission within the state.

According to long-standing Israeli case law, Regulation 500(7) requires certain nexus to
Israel in addition to the damage: the mere occurrence of damage in Israel does not amount to
‘an act, or omission, within the state of Israel’, and accordingly does not confer on the Israeli
court jurisdiction over the foreign defendant. 30

In August 2017, the Supreme Court upheld the Central District Court decision in the
LCD cartel case, ruling that according to Regulation 500(7), damage, by itself, would not
suffice to establish a basis for service outside Israel if the act or omission of the alleged cartel
was not performed in Israel. 31 The Court issued this decision stating that its decision may
cause discomfort since it leads to a situation in which Israeli consumers are not able to claim
damages from entities that allegedly engaged in an international cartel that caused them
harm; however, the Regulation language does not allow for a different interpretation.

In light of the Supreme Court’s decision in the LCD class action, plaintiffs in both the
CRT and ODD class actions submitted new motions to allow service outside the jurisdiction
provided in Regulation 500(10). 32 In the LiB cartel, the plaintiff recently filed an update to
the Court stating that he is gathering evidence to prove that the wrongdoing had occurred
in Israel and not only the damage, and could therefore perform service in accordance with
Regulation 500(7). Since the Effect Doctrine was not accepted as a ground to serve parties
outside the state justification, and since the defendants have no presence in Israel that allow
for the service, the plaintiffs will try to establish that some of the wrongdoing itself (and not
merely the damage caused by it) had occurred in Israel.

In December 2018, Regulation 500(7A) came into force. According to the new
Regulation, the Court may authorise service outside the jurisdiction when damage is incurred
by the plaintiff in Israel from the defendant’s product, service or conduct, provided that
the defendant could have anticipated that the damage would be caused in Israel, and that
the defendant, or a person affiliated with it, is engaged in international commerce or the
 provision of international services of a significant scope.

29 Fulfilment of one of the grounds for the service out of the jurisdiction under Regulation 500 will allow
the court to properly exercise jurisdiction over foreign entities, subject to compliance with the forum non
conveniens doctrine.
31 Supreme Court, permission for civil appeal 925/17 Hatzlacha consumer movement for the promotion of
equitable economic society (RA) v. AU Optronics Corporation and others, 31 July 2017, published in Nevo.
32 According to Regulation 500(10) the court may permit service outside the jurisdiction if a person outside
the territory of the state is a required litigant or a right litigant in an action properly filed against another
person to whom a lawful service has been duly effectuated within the state of Israel.
IV STANDING

Section 3 of the Torts Ordinance provides that any person who is injured or has suffered damage due to a tort committed in Israel is entitled to a remedy from the infringer, as provided for in the Torts Ordinance. In *Tivol Ltd v. Chef of the Sea Ltd*, a majority of the Supreme Court held that a party to a restrictive arrangement is not prevented from bringing a claim for the cancellation of the agreement under the rubric of the antitrust laws, and many of the first private enforcement claims of the Economic Competition Law were brought by parties to restrictive agreements to escape their contractual obligations. In a recent decision, the Court ruled that accepting a personal compensation claim from a party to a restrictive arrangement is inconsistent with the rationale set out by the Court in the *Tivol* case, whereby granting relief (of contract nullity) to a party to a restrictive arrangement is possible only in view of the public interest of free competition. The Court emphasised that compensation should not be awarded to a party that entered into such a contract with free will and with full awareness. The financial compensation essentially embodies the damage caused to that specific claimant due to the restrictive arrangement, and is not granted for the public as a whole. Section 4 of the Class Action Law sets out the requirements for standing to bring a class action suit. As regards natural persons, the claimant must have standing to bring a personal claim in the matter to have standing to bring a claim on behalf of a class. A public authority or organisation may also bring a class action acting in furtherance of an issue related to the field in which it engages and in which there are significant factual or legal questions common to the group of persons represented in the class action (note that as a condition for approving a class action brought by an organisation, the court must usually be convinced that the claim cannot be brought by a natural person). Where one of the bases for the class action is damage, then it is sufficient for individuals to show that prima facie they suffered damage. Similarly, a claim that damage was suffered by a member of the group represented by a public authority or organisation will suffice where the class action is brought by such public authority or organisation on behalf of that group.

In *Auto Line*, the Central District Court stated, obiter dictum, that a person who is not party to a consent decree entered into with the ICA has no standing to sue based on that consent decree.

34 Tel Aviv District Court 2407-06-09 *Eliyahu Kislev v. ‘Delek’ Israel Fuel Company Ltd*, 29 August 2019, published in Nevo.
35 The District Court in Tel Aviv ruled on what is the correct interpretation of the class action laws requirement to prove that under the circumstances of the case, it would be difficult to bring the petition in the name of a natural person. Class action 2484-09-12 *Hatzlacha The Consumers’ Movement for the Promotion of a Fair Society and Economy v. Cohen et al.*, 18 February 2013, published in Nevo. See also Supreme Court, PCA 6897/14 *Kol Barama Radio v. Kolech- Religious women Forum*, 9 December 2015, published in Nevo.
36 Central District Court, civil case 13427-02-10 *Auto Line Ltd v. Universal Motors Israel Ltd (UMI)*, 19 June 2012, published in Nevo.

In June 2012, the District Court denied a 20 million shekel lawsuit submitted by Auto Line Ltd, an importer and marketer of automotive spare parts for vehicles manufactured by General Motors and Isuzu, against UMI, a General Motors importer and Auto Line’s main competitor in Israel, alleging restrictive arrangements and violation of a consent decree UMI signed with the ICA in 2003.
V THE PROCESS OF DISCOVERY

The CP Regulations govern discovery and inspection of documentation in civil proceedings. ‘Laying your cards on the table’, and not surprising the opposing litigant with evidence of which the litigant may not have been aware, is viewed as both efficient and in the interests of determining the truth in respect of the issue in dispute. The emphasis in the discovery process is on the relevance of the documents to be discovered (i.e., relevance being determined by whether such documents may shed light on the dispute). The range of documents permitted to be requested in a discovery application is wide, and the courts have allowed not only actual documents of the parties to be discovered, but information contained in other forms (e.g., recordings and transcripts of recordings, video recordings, and information including lists and records contained in magnetic or electronic form). Note, however, that the courts have emphasised that a distinction must be made between appropriate discovery applications and fishing expeditions. Fishing expeditions will not be granted by the courts.

Usually, litigants (any litigant, not necessarily an opposing one) must disclose by way of affidavit the documents that pertain to the matter at hand or that were under their control or possession. The affidavit must describe the documents that are relevant to the matter at hand and that are or were in the possession or under the control of the litigant disclosing them. The concept of relevance is interpreted broadly and includes both documents that are damaging to the litigant discovering them as well as documents that may prove useful to the opposing party. The existence of a privileged document must still be declared, although its contents may be claimed (in the affidavit) as privileged. Note that fulfilment of this requirement does not require the litigant to detail the content of the documents.

A litigant may also be required to produce documents for inspection and copying. This may apply to documents that have been mentioned in the pleadings or in the affidavit of that

As part of its business, UMI engaged in several types of maintenance agreements with automobile fleets under which UMI is responsible for any repair needed. The repair services are done by garages that are UMI’s subcontractors, which are required under their contracts with UMI to use only UMI’s original spare parts.

Inter alia, Auto Line argued that the 2003 consent decree with the ICA prohibits importers of vehicles from restricting garages in any way, and that the obligations UMI imposed on the garages violated the consent decree. The District Court rejected Auto Line’s argument. First, the Court indicated that Auto Line itself had admitted that the consent decree violation was not an independent cause. In addition, in obiter dictum the Court stated that since Auto Line was not a party to the decree, it could not sue on its basis and, in any case, the ICA references to the maintenance agreements in the consent decree were not conclusive. An appeal against this ruling was denied in December 2013 by the Supreme Court. See civil appeal 7490/12 Auto Line Ltd v. Universal Motors Israel Ltd, 26 December 2013, published in Nevo.

37 Rishon LeZion Magistrate Court, civil case 18673-05-14 Hiakiyahu company Ltd (CIC) et al. v. Netzer Israel Torah, grace and education institutions et al., 15 November 2015, published in Nevo.
39 Tel Aviv District Court, civil case 2487/04 STA Industries and Technologies Ltd v. Pennsylvania Investments Ltd et al., 9 December 2007, published in Nevo; Nazareth District Court, civil case 1140/98 Tzadik Chazan v. Mitzpeh Hayamim Ltd, 5 May 1998, published in Nevo.
40 CP Regulation 112.
litigant, or to documents that have not been mentioned. The applicant, however, must show that the documents requested are relevant to the instant matter, and the court may not grant the applicant’s request unless satisfied that the requested documents or category of documents are necessary for the conduct of a fair trial or to lessen expenses. The onus of proof is on the party requesting the inspection.

A litigant may also obtain information through a questionnaire submitted to another litigant. The questionnaire may cover information that is not limited to documents. It may pose a broad range of questions to the other litigant, often aimed at extracting admissions, which questions are limited only by their relevance to the issue at hand. Again, the central concern is that of relevance. Although the questionnaire itself and the answers thereto do not form part of the court file and automatically become admissible as evidence, any party to the proceedings may use the information provided in the answers of the other party, in whole or in part, as part of its evidence. The court may also order the inclusion of further information provided by a litigant in its answers to the questionnaire should the court find that such further information is closely connected to the information already submitted as evidence.

Failure by a litigant to reply to a questionnaire, to produce documents or to allow inspection of documents contrary to an order granted by the court may justify the dismissal of that litigant’s statement of action or defence and could result in judgment being entered against that litigant. Failure to discover a specific document that should have been discovered results in the litigant being unable to use that document as evidence during the course of the trial without the court’s permission.

Third-party testimony is regulated by the CP Regulations and the Courts Law. CP Regulation 178(a) stipulates that litigants may summon third parties to provide testimony before a court on their behalf. Such third parties may also be summoned to present documents to court. The court may not prevent such third-party testimony on the basis that, in its opinion, such testimony will not assist the litigant who summoned the third party in the furtherance of his or her matter. As with expert evidence (discussed below), the court may also call on witnesses to testify as to matters before the court, or to produce documents that are either in their possession or under their control. Testimony may be provided in the form of an affidavit (although it may be required of the witness to later appear in court to provide oral testimony, particularly where the opposing party wishes to question the witness). It is also possible, depending on the particular circumstances of the matter, for testimony from third parties to be given via electronic means, such as videoconferencing, for example, where witnesses are abroad. Should a person summoned to testify or produce documents by the

42 CP Regulation 114.
43 CP Regulation 117.
44 CP Regulation 120(b).
45 Tel Aviv District Court, civil case 3006/00 Danoosh Dani v. Chrysler Corporation, 24 October 2004, published in Nevo.
46 CP Regulations 109 to 111.
47 CP Regulation 122.
48 CP Regulation 114.
51 CP Regulation 167.
52 Supreme Court, civil appeal 3005/02 SmithKline Beecham PLC v. Unipharm Ltd, 30 June 2002, published in Nevo.
court fail to appear or produce such documents, Section 73 and 73A of the Courts Law empowers the court to take measures to compel such witness to appear before it or to produce such documents, including fining, imprisonment or the confiscation of passports.

VI USE OF EXPERTS

Regulation 20 of the Evidence Ordinance\textsuperscript{53} entitles the court to receive into evidence the opinion of an expert relating to issues of science, research, art or professional knowledge. Economic assessments to establish antitrust violations and prove competition damages would certainly fall within the scope of expert evidence permitted to be received by a court hearing a civil antitrust claim for damages.

Litigants may choose to present expert evidence to the court to substantiate or prove their arguments.\textsuperscript{54} In addition, the court also may, on its own initiation and at any stage of proceedings, appoint an expert to give evidence on an issue on which the litigants disagree.\textsuperscript{55}

In practice, as the popularity of the civil enforcement of the Economic Competition Law increases in Israel, the use of experts to determine damages will also increase.

In recent years, the courts have required class action applicants to support their motions for class action approval with an expert opinion to satisfy the requirement of providing prima facie evidence by anticompetitive conduct or impact.\textsuperscript{56} Moreover, courts may even require applicants to base their claim on an expert opinion prepared especially for the purpose of the specific class action. In \textit{Johanan v. Partner Tikshoret Ltd},\textsuperscript{57} the applicants claimed that the cellular companies (the respondents) charged their customers an unfair price for texting services (SMS). The applicants did not support their claims with an independent expert opinion, but relied on reports and experts’ opinions that had originally been prepared by and for the Israel Ministry of Communication (MOC). The court criticised the applicants and rejected their claims, inter alia, since the MOC’s reports had no legal probative weight, being no more than hearsay testimony, and their purpose was to assist the MOC in its decision-making process. Consequently, the court ruled that the applicants had not provided sufficient evidence to support their claim. The Supreme Court took a similar approach in the \textit{Tnuva v. Naor} class action case.\textsuperscript{58}

In \textit{Tnuva-Strauss},\textsuperscript{59} the Court determined that since the applicant did not attach an expert opinion to prove its claims, and since it is not possible to rely only on identical prices for a defined period of time to prove price fixing over time, the application should be denied. Furthermore, the Court emphasised that an applicant should turn to court only when it possesses sufficient evidence to support its claim, at least prima facie, and cannot use the legal proceedings to obtain the initial support for its claim.

\textsuperscript{53} Evidence Ordinance [New Version], 5731-1971.
\textsuperscript{54} CP Regulation 129.
\textsuperscript{55} CP Regulation 130.
\textsuperscript{56} Supreme Court, permission for civil appeal 2616/03 \textit{Isracard Ltd v. Haward Rice}, 14 March 2005, published in Nevo; Central District Court, civil case 1817-08-07 \textit{Johanan and others v. Partner Tikshoret Ltd, Cellcom Israel Ltd, Pelephone Tikshoret Ltd}, 19 January 2011, published in Nevo.
\textsuperscript{57} Civil case 1817-08-07, ibid.
\textsuperscript{58} PCA 4778/12 \textit{Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd v. Advocate Ophir Naor}, 19 July 2010, published in Nevo.
\textsuperscript{59} Central District Court, class action 3947-09-11 \textit{Amir Josef Brot v. Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd}, 11 March 2012, published in Nevo.
In *Ben Shushan v. Keshet Broadcasting Ltd.*\(^{60}\) the Court upheld the respondent’s request to withdraw the motion to certify the class action, noting that the main basis of the claim is a study conducted by one of the plaintiff’s attorneys, without an affidavit or opinion describing the method in which the study was conducted, and the conclusions that the plaintiffs wish to draw from it regarding the existence of a restrictive arrangement. Similarly, in *Rachmani v. Idud Ltd.*\(^{61}\) the Court stated that the plaintiff asserted, laconically and inaccurately, that the Jewish Agency held a monopoly on the land it leased and that it was abusing its monopolistic power. The Court held that it is not enough to raise the claim in general, without providing data and without attaching an expert opinion.

### VII  CLASS ACTIONS

Standing to bring a class action is discussed in Section IV.

Section 8(a) of the Class Action Law provides that a court may authorise a class action under the following, cumulative, conditions:

- **a** the claim raises significant questions of fact or law that are common to the group purported to be represented in the claim, and there is a reasonable possibility that such questions will be answered in favour of the group;
- **b** the class action is the most efficient and fairest method to make a determination in the dispute in the circumstances of the case; and
- **c** it is reasonable to presume that the interests of the members of the group purported to be represented will be represented and managed in an appropriate manner and in good faith.

Of course, one of the advantages of a class action claim is its efficiency, both in terms of litigation costs saved and in terms of forcing a defendant at fault to compensate those who suffered damage. The flipside, however, is that respondents, some of whom are not necessarily at fault, may be coerced, because of the sheer size and impact of an impending class action suit, to compromise. The class action brought against the banks in *Sharnoa Computerised Machines*\(^{62}\) exemplifies the massive claims that may be levied against respondents in a class action – the maximum amount of 7 billion shekels could be devastating to the banks and might force them into a settlement with the applicants (for further discussion, see Section XII).

In this context, the decision by the Supreme Court in *Phoenix Insurance Company v. Amusi*\(^{63}\) is relevant: the Court discussed the term ‘reasonable possibility that such questions will be answered in favour of the group’ (from Section 8(a) of the Class Action Law), and criticised the lower courts’ tendency to set too strict standards for claimants in class action proceedings at the preliminary approval stage. The Supreme Court clarified that at this stage, the Class

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\(^{61}\) Tel-Aviv District Court, class action 45122-02-15 *Nechemya Rachmani v. Idud Ltd. et al.*, 28 August 2019, Published in Nevo.

\(^{62}\) Tel Aviv District Court, civil case 19230/06 *Sharnoa Computerised Machines Tel Aviv Ltd v. Bank Hapoalim Ltd, Bank Leumi Israel Ltd and Bank Discount Ltd*, 21 January 2008, published in Nevo.

Action Law requires no more than a reasonable possibility that the common questions will be ruled in favour of the group and that, for that purpose, the courts should refrain from bringing the main hearing of the case into the preliminary approval stage.

In 2012, the Supreme Court ruled on the standard under which applications to approve actions as class actions should be examined. Specifically, in *Phoenix Insurance Company v. Amusi*64 (which is not an antitrust case), the Supreme Court considered the criterion of showing a reasonable possibility that the common questions will be answered in favour of the group.65 The Supreme Court criticised the lower courts’ tendency of setting too strict a standard for claimants in class action proceedings at the preliminary approval stage, clarifying that at the preliminary stage, the Class Action Law requires no more than a reasonable possibility that the common questions will be ruled in favour of the group, and the courts should refrain from setting stricter proof standards, which are more appropriate during the hearing of the main case.

At the same time, however, the Supreme Court continued to set strict requirements concerning the evidentiary standard at the preliminary stage of a class action. In the *Tnuva v. Naor* class action,66 for example, the Supreme Court upheld the requirement of including with the application for a class action in an antitrust case an expert’s opinion, prepared specifically for the purpose of the claim, and refused to allow the submission of the expert’s opinion later unless the applicant can show that the submission thereof together with the claim was impossible.

The use and the evidentiary significance of an expert’s opinion in class action cases are discussed in Section VI.

As discussed below, the amount of damages awarded need not be determined on an individual basis, and may instead be a global award. While a global award may be significant in terms of the payer, the class action members may only receive a token amount as compensation, thus not truly being compensated. Class actions, from this perspective, may be viewed as an efficient deterrent but an inefficient compensatory mechanism.

In May 2014, the Tel Aviv District Court partly approved an application for a class action against The Israel Telecommunication Corp Ltd (Bezeq) for collecting payments after ceasing to provide services to its subscribers.67 The applicants argued, inter alia, that by doing so, Bezeq had abused its dominant position.

The Court denied the applicants’ argument, stating that since Bezeq acted according to the law (the telecommunications laws) it could not be said to have abused its dominant position. The Court added that activities that are allowed by law cannot be considered, by themselves, as abuse of dominant position.

In January 2014, the District Court in Tel Aviv denied a class action application against Israel Railways, the national operator of train transportation.68 The applicant alleged that Israel Railways had abused its monopolistic position by ceasing to provide its services to the public due to an employees’ strike. During the strike, so alleged the applicant, Israel Railways

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64 ibid.
65 Section 8(a)(1) of the Class Action Law 5366-2006 (Class Action Law).
67 Tel Aviv District Court, 2519-06 *Eyal Goldenberg v. Bezeq The Israel Telecommunication Corp Ltd*, 15 May 2014, published in Nevo.
reduced the scope of its services not within the context of fair competitive activity. The applicant pointed to the Court’s decision in *Bezeq*, 69 in which it upheld the ICA’s determination that Bezeq had abused its monopolistic position by striking and failing to provide services to its competitors. The Court distinguished between the cases and determined that in contrast to Bezeq, Israel Railways’ management had operated quickly and efficiently to bring to an end the employees’ strike and did not harm its competitors. On the contrary, the Court stressed, Israel Railways’ competitors (the bus companies) gained from the strike.

In April 2016, the Central District Court issued a precedential preliminary decision explicitly recognising excessive pricing as a ground for a claim under the Economic Competition Law. 70 The Central District Court certified a class action against Tnuva, Israel’s largest dairy manufacturer. According to the plaintiff, Tnuva charged excessive and unfair prices for cottage cheese between 2008 and 2011. In support of its decision, the Court stated that the language of Section 29A of the Economic Competition Law, which prohibits monopolies imposing unfair pricing, applies not only to predatory pricing, but also to excessive pricing.

Further, the Court based its decision on the ICA’s previous public statement regarding the prohibition on charging excessive prices by a monopolist, stating that although the ICA’s guidelines are not binding in court, they should be given significant interpretative weight. Finally, the Court supported its ruling on the fact that Article 102 of the Treaty on the Functioning of the European Union (TFEU), upon which Section 29A of the Economic Competition Law is based, was interpreted in the European Union ruling as, inter alia, prohibiting charging excessive monopolistic prices. An appeal against this preliminary decision was submitted by Tnuva and is still pending in the Supreme Court.

In recent years, there has been an increasing number of motions to certify class actions based on alleged global cartels filed against foreign companies (see Section I).

VIII CALCULATING DAMAGES

A private litigant injured monetarily by contraventions of the Economic Competition Law may bring a claim for tortious damages in terms of the *Torts Ordinance*. The purpose of damages under Israeli law, which derives from the English law, is to place injured parties in the position they were in prior to the commission of the tort. Punitive damages are not usually awarded by the Israeli courts. Note, however, that in February 2013 a legislative memorandum that was published by the ICA proposed, inter alia, the adoption of the American triple damages model in private enforcement of antitrust (except for cases where a defendant was granted immunity from criminal prosecution under the ICA’s leniency programme).

In class actions, the court may determine various compensatory damage awards. Section 20 of the Class Action Law directs that the court may order compensation to be paid to each member of the group who has proven his or her entitlement thereto, or may order that each member of the group prove the actual damage he or she has suffered. The court may also order global compensation to be paid and divided among the members of the group, so long as where global compensation is granted, the amount of damages is capable of precise

69 Antitrust case 801/08 *Bezeq the Israeli company for communication v. the Director General of the ICA*.
70 Class action (Center) 46010-07-11 *Ophir Naor v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel* (5 April 2016, published in Nevo).
calculation in accordance with the evidence presented to the court. In Dan Reichart v. the Heirs of Moshe Shemesh, the Supreme Court discussed the different methods of calculating or proving damages. Where individual damages are awarded to each member of the class, each member must show the amount of damage personally suffered, for example, by way of production of documentary proof such as receipts. On the other hand, various methods exist to determine global damages, such as having regard to the accounts and documents of the respondent, the use of statistics or the use of mathematical models.

In Dan Reichart, the Supreme Court also approved a third method for determining damages – estimation of the amount of damages based on the information that has been brought before it. In the Court's opinion, however, this latter method should be reserved for exceptional circumstances.

Professional attorneys' fees are, in the main, determined between litigants and their attorneys, and may be based on a global amount, an hourly charge or a fee based on the percentage of the amount awarded to the litigant. It is possible to request that the court determine the professional fee, and in so doing, the court must take account of all the circumstances of the matter before it, including the time devoted by the attorney to the matter at hand, the significance of the matter, the extent and complexity of the matter, and the reputation of the attorney. Section 23 of the Class Action Law specifies that the court will determine the maximum professional fees of the attorney representing the claimant. The court makes this determination based on several factors, including the benefit of the class action for the members of the class, the complexity of the matter, the risk undertaken by the attorney and the expenses incurred by him or her, the public significance of the class action, the manner in which the attorney conducted the matter, and the difference between the requested remedies and those that were granted by the court. The court can also determine partial attorneys' fees (out of the global attorneys' fees) to be paid to attorneys during the course of the proceedings. Attorneys may appeal the court's ruling regarding the attorneys' fees. Nevertheless, this is not common practice.

It should be mentioned that in May 2018, to reduce the increasing volume of motions for approval of class actions that are filed to court each year on various legal grounds, and in an effort to reduce defendants' exposure to groundless claims, a new regulation that requires court fees to be paid on the commencement and development of class action proceedings entered into force. According to the new regulation, plaintiffs are required to pay a total fee of 16,000 shekels for filing a class action motion to the District Court, and 8,000 shekels when filing it to the Magistrates Court.

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72 Supreme Court, civil appeal, 345/03 Dan Reichart v. The Heirs of Moshe Shemesh, 7 June 2007, published in Nevo.
74 In practice, such an appeal was submitted to the Supreme Court in February 2011 by the plaintiff’s attorneys in the Crocs class action (Supreme Court, civil appeal 959/11 Adv Nachum Oren v. Kolnoa Hadash Ltd and subsequent procedure). The appellants argued that the attorneys’ fees awarded by the District Court in the class action (493,000 shekels) were remarkably low, and reflected an average hourly rate of 150 shekels instead of the appropriate rate of approximately 930 shekels per hour. In September 2011, the appeal was annulled by the Supreme Court with the respondents’ consent to pay up to 45,000 shekels to the appellants to cover their expenses in the class action proceedings.
75 Section 7A(A) of the Court Regulations (Fees), 5767–2007.
IX PASS-ON DEFENCES

While attempts have been made to use the pass-on defence in various cases, the courts have not yet explicitly ruled on the issue. While the indirect purchaser doctrine was expressly asserted in several matters before the courts, ultimately the cases were settled without the courts ruling on the issue. In Howard Rice, the Supreme Court noted that even under the assumption that the plaintiff was able to prove that the fee was excessive or unfair, it will be difficult to approve a class action since the damage was partly passed on to the plaintiffs’ customers and was not suffered by the plaintiff alone.

In November 2013, the Central District Court rejected a motion for dismissal of a class action application, having determined that the existence of a conflict of interest between the members of two distinct sub-groups of the class action group (direct and indirect injured members) does not deny the possibility of providing compensation to any of the group’s members. This may be the path for rejecting the pass-on defence doctrine in antitrust private actions. Note, however, that this issue was not the core of the debate there, and was not the subject of the decision. Also notable is the position paper submitted by the State Attorney General to the Central District Court in the context of the Aviation cartel case, in which he argued that indirect consumers should be allowed to claim their damages from the cartel members. Although this opinion has not yet been examined by the Court, it reflects the authorities’ policy and might lead to the rejection of the ‘pass-on’ defence in antitrust private actions.

X FOLLOW-ON LITIGATION

Private enforcement of the Economic Competition Law may be carried out alongside public enforcement, which includes criminal and administrative enforcement. Notably, special evidentiary significance is attributed to the following: the findings and conclusions of a final verdict of the court, convicting the defendant in the criminal proceeding, serve as prima facie evidence in a civil proceeding to which the defendant is a party; and a determination of the Director General of the ICA made in terms of the Economic Competition Law shall constitute prima facie evidence in any legal proceedings.

Inter alia, the Director General may determine that an arrangement or agreement constitutes a restrictive arrangement in contravention of Section 4 of the Economic Competition Law or that a monopolist has abused its market position in contravention of the provisions of Section 29A of the Economic Competition Law. Indeed, as discussed above, it is possible for criminal investigatory activity by the ICA and civil proceedings to proceed in parallel, as is the case, for example, with the Sharnoa Computerised Machines case, the

76 Supreme Court, permission for civil appeal 2616/03 Isracard Ltd v. Howard Rice, 14 March 2005, published in Nevo.
78 Tower Air, footnote 9.
79 Section 42A of the Evidence Act.
80 Section 43(e) of the Economic Competition Law.
Poland Expeditions cartel, and the Bakeries cartel. In fact, it is common to see the filing of class actions immediately upon the discovery of a criminal investigation (for example, in the Bakeries cartel).

In 2004, the ICA adopted a leniency programme in respect of cartels. Leniency is awarded to the first party to come forward with full information regarding the illegal activity in which such party was involved, unless the party led the illegal activity or has previously been convicted of a cartel offence. Leniency is available to both an individual and a corporation, and where a corporation qualifies for leniency, such leniency extends to all its directors, officers and employees. An agreement of leniency is entered into between the Director General, the District Attorney and the applicant and, after execution, is binding on the state. Note that, as such, civil litigants are not bound by the terms of a leniency agreement, and they may bring a civil action even against those that enjoy the application of the leniency programme’s defence.

The actions against the GIS cartel members exemplify actions for damages. Following the GIS cartel declaration of September 2013 (see Section III), a class action on behalf of electricity consumers, and a private action for damages by the Israel Electricity Company, have been submitted against the cartel members. That declaration, which is an administrative measure, was based on information gathered in the framework of a criminal investigation commenced as a result of an application made by one of the cartel members to apply the leniency programme. That cartel member is one of the defendants in the claims for damages.

While immunity from criminal prosecution under the leniency programme does not preclude private enforcement, such immunity may assist the immunised wrongdoer in gaining exemption from administrative monetary sanctions in those cases where the Director General elects to take this measure.

Note also that Section 77 of the Courts Law allows incidental civil actions in criminal proceedings. Thus, if a defendant has been convicted in court, and a civil lawsuit was filed against the defendant (and only against him or her) on the basis of the same facts constituting the offence in which the defendant was convicted, the judge or the bench that convicted the defendant is allowed to rule in the civil lawsuit as well on the basis of the evidence already admitted to the court in the criminal case (as long as the criminal judgment has become peremptory).

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81 See footnotes 5 and 66; also see Jerusalem District Court, class action 41272-05-10 Nazar Tanus v. Angel Bakery Ltd, 16 June 2011, published in Nevo (the motion was dismissed in June 2011 following the plaintiff’s application to withdraw the class action); Tel Aviv District Court, class action 41418-05-10 Mia Edry v. Shlomo Angel Ltd (this motion was dismissed as well on 8 June 2011, following the applicants’ application to withdraw the class action due to lack of grounds. Notably, the District Court denied the parties’ withdrawal agreement according to which the respondents were supposed to pay the applicants and their representatives 10,000 shekels each. The Court emphasised that such payment in the circumstances of withdrawing due to lack of grounds is an incentive for the submission of ungrounded class actions, and therefore should not be allowed. Interestingly, the Court stated that in the future it may consider sanctioning applicants who file an ungrounded class action and later ask for its withdrawal).

82 Director General’s Guidelines 2/12: The Director General’s considerations in setting the level of financial sanctions.

XI PRIVILEGES

Section 48 of the Evidence Ordinance provides for legal privilege for documents and information exchanged between attorneys and their clients. The privilege extends solely to documents exchanged in the context of the professional services provided by the attorney to the client. Importantly, the right and duty of non-disclosure attaches to the attorney. The information itself is not privileged, and the client is not exempted from disclosing it in the framework of an investigation or court proceedings. Section 48 provides that unless the client has waived his or her right to claim legal privilege, an attorney is not obliged to produce for evidence documents or information that were exchanged with his or her client and related to the professional services provided by the attorney to the client. This obligation is reinforced by the confidentiality obligations of attorneys, as set out in the Bar Association Law.84 Note that the courts have held that legal privilege may be invoked in respect of documents prepared for purposes of obtaining legal advice in connection with legal proceedings, which proceedings are either then currently under way or are expected. This privilege applies even where such documents have not yet been exchanged between the attorney and the client, or where such documents were prepared by a third party in accordance with the request of either the client or the attorney.85 The Supreme Court explicitly ruled that privilege for documents exchanged between an attorney and client related to the professional services provided by the attorney may apply regardless of the geographical location of those documents. Therefore, privilege may apply also to documents such as emails and text messages that are held by the client or saved in the client’s computer.86

Section 23 of the Law of Commercial Wrongs87 directs that a court, an authority, a person or a body with judicial or quasi-judicial authority may grant an order, at its own initiative or on the request of a person, ensuring the confidentiality of a commercial secret disclosed in proceedings before it. Thus, a party may claim confidentiality in a document or information submitted to a government authority on the basis of its containing commercial secrets. The submission of a document or information containing commercial secrets to a government authority does not alter the status of such document as a commercial secret. Similarly, the Privacy Law88 protects private information of parties. Thus, any such information or documentation (with a few exceptions) submitted to a government authority remains protected under this law.

A request for access to information submitted to government authorities may be made under the Freedom of Information Law.89 Section 9 of the Freedom of Information Law, however, sets out the circumstances in which a government authority may not disclose the information provided to it, including where:

- the information constitutes commercial or professional secrets, or has an economic value that would be seriously damaged by such disclosure;

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84 Bar Association Law, 5721-1961.
86 Supreme Court, permission for criminal appeal 8873/07 Heinz Israel Ltd v. The State of Israel, 2 January 2011, published in Nevo.
88 Privacy Law, 5741-1981.
the information is commercial or business information relating to the business of a person the disclosure of which information would significantly damage the business, commercial or economic interests of such person;

c the information was provided to the authority on condition of confidentiality;

d disclosure of the information would jeopardise future receipt of information; or

e disclosure of the information would result in the disclosure of the existence or identity of a privileged source.

Note, however, that Section 11 of the Freedom of Information Law provides that, where the concerns addressed in Section 9 may be alleviated by omitting or altering the details contained in the information or providing the information subject to conditions, then, unless it proves too burdensome on the authority concerned, these steps should be taken, and the remaining information, subject to the necessary amendments, must be provided to the person requesting access.90

XII SETTLEMENT PROCEDURES

Section 79A of the Courts Law provides that parties to a civil proceeding may reach a settlement agreement, either of their own accord or proposed to them by the court, and the court may, with the consent of the parties, enforce such settlement agreement. A court-enforced settlement agreement has the effect of a judgment.

Sections 18 and 19 of the Class Action Law specifically address the possibility of settlement agreements in detail. The parties to a class action may request that the court approve a settlement that was agreed to by the parties. A member of the group represented in the class action, however, may elect to be excluded from the settlement. The court may not approve a settlement agreement in a class action unless it determines that the terms of the agreement are fair and reasonable as concerns the interests of all the members of the class and that the termination of proceedings by means of settlement is the most efficient manner of settling the dispute between the parties.91 In February 2019, the Court rejected a settlement agreement between the plaintiffs and one of the respondents in the Compressors cartel stating that the settlement is unfair and unreasonable as concerns the interests of all the members of the class. The Court held that the compensation agreed upon is fairly low, and reflects the plaintiffs’ desire to use the settlement agreement mechanism to overcome the lack of possibility of service outside the jurisdiction to the rest of the respondents.92 Despite similar circumstances, in April 2019, the Court approved a settlement agreement between the plaintiffs and one of the respondents in the LCD cartel,93 therefore enabling service outside the jurisdiction to the rest of the respondents according to Regulation 500(10) of the CP Regulations. In November 2018, the Attorney General submitted his objection to the settlement agreement that was reached between the plaintiff and Zepra restaurant, which was alleged to have sold pork to its customers without their knowledge.94


92 The Compressors cartel, footnote 2.

93 The LCD cartel, footnote 2.

stated that the settlement agreement does not adequately serve the interests of the members of the class, and does not constitute any compensation. As a result, the Attorney General claimed that this agreement does not comply with the purposes of the Class Action Law, which includes deterrence of law infringement and granting a fit remedy to those injured by a breach of the law, and therefore should not be approved by Court. The Court’s decision regarding this matter is still pending.

Further protection to the members of a class is provided by the requirement that the court, prior to granting a settlement agreement, hear the opinion of a court-appointed expert in the relevant field. The court may dispense with this requirement, however, if it determines that such evidence is unnecessary.95 The court must substantiate its decision regarding approval of a settlement agreement by addressing the following issues:

- the delineation of the group subject to the settlement agreement;
- the legal claims, the significant questions of fact or law common to the class and the remedies requested;
- the main aspects of the settlement agreement;
- the difference between the remedies requested in the claim and those agreed to in the settlement agreement;
- any opposition entered into the settlement agreement;
- the stage of the proceedings;
- the recommendations contained in the expert opinion; and
- the risks and likelihood of success in the class action in comparison to the settlement agreement.

As part of the settlement agreement in a class action, the court will determine the professional attorneys’ fees and any remuneration due to the claimant, and in so doing, may take into account any recommendation of the parties proposed in terms of the settlement agreement.96 Finally, the Class Action Law provides that should the settlement agreement not be approved by the court, or should the court’s approval thereof be subsequently annulled by the court, any determinations made in terms of the settlement agreement and any statements made in the framework of the settlement proceedings will not be admissible as evidence in civil proceedings.97

Several antitrust class actions were settled with coupons arrangements. For example, in October 2012, the District Court of Beer-Sheva approved a settlement agreement between the Central Bottling Company (Coca-Cola Israel) and 300 individuals and soft drink companies, upholding Coca-Cola Israel’s expert’s opinion and rejecting the opinion of the objective examiner appointed by the court.98

In the settlement agreement, Coca-Cola Israel undertook to give the vending machine operators a 2 per cent discount for the next three years on soft drinks cans purchased from it. Coca-Cola Israel also committed not to give higher discounts to Mashkar. In addition, any

95 Section 19(b)(1) of the Class Action Law.
96 The terms of the settlement agreement may not contain agreement as to professional attorneys’ fees and remuneration for the claimant, but may contain a recommendation as to these amounts.
97 Section 19(g) of the Class Action Law.
operators that exited the market before 2007 as a result of Coca-Cola Israel’s alleged abusive behaviour would be able to re-enter the market and receive a 10 per cent discount for up to 5,200 cans of soft drinks per year.

In June 2014, the Competition Tribunal approved a consent decree between the ICA and the five largest banks in Israel, which was reached during an appeal submitted by the banks against a determination of the Director General stating that the banks engaged in a restrictive arrangement by repeated exchange of information regarding their fees. Within the framework of the consent decree, the banks undertook to pay to the State Treasury a sum of 70 million shekels. It was also agreed that if eventually the class actions brought against the banks regarding the alleged coordination of fees come to an end by way of a settlement, this amount of money will be directly passed on to the consumers. This unusual solution creates, for the first time, a link between administrative and private enforcement measures. In April 2015, a revised motion to certify a class action was submitted against the banks regarding the alleged coordination of fees. In May 2015, the Tel Aviv District Court approved a settlement agreement between the parties that implemented the provision of the consent decree after finding that it was a proper, fair and reasonable arrangement.99

In April 2016, the Central District Court approved a settlement agreement between Dead Sea Works Ltd, a governmental company which constitutes one of the world’s largest manufacturers of potassium, and an individual farmer who purchased potassium from the company for fertilisation purposes, on behalf of all consumers of potassium in Israel.100 According to the application to approve the action as a class action, Dead Sea Works allegedly abused its dominant position in the potassium market by charging excessive, unfair prices. According to the settlement agreement, Dead Sea Works will compensate the class action’s group members in an amount of 20 million shekels. Moreover, it was agreed that over the next seven years the company will sell potassium in Israel at prices not exceeding the average of the three cheapest prices under which it will sell potassium to any of its customers worldwide, or at a price not exceeding US$400, whichever is the lowest. The settlement agreement was approved in January 2017 after being revised and amended according to the Court’s suggestions and comments.101 The Court recognised excessive pricing as a ground for claim under the Economic Competition Law in Israel, based on the wording of Section 29A(a)(1) thereof and on the TFEU from which it originated, and under the purpose of the Economic Competition Law. The Court even went further and considered excessive pricing as a specific case of exploitation from the field of contract laws and consumer protection laws. The Court viewed the settlement agreement as a suitable deterrent since, on the one hand, the prohibition on charging excessive prices was not enforced before, and on the other, it will demonstrate the possibility of private enforcement.

In July 2017, the District Court of Tel Aviv-Jaffa approved a settlement agreement between a shoe company (Naot Shoes) and Shanit Oren, a customer of that company.102 The claim in this class action was that the shoe company had adopted anticompetitive

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100 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 5 April 2016, published in Nevo.
101 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 29 January 2017, published in Nevo.
practices, dictated and enforced minimum resale prices for the final consumer, and restricted independent stores from selling its products by providing discounts to the final consumer. As part of the settlement agreement, the shoe company undertook not to bind retailers to the recommended retail price set by it. In addition, the shoe company agreed to grant consumer benefits worth 6.75 million shekels to members of the class action group.

In December 2018, a request for approval of a settlement agreement was filed in the GIS cartel. The Court’s decision on this matter is still pending.

XIII ARBITRATION

In general, in accordance with Section 79B of the Courts Law, a court, with the consent of the parties, may order that a civil matter before it be referred, in whole or in part, to arbitration. In addition, the parties themselves may have agreed or may agree to proceed to arbitration, and may agree on the appointment of an arbitrator. Failing an agreement between the parties in respect of the arbitrator’s identity, the court may appoint the arbitrator. 103 Section 13(a) of the Arbitration Law directs that an arbitrator will have the same powers as a court in respect of the summoning of witnesses to appear or to produce documentation. The decision of an arbitrator has the effect of a court judgment for the litigants. 104

Arbitration in antitrust cases is not a common practice in Israel; nevertheless, this seems to be changing. The arbitration mechanism was used in an antitrust matter for the first time by several food suppliers following a consent decree they entered into relating to anticompetitive conduct in the supply of various foodstuffs. The consent decree included stewarding arrangements between suppliers and food chains. Apart from the compensation agreed to and the possibility of criminal charges in the event of breach of the consent decree, the concerned suppliers undertook to engage in a special agreement in which the dominant suppliers must compensate each other and non-dominant suppliers should they breach the provisions in the consent decree that relate to stewarding. The consent provided that any disagreement between the parties concerning the terms of the consent decree would be referred to arbitration. Note, however, that the arbitration mechanism was not used to determine the substantive antitrust issues in that case.

Section 3 of the Arbitration Law directs that an arbitration agreement will have no validity in matters that cannot be a proper subject for arbitration between parties. Some academics suggest that antitrust matters may not be a proper subject for arbitration because an anticompetitive injury may affect a broad range of persons who may not be the direct parties to the specific court or arbitration proceeding. 105 We see no reason, however, why antitrust-related disputes may not be resolved in an arbitration proceeding, particularly given that the public or the public interest can still be safeguarded by the ICA. Nor does arbitration prevent claimants from suing for damages.

The Tel Aviv District Court considered the legitimacy of a ruling given by an arbitrator involving a non-competition provision. In 2009, the Court ruled on an application to annul an arbitrator’s ruling concerning a restrictive arrangement in Novosty Neidly et al. v.

103 Section 8(a) of the Arbitration Law, 5728-1968.
104 Section 21 of the Arbitration Law.
105 Yagur, footnote 32.
The applicant, a private firm engaged in the publication of a Russian language newspaper, Novosty, and the owner thereof, entered into a contract with the respondent, the second-largest publisher of newspapers in Israel at that time, whereby the applicant purchased from the respondent the right to publish another newspaper in Russian. In return, the applicant undertook to pay the respondent monthly royalties. After six years the applicant ceased to pay royalties, and the parties turned to arbitration. The arbitrator ruled that the applicant had to pay the balance to the respondent. The applicant subsequently applied to the Tel Aviv District Court, requesting an annulment of the arbitrator’s ruling. The applicant argued that the contract, in which the respondent undertook not to compete with the applicant in the publishing of newspapers in Russian, was a restrictive arrangement and as such was illegal and unenforceable. Thus, the applicant argued, the arbitrator’s ruling to enforce the contract was against public policy and should be annulled in accordance with the Arbitration Law.

Emphasising that this argument had not been raised in the arbitration proceeding, the Court adopted the opinion expressed by one of the Supreme Court judges in an earlier case, according to which such an argument, when brought following many years of performance of a contract by the parties, is unfair. Further, the District Court ruled that the applicant could not, on the one hand, claim damages based on the non-compete provision and, on the other, seek to rely on the alleged illegality of such provision, as an illegal restrictive arrangement, to annul the arbitration ruling. The Court also noted that the causes for annulling an arbitration ruling, set out in the Arbitration Law, have been interpreted narrowly, and that according to the Arbitration Law, a court may in any event reject an application for annulment of an arbitrator’s ruling if no distortion of justice is caused as a consequence.

In light of the above, the Court ruled that after many years of adherence to the contract, the parties were stopped from raising a claim of illegality in respect of the non-compete provision.

In December 2011, the Tel Aviv District Court annulled an arbitration award, stating that the arbitration award in effect enforced a memorandum of understanding (MOU) that was illegal according to the Economic Competition Law. The Court determined that the MOU was an agreement between two competitors in the cement industry, and that its purpose was to prevent the respondent from competing with the applicant and to allocate the market, thus amounting to an unenforceable restrictive arrangement.

In February 2015, the District Court rejected a motion to partially void an arbitration award after ruling on substantial antitrust-related matters. The arbitrator rejected a petition for declaratory relief finding that a non-competition clause in a partnership agreement between lawyers was unreasonable and constituted an illegal restrictive arrangement.

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107 Permission for civil appeal 6233/02 Extel Ltd v. Kalma Vi Industries, 4 February 2004, Official Rulings of the Supreme Court 58(2) 635. One of the questions discussed in that case was whether an arbitrator is authorised to sit in judgment when the dispute involves an illegal restrictive arrangement. Since each one of the three judges held a different opinion, no decisive ruling was given by the Supreme Court in respect of this question.

108 Tel Aviv District Court, originating summons of arbitration 1039-08 Ardan – Cement Industries Ltd v. Dan Tmir, published in Nevo.

Specifically, the arbitrator ruled that not all non-competition clauses that limit the freedom of occupation are unreasonable and contrary to public policy, and that in this specific case the non-competition clause was reasonable in light of its limited scope. Further, the arbitrator stated that the non-competition clause was set in accordance with reasonable and acceptable practices, and therefore was not considered a restrictive arrangement according to Section 3(8) of the Economic Competition Law, which states that an obligation by the seller of a business sold in its entirety towards the purchaser of the business not to engage in the same type of business, provided such obligation is not contrary to reasonable and accepted practices, shall not be deemed a restrictive arrangement. Moreover, even if the non-competition clause constituted a restrictive arrangement, it falls within the application of the Block Exemption for Agreements of Minor Importance (de minimis).

The District Court upheld the arbitrator's ruling without analysing in detail the application of Section 3(8) of the Law and the said block exemption. The Court added that even if the arbitrator erred in the application of the substantive law, such error does not establish grounds for the revocation of the arbitration award. This ruling further strengthens the tendency to recognise the authority of arbitrators to rule on antitrust-related questions of substance.

XIV INDEMNIFICATION AND CONTRIBUTION

Parties may be found liable jointly as joint wrongdoers in a civil action for damages. In these circumstances, the court may rule on the amount of damages for which each co-respondent is liable (i.e., liability for damages may be apportioned among the co-respondents). Where a party has not been cited as a co-respondent, he or she may be joined by the respondent as a co-respondent by submission of a third-party notice, such that that party contributes to or indemnifies the respondent against the damages claimed. To date, there does not appear to be a civil antitrust damages ruling in which this procedure has been used.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In recent years, there has been increasing criticism about the concentrated structure of the markets in Israel and the skyrocketing cost of living. Consequently, several laws were enacted and some were amended with the aim of improving the competitiveness of markets, and expanding substantially the (already wide) powers of the ICA’s Director General. Further legislation of this type has yet to come. Some of the laws and guidelines are expected to lead to many private claims, for example claims for abuse of dominant position by charging excessive prices and claims based on the Food Law (see Section II).

Since 2013, several applications to approve actions as class actions have been submitted against alleged members of international cartels (with or without the participation of a company based in Israel): the LCD cartel, the GIS cartel, the CRT cartel, the LiB cartel, the Trucks cartel and the ODD cartel. To date, no decision has been made as to whether to certify any of these applications.

On 11 December 2018, an amendment to the CP Regulations entered into force, adding Regulation 500(7A), which enables the Court to authorise service outside the

110 Section 84 of the Torts Ordinance.
111 CP Regulation 216.
jurisdiction when damage incurred by the plaintiff in Israel from a product, service or conduct of the defendant, provided that the defendant could have anticipated that the damage would be caused in Israel, and that the defendant, or a person affiliated with it, is engaged in international commerce or the provision of international services of a significant scope. On 10 January 2019, a significant amendment to the Israeli Antitrust Law, which changed the statute’s name to the Economic Competition Law, entered into effect. The amendment has revamped the Competition Authority’s enforcement powers, and has also amended the monopolistic requirements and limitations applicable to corporations that have market shares that are lower than 50 per cent but that have significant market power. These amendments are expected to promote and encourage private enforcement.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation remains active in Japan. This reflects the active enforcement of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, the AMA) by the Japan Fair Trade Commission (JFTC) and the general trend and willingness in the Japanese business community to utilise the AMA and other competition-related laws as a means to secure fair competition.

There has not been so much change in terms of legislation in the context of private antitrust litigation, except for the relatively recent introduction of an opt-in class action mechanism for certain consumer protection-related claims that came into effect in October 2016. On the public enforcement side, there has been a significant amendment to the AMA in 2019 in terms of the calculation of the surcharges (which is expected to significantly increase the amount of surcharges) and how the reduction of surcharges would be calculated for leniency applicants. The impact of this amendment on the private enforcement side is yet to be seen, but the active enforcement of the AMA on the public sector would likely result in more enforcement in the private sector as well.

There have been developments in case law as well: the landmark 2017 Supreme Court decision in relation to the cathode ray tubes cartel investigation has set the precedent for the first time on extraterritorial application of the antitrust law.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust actions can be brought in the form of a follow-on litigation following a public enforcement by the JFTC or a stand-alone litigation. The AMA provides certain special rules for bringing private actions. The general legislative framework for private antitrust enforcement in Japan is as follows.

i Private antitrust actions based on the general tort claims pursuant to the Civil Code

Private antitrust action can be brought in the form of stand-alone litigation seeking monetary compensation for damages or injunctive relief under the general tort claim pursuant to Article 709 of the Civil Code (Act No. 89 of 1896) or an unjust enrichment claim pursuant...
to Article 703 of the Civil Code. To bring a general tort damages claim, the claimant must demonstrate infringement of the claimant’s rights; the existence of fault on the part of the defendant; damage; and the casual link between the fault and the damage.

The statute of limitations for general tort claims is whichever comes first from the following (Article 724, Civil Code):

- three years from the time when the claimant came to know both the damage and the identity of the perpetrator; or
- 20 years from the time of the tortious act.

A party to an agreement can seek declaratory judgment from the court alleging violation of the AMA which, if established, would render the relevant provision in question null and void pursuant to Article 90 of the Civil Code. Similarly, a defendant in a litigation can claim that a certain provision in an agreement is void by alleging its violation of the AMA as a defence to a contractual claim made by the plaintiff.

ii Private antitrust actions based on the no-fault liability rule pursuant to the AMA

The AMA provides for the no-fault liability rule where the JFTC has made a determination that there has been an Article 3 (which includes cartels and bid-riggings) or Article 19 (which includes refusal to deal, price discrimination, resale price maintenance and abuse of superior bargaining position) violation and such determination has become final (Article 25(1), AMA).

The claimant need not prove the defendant’s fault – in other words intent or negligence as to the illegal act – which would otherwise be required in damages action based on general tort claims (Article 25(2), AMA). However, the claimant would still need to demonstrate the damages and the casual link between the infringing act and the damages. The court may determine the amount of damages based on all the circumstances of the case (Article 248, Code of Civil Procedure, Act No. 109 of 1996), and in doing so, may request the JFTC to provide an opinion on the amount of damages to be recovered by the plaintiff (Article 84(1), AMA).

The claimant may also seek an injunction pursuant to Article 24 of the AMA when there is an Article 19 (Unfair Trade Practice) violation or when there is a likelihood of such violation. The claimant would need to demonstrate the existence or likelihood of significant damages resulting from the violation. It should be noted that Article 24 of the AMA only applies to Article 19 violation and it does not apply to Article 3 violations such as unreasonable restraint of trade or private monopolisation claims.

The statute of limitations for such a no-fault liability rule is three years from when the JFTC’s determination becomes final (Article 26(2), AMA).

III EXTRATERRITORIALITY

For administrative sanctions such as cease-and-desist orders and surcharge payment orders, the Supreme Court of Japan rendered a judgment on 12 December 2017 in relation to the Cathode Ray Tubes (CRT) cartel investigation that the AMA applies to cartel conduct that took place outside of Japan to the extent that the conduct at issue relates to the functioning of free competition and trade in the Japan market. This was the first decision in which the Supreme Court ruled on the extraterritorial application of the AMA.
Earlier, the JFTC imposed surcharge payment orders against CRT manufacturers, including the appellant CRT manufacturer. The appellant CRT manufacturer argued that the appellant should not be subject to the AMA because the price-fixing cartel took place in South-East Asian countries and the direct purchasers of the product at issue were foreign manufacturing subsidiaries of Japanese television manufacturers. However, the Supreme Court determined that the Japanese parent companies of the television manufacturers presided over overall manufacturing and sales of televisions throughout the region and directed their foreign manufacturing subsidiaries to purchase CRTs from the foreign CRT manufacturers (including the appellant). The Japanese parent companies were even found to be directly involved in the negotiations with the CRT manufacturers when purchasing those CRTs. The Supreme Court held that the transaction was carried out by Japanese parent companies and their local subsidiaries together, and therefore the conduct at issue damaged the competitive functioning of the relevant market involving the Japanese television manufacturers. It should be noted that the Supreme Court decision is based on the specific facts and circumstances of the case: it is yet to be seen how it would rule if the facts and circumstances are different.

For criminal sanctions under the AMA, it is generally understood that the Act applies only to conduct that took place within Japan. However, there is no precedent to date on this issue and it is yet to be seen how the courts would rule on the extraterritorial application of the criminal sanctions under the AMA.

IV STANDING

Any claimant injured by the violation of the AMA has standing to bring stand-alone or follow-on actions.

As discussed in Section II, to bring a stand-alone general tort damages action, the claimant needs to demonstrate: (1) infringement of the claimant's rights; (2) the existence of fault on the part of the defendant; (3) the damage; and (4) the casual link between (2) and (3). To bring a follow-on damages action, the claimant only needs to demonstrate (1), (3) and the casual link between the infringement and the damages.

Both direct and indirect purchasers can bring stand-alone or follow-on actions if and to the extent that they can demonstrate the damage and the casual link.

V THE PROCESS OF DISCOVERY

There are principally two procedures for disclosure of documents in the course of litigation under the Code of Civil Procedure:

a a commission to send documents; and
b a document production order.

A commission to send documents is a request made by a party to a civil action addressed to anyone in possession of documents to produce these documents for the requesting party (Article 226, Code of Civil Procedure). There is no sanction available for the failure to comply with such a request. However, this procedure can be an effective tool in obtaining documents from a third party including the JFTC because the JFTC respects such requests in certain situations and will provide investigative records and documents in response to such requests from an alleged victim of the AMA.
The JFTC has set out guidelines on complying with commission to send documents requests that are sought in relation to follow-on damages actions. The guidelines state that under certain conditions the JFTC will produce documents that formed the basis of the administrative orders (or where there was an administrative hearing, the case files) in response to a request forwarded by the court handling a follow-on damages action. These conditions include redacting from the documents information which the JFTC considers to constitute business secrets, or which unnecessarily invades the privacy of the relevant parties. In addition, it is the JFTC's general policy not to disclose leniency material.

Alternatively, a party to a civil action can request that the court issue a document production order against those who possess relevant documents. In making such a request, the requesting party must specify the document, the general content, the possessor, the issue the requesting party seeks to prove and the grounds for the request (Article 221, Code of Civil Procedure).

The court must grant the request for the document production order unless the document falls under the following categories specified in the statute:

- documents stating the matters the possessor can refuse to testify on due to kinship;
- documents concerning a secret in relation to a public officer's duties which public disclosure of would likely harm the public interest or the performance of the public duties;
- documents concerning a business secret or matters certain professionals like doctors and lawyers can refuse to testify about due to their confidentiality obligations;
- documents created exclusively for use by the possessor (excluding documents held by the state or a local public entity, which are used by a public officer for an organisational purpose); or
- records or seized documents concerning a criminal case or juvenile protection case.

If the addressee does not produce the specified documents despite the court order, the court can deem the proposition the requesting party sought to prove through those documents to be true (Article 224, Code of Civil Procedure). In the case of third-party addressees, the court can impose an administrative fine of up to ¥200,000 (Article 225, Code of Civil Procedure).

A party to a civil action can request the testimony of factual and expert witnesses. In the case of factual witnesses, parties can appoint the witness, whereas in the case of expert witnesses, parties cannot appoint the witness – but the court will.

There is a third category of witness: a quasi-expert witness upon whom the parties call but who is not a court-appointed expert witness. There is no strict regulation concerning the admissibility of opinions by a court-appointed expert or a privately appointed expert. The value of evidence will be determined by the judge taking into consideration all the circumstances.

Often, witnesses are requested to prepare a written statement providing the overview of his or her testimony in advance of his or her testimony. Both factual and expert witnesses are cross-examined on their testimony.

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VI USE OF EXPERTS

As discussed in Section V, a party to a civil action can request the testimony of expert witnesses and the court will appoint the witness. The court will select the appropriate witness from academic institutions or economist firms that can assist the court in evaluating the relevant facts and calculating the damages.

The use of economists was not very common in the context of private antitrust enforcement, but it is becoming more common in recent times as the antitrust issues are increasingly more complex and challenging for courts to handle.

VII CLASS ACTIONS

In Japan, class actions are introduced to a limited extent and mainly in the area of consumer protection.

Certain qualified consumer organisations can seek injunctive relief for the benefit of consumers against business operators if there is violation of certain consumer protection laws—such as the Consumer Contract Act (Act No. 61 of 2000), which prohibits misrepresentation and other deceptive practices, and the Act Against Unjustifiable Premiums and Misleading Representations (Act No. 134 of 1962), which prohibits misleading representation of the quality of goods and services offered to consumers. This mechanism is actively pursued by various qualified consumer organisations and has resulted in verdicts or settlements in more than 30 cases since the start of the 2019 fiscal year alone.³ This includes a settlement between MUFG Bank, Ltd and the Consumer Organisation of Japan over an alleged violation of the Consumer Contract Act, and a settlement between Esta Co, Ltd and the Consumer Organisation of Japan over an alleged violation of the Act Against Unjustifiable Premiums and Misleading Representations.

The Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage of Consumers (Act No. 96 of 2013, the Collective Recovery Act) introduced an opt-in class action mechanism for seeking monetary compensation. Under this mechanism, the existence of liability will be determined at the first stage based upon claims brought by certain qualified consumer organisations. If affirmed, the action will move forward to the second stage, where the amount of damages will be determined based upon individual claims filed by consumers who elected to opt in to the procedure upon circulation of proper notice following the first stage.

It should be noted that the Collective Recovery Act only covers claims arising from consumer contracts. A consumer contract is defined as any contract (excluding employment contracts) entered into between an individual and a business operator (Articles 2(iii), Collective Recovery Act). Class actions seeking the recovery of damages from an antitrust violation can be brought under the Collective Recovery Act if a business operator (e.g., a retailer) engages in an antitrust violation (e.g., a price-fixing cartel with its competitors) and the purchaser of the product or service at issue allegedly suffered damage from such violation.

Claims subject to this class action mechanism must satisfy the following three requirements:

a. ‘numerousness’, meaning that claims must relate to damages owed to a considerably large number of persons;

b. ‘commonality’, meaning that claims must arise from common obligations (in other words, the same factual and legal cause); and

c. ‘predominance’, meaning that individual issues such as damage must not predominate over common issues such that appropriate and swift determination of individual claims cannot be achieved at the second stage.

It should also be noted that the Collective Recovery Act does not apply to antitrust actions based on a no-fault liability rule pursuant to the AMA; it only applies to antitrust actions based on the general tort claims, etc., pursuant to the Civil Code.

The Collective Recovery Act came into effect on October 2016. However, to the best knowledge of the authors, no private antitrust action has been brought using this class action mechanism yet.

VIII CALCULATING DAMAGES

Damages are limited to actual loss that the claimant suffered as a result of the antitrust violation. Punitive or exemplary damages are not available under Japanese law.

Quantification is at the sole discretion of the court (Article 248, Code of Civil Procedure). In bid-rigging and cartel cases, the courts in many cases rely on the ‘before and after’ analysis in quantifying the damages (see, for example, the Supreme Court decision on 8 December 1989 in the Tsuruoka Tōyu damages action). Under this approach, the courts would compare the actual prices paid during the pre-cartel and post-cartel periods and those paid during the cartel period and calculate the difference between the two periods as the damage caused by the cartel.

The court can, at their discretion, reach a finding on the amount of damages based on all facts and circumstances of the case. In bid-rigging cases, the courts have at times awarded approximately 5 to 10 per cent of the bid price as antitrust damages. On the higher end of the spectrum, there are cases where the courts awarded 20 per cent of the bid price as antitrust damages (see, for example, the Osaka High Court decision dated 24 August 2010 in bid-rigging for Nara Prefectural Survey Business).

Recently, there has been a trend for local governments and public corporations to insert a provision in contracts for liquidated damages in the case of bid-rigging or cartels. These provisions often provide for liquidated damages of 10 to 15 per cent of the relevant sales and the courts would normally award the damages based on the provision unless the agreed amount is so unreasonable as to render the provision void pursuant to Article 90 of the Civil Code.

Each party generally bears its own attorneys’ fees. Although there has been discussion about requiring the losing party to pay the attorneys’ fees of a winning party, such a system has not been implemented. However, in some complex cases, courts have ordered that reasonable attorneys’ fees be borne by the losing party.
IX PASS-ON DEFENCES

In Japan, pass-on defence is not allowed per se. For instance, under the general tort theory, to seek economic compensation for damage from a price cartel violation, the claimant must demonstrate the actual loss it suffered as a result of the cartel. As long as the claimant can demonstrate an actual loss by establishing that there is a difference between the price it paid and the hypothetical price that it would have paid but for the cartel, the claimant should be entitled to recover the entirety of the difference under Japanese law, even when part or the whole of this difference was passed on to its downstream customers.

X FOLLOW-ON LITIGATION

As discussed in Section II.ii, the AMA provides for no-fault liability rule where the JFTC has decided that there has been an Article 3 or Article 19 violation and such determination is final (Article 25(1), AMA).

The claimant may also seek an injunction pursuant to Article 24 of the AMA when there is an Article 19 violation or when there is a likelihood of such violation.

XI PRIVILEGES

Attorney–client privilege (including attorney work product and joint work product defences) is not recognised in Japan. However, the amendment to the AMA (the 2019 Amendment) was passed by the Diet on 19 June 2019 and is expected to come into effect by December 2020. Along with the 2019 Amendment, the JFTC is expected to introduce certain measures in its guidelines to make clear that it would respect the confidentiality of attorney–client communications.

Under the 2019 Amendment, when calculating the surcharges, the JFTC can go back 10 years instead of three years, to the extent that the conduct continued, as a basis for the calculation of the surcharge. The statute of limitations has also been extended from five years from the end of the conduct to seven years. The starting point for the statute of calculation was not affected by the amendment, so, following the 2019 Amendment, the JFTC can prosecute a case until seven years have passed since the cessation of the conduct.

The 2019 Amendment further abolished some reduced calculation rates for wholesale and retail businesses (2 and 3 per cent respectively) and would apply the same 10 per cent flat rate for cartels and bid-rigging. These changes are expected to result in a significant increase in the amount of surcharges.

Under the 2019 Amendment, the leniency programme will be amended to allow the JFTC to have certain discretion in determining the reduction rate of surcharge payments – going forward, the JFTC will take into account the degree of cooperation it received from each leniency applicant throughout its investigation. The rate of surcharge reduction would not simply be based on the order of leniency application (as is the case now) but also on the qualitative value of cooperation that each leniency applicant provided. Under the 2019 Amendment, the effective communication between the client and its attorneys becomes ever more important.

Against this backdrop, the JFTC is expected to make clear in its guidelines that the confidentiality of attorney–client communications will be respected during the course of the JFTC’s investigation. The JFTC has yet to announce the draft change to the guidelines, but
it is expected that the JFTC will introduce certain measures to ensure that the JFTC would return those documents that contain confidential attorney–client communications to the parties under certain conditions and through certain procedures.

Note, however, that the new measures only apply to administrative (not criminal) investigations by the JFTC and to suspected unfair restraint of trade behaviour (such as cartels and bid-rigging). The new measures would only cover confidential communications between a client and its external attorneys; it is expected that they would not cover communications between a client and its in-house counsel.

As discussed in Section V, there are certain avenues for the claimants to access the information or documents once produced for or seized by the JFTC. The new measures are expected to provide certain comfort to the defendants that the confidentiality of attorney–client communications will be maintained.

XII SETTLEMENT PROCEDURES

Parties to a civil action can at any point in time during the course of a litigation reach a settlement either with or without the involvement of the court. Settlements, if recorded on the court records, would have the same legal effect as a final judgment of the court, and would thus would be legally conclusive and enforceable against the opposing party (Article 267, Code of Civil Procedure).

XIII ARBITRATION

Private antitrust claims can be dealt with through an alternative dispute resolution mechanism such as arbitration or mediation.

Arbitration proceedings are administered by private institutions like Japan Commercial Arbitration Association and Bar associations. More recently, the Japan International Dispute Resolution Center was launched in Osaka in May 2018 and is expected to launch in Tokyo in March 2020. Mediation proceedings are administered by private and public institutions as well as the courts. The Japan International Mediation Center was launched in Kyoto in November 2018.

Historically, the use of alternative dispute resolution mechanisms in private antitrust enforcement was not very common, but these new additions to the existing platform for alternative dispute resolution mechanisms are expected to facilitate resolution of international and domestic disputes including private antitrust claims through arbitration and mediation.

Arbitral awards and court-administered mediated settlement agreements would have the same legal effect as a final judgment of a court, and thus be legally conclusive and enforceable against the opposing party (Article 45, Arbitration Act and Article 16, Civil Mediation Act).

XIV INDEMNIFICATION AND CONTRIBUTION

Parties who have jointly committed tortious acts could be deemed joint tortfeasors and held joint and severally liable for damages (Article 719(1), Civil Code). One of the joint tortfeasors, upon compensating the claimant for the damages in their entirety, could seek compensation from other joint tortfeasors and demand contributions equivalent to their respective proportion of the damages. In bid-rigging cases, for example, it is common for
claimants to seek compensation for damages from one of the joint tortfeasors with deep pockets, and for the latter to seek compensation from other joint tortfeasors who participated in the same bid-rigging conspiracy.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The 2019 Amendment is expected to come into effect by December 2020. There will be a series of new regulations and guidelines as well as amendments to the existing regulations and guidelines that will follow the 2019 Amendment, including the new measures to maintain the confidentiality of attorney–client communications, that may have an impact on private antitrust enforcement.

In addition, in recent years the JFTC has publicly announced a series of changes to the way it applies the AMA, in an effort to regulate digital platform operators. For instance, the JFTC announced on 17 December 2019 that it would not hesitate to apply the abuse of superior bargaining position (Article 2(9)(v), AMA) against transactions between digital platform operators and consumers who provide personal information in exchange for the goods or services that digital platform operators provide. This marks a change in the historical stance of the JFTC, which used to apply the abuse of superior bargaining position against transactions among and between business operators only. This means that the consumers can now bring an antitrust claim against digital platform operators alleging violation of the abuse of superior bargaining position.

Private antitrust enforcement cannot remain isolated from such changes in legislation and the trend in public enforcement of antitrust laws in Japan. The impact of such changes in public enforcement on private enforcement is yet to be seen, but the general trend towards the active use of antitrust laws to regulate digital platform operators, for instance, is likely to encourage private enforcement of antitrust laws by consumers and private businesses.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In Korea, there was no significant activity relating to private antitrust litigation in 2019 including landmark court decisions or legislative change.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Damages claim

The primary competition law governing antitrust issues in South Korea is the Monopoly Regulation and Fair Trade Act (MRFTA). Article 56, Paragraph (1) of the MRFTA states, ‘where a person sustains damage caused by a violation of any provision of this Act by a business entity or an association of business entities, the business entity or the association of business entities shall be liable for the damages, provided that the foregoing shall not apply if the business entity or the association of business entities proves that it acted neither intentionally nor negligently.’

In order to successfully assert a claim for damages under the above MRFTA provision, the plaintiff must establish the following elements: an act violating the MRFTA, the fact that damage occurred and the amount of the damage, and causation between the violation and the damage.

With regard to the first element, the Korean courts have ruled that even if the Korean Fair Trade Commission (KFTC), the antitrust enforcement agency, issues a corrective order on the alleged violation of the MRFTA, it does not automatically lead to a court finding the violating party’s conduct illegal because the KFTC’s fact-finding and ruling is not binding upon the courts. However, the courts have also ruled that in such a case, the violating act can be presumed in a subsequent civil lawsuit to have occurred. Once the KFTC finds through its investigation or disposition that a violation of the MRFTA has occurred, the damaged party may use it in a civil lawsuit against the violating party and this would certainly lighten the damaged party’s burden of proving the violation.

With regard to proving that damage occurred, see Section VIII.

To address causation between the alleged violation and resulting harm, the Korean courts have taken the position in line with the general civil law principle that there should be reasonable causation between the violation and the damage. Consider a lawsuit that a

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1 Kuk-Hyun Kwon is a managing partner, Junghoon Yoo is a partner and Jee-Hyun (Julia) Kim is an associate at EJE Law.
competitor filed against Microsoft seeking damages for harm allegedly caused by the latter’s bundling practices (i.e., sale of its Windows Media Service with the Windows Server operating system as well as its media player and instant messaging (IM) program). While the court recognised that the defendant’s bundling practices violated the MRFTA and that the plaintiff had to give up its business, the plaintiff’s business failure was deemed to have been caused by internal factors such as its failure to operate a portal site, as well as outside factors such as the crash of the venture bubble. Therefore, the court declined the find the requisite causation between the defendant’s bundling and the alleged damage to the competitor.²

Further, while the plaintiff asserting a general tort claim must prove the defendant’s intent or negligence, the burden of proof shifts to the defendant to prove the lack of intent or negligence in order to be relieved from liability in accordance with Article 56, Paragraph (1) of the MRFTA.

The statute of limitations for a general tort claim is also applicable to the above damage claims under the MRFTA: (1) three years from the date on which a claimant comes to know of the damage and the person who inflicted such damage, or (2) 10 years from the date on which the act of violation occurred, whichever is earlier. However, if the damaged party is the national or local government (commonly, in cases involving bid-rigging for construction ordered by the national or local government), the (2) part of the above statute of limitations is reduced to five years in accordance with the National Finance Act or the Local Finance Act.

### ii Injunctive relief

The MRFTA and other legislation relating to antitrust issues do not explicitly provide injunctive relief against a violation of the MRFTA. Accordingly, the court in the Microsoft case also dismissed the plaintiff’s claim for an injunction against the defendant’s illegal bundling practices.

However, some scholars and legal commentators began to criticise the court’s position regarding injunctive relief, as merely based on the lack of an explicit provision in the MRFTA. Thereafter, the Supreme Court ruled that an injunction may be granted if (1) the defendant’s unauthorised use of the outcome built by the competitor’s substantial efforts and investment in its own business contrary to the order of competition constitutes a tort under the Civil Code because it is an unfair competitive act that infringes on the profits that are valuable and entitled to legal protection; (2) if the violation continues, awarding monetary compensation alone would be insufficient to expect effective remedy for the victim; and (3) if, when comparing the benefit to the victim protected by the injunction and the disadvantage to the violating party caused by the injunction, the benefit to the victim is recognised to be greater.³

Although the above decision mainly addresses the issues under the Act on Unfair Competition Prevention and Trade Secret Protection, which primarily governs infringement of intellectual property and trade secrets rather than pure antitrust issues and fair advertising and labelling issues, legal commentators expect that the courts are likely to recognise injunctive relief against antitrust violations according to the same legal doctrine.

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² Seoul Central District Court judgment rendered on 11 June 2009, Case No. 2007GaHap90505.
³ Supreme Court Decision rendered on 25 August 2010, Case No. 2008Ma1541.
III EXTRATERRITORIALITY

Article 2-2 of the MRFTA, which was first enacted by the amendment to the MRFTA in December 2004, stipulates that the MRFTA shall also apply to acts done outside South Korea if such acts affect its domestic market. It is understood that the MRFTA explicitly adopted the ‘effect principle’ in relation to the extraterritorial application of antitrust regulations.

The Supreme Court held that the phrase, ‘if such acts affect its domestic market’, under Article 2-2 of the MRFTA refers to cases where an act done overseas has direct, considerable, reasonable and predictable effects on the domestic market. Whether or not a case meets the above criteria will be determined on a case-by-case basis by considering the totality of circumstances, including the details of and intent behind the act in question, the goods and services subject to the act in question, the transaction structure and the effects of and degree to which the act in question will affect the domestic market. In particular, with respect to the element of ‘direct effect’ (which refers to the direct result of the act committed by the business entity), the Supreme Court ruled, over the conflicting views of the lower courts, that such element is necessary in determining the extraterritorial application of the Korean antitrust laws.

For instance, in a case where foreign entrepreneurs have reached an agreement that limits competition in many markets, and those markets include the Korean market, the court held that in the absence of any special circumstances, such agreement is deemed to have effects on the Korean market and therefore the MRFTA is applicable.

Furthermore, when an act of a foreign entrepreneur that occurred overseas affects the domestic market, the MRFTA can be triggered as it satisfies the requirements under Article 2-2 thereof, and the same applies even if such act is deemed legally permissible under the law and policy of the foreign country. However, the application of the MRFTA to foreign entrepreneurs is not mandatory. For that reason, where the legality of an act in question is in dispute – in other words, the act in question is deemed illegal and prohibited under Korean law but permissible under the laws of a foreign country – this dispute makes it extremely difficult for foreign business entities to do business in Korea as they may require substantial adjustment and changes to be made to their business structures. Hence, in such a case, if the need to respect the foreign law is deemed substantially greater than the need for regulating the act of a foreign entrepreneur by applying the MRFTA, then the application of the MRFTA should be restricted. In determining whether or not a situation falls into this category, the court will consider the totality of circumstances, such as effects that the act in question could have on the domestic market, the degree of involvement in the act in question by the foreign government, the degree of difference between the Korean and foreign laws, disadvantages to the foreign entrepreneur if the MRFTA is applied to the act in question, the degree to which the legitimate interest of the foreign government is harmed, etc.⁴

⁴ Supreme Court judgment rendered on 16 May 2014, Case No. 2012Du5466.
IV STANDING

As discussed in Section II, the victim may file a civil lawsuit against the violating party seeking damages or an injunction. There are no other limitations on the standing for a private party to bring a lawsuit against the violating party. For example, the doctrine restricting the standing of an indirect purchaser, as recognised by the United States Supreme Court, does not exist under Korean law.

V THE PROCESS OF DISCOVERY

There is no common law rule of discovery in South Korea.

Under the Korean Civil Procedure Act, a party to a litigation may ask the court to issue an order for production of documents to the other party or a third party. The request for document production can be filed (1) for the documents referred to or cited by the other party to the lawsuit, (2) when the requesting party has a legal right to request that the person who possesses the documents transfer them or grant access to them (3) when the documents in question were prepared for the benefit of the requesting party, or (4) when the documents in question were prepared to address the legal relation between the requesting party and the possessor.

But, since the requested party may refuse to submit the documents on the ground that the ‘document has been prepared solely for use by the possessor’ under the Korean Civil Procedure Act and considering that most of the documents that can be used to prove damage are internal documents of the violating entity, in practice, the plaintiff faces the difficulty of proving damage caused by the violation of the MRFTA since most defendants can argue for the above exemption from the document production order.

In addition, the party that receives the court’s document production order is not subject to sanctions for non-compliance; the court may simply find the other party’s argument concerning the contents of such document in question to be true.

In addition to those grounds listed above, a party may also file a request for the court order requiring the other party or a third party to submit the document in question to the court. This request for document submission order is commonly utilised to collect documents relating to the lawsuit from the government or other institutions. But, similar to the court’s document production order, there are no legal grounds to enforce the document submission order on the other party or the authorities.

In a lawsuit in which a private party files to seek monetary damages against the party violating the MRFTA pursuant to Article 56 thereof, if it finds it necessary, the court may order the KFTC to produce the entire set of investigation records for the case in question, which include interviews with persons related to the case, witnesses, appraisers, stenographic records and other evidentiary documents.

VI USE OF EXPERTS

In lawsuits dealing with antitrust issues, there is no formal procedure in which experts or economists can be involved.

However, in ordinary civil lawsuits the court may call for an expert opinion or appraisal of a party’s application or its initiative and such procedures can be also used to establish violation and damage, or to calculate damages, in antitrust litigation.
The Civil Procedure Act only provides that a court can appoint an expert or appraiser having knowledge and experience on the subject matter at issue, but there are no specific qualifications for such expert or appraiser. Please note that, unlike typical litigation cases involving appraisal – such as construction costs, land survey or authenticity of a document – Korean courts do not have a set pool of experts or appraisers in relation to antitrust issues. While a party cannot apply for a specific person to be appointed as an expert or appraiser, and only the court has an authority to appoint one, in general practice the experts are usually recommended by the party that requests the expert opinion or appraisal and decided on by the court after review.

VII CLASS ACTIONS

Class actions are not available under Korean law except for claims relating to securities.

VIII CALCULATING DAMAGES

In principle, the scope of recoverable damages is limited to actual damages under Korean law. The same principles apply to antitrust cases, but the MRFTA permits recovery of damages up to three times the amount of actual damages in the case of (1) unfair collective action such as price fixing or collusion, (2) retaliatory measures taken against a person or entity that has reported the unfair trade practice to the KFTC, cooperated with the KFTC’s investigation on such unfair trade practices or filed a request for mediation with the Korea Fair Trade Mediation Agency (KOFAIR) in relation to unfair trade practices (Article 56, Paragraph (3) of the MRFTA).

When determining the amount of such treble damages in accordance with Article 56, Paragraph (3) of the MRFTA, the court will consider the following factors (Article 56, Paragraph (4) of the MRFTA):

a. intent or degree of awareness of the violating party of the damage caused;
b. severity of the damage caused by the violation;
c. economic benefits the violating business entity or association of business entities gained from the violation;
d. fine and penalty following the violation;
e. duration and frequency of the act of violation;
f. financial status of the business entity; and
g. effort exerted by the violating business entity or association of business entities remedy the damage.

However, the amount of damages that the violating business entity that has been granted leniency pursuant to the MRFTA is liable to pay shall not exceed the amount of damage the victim suffered as a result of the violation (Article 56, Paragraph (4) of the MRFTA).

Further, if it is recognised that damage has been caused by a violation of the MRFTA but it is extremely difficult to prove the facts supporting the amount of such damage, the court may award a considerable amount of damages to be calculated based on the parties’ arguments and the results of its examination of the evidence submitted (Article 57 of the MRFTA).

Please note that computation of damages under Korean law is based on the theory of ‘difference in financial status’, under which the amount of damages is determined to be the
difference between the financial status that would have existed without the violation and the financial status that existed as a result of the violation, thus the ‘but for’ test will apply. In cases of unfair collective action (i.e., cartels), the damages are calculated by finding the difference between the price resulting from the cartel and the price that would have been deemed competitive in the absence of the cartel. In case of exclusionary conduct, the amount of damages will be generally calculated as the loss in sales caused by the exclusionary act in question.

In view of the foregoing, determining a virtual competitive price or overcharged price is the key element in calculating damages for a cartel. According to the relevant precedent, the courts have taken the position that a competitive price should be determined by deducting the portion of price increase resulting from the cartel while maintaining the other pricing factors. Thus, if there are no changes in economic conditions, market structure, terms of transaction and other economic factors, it would be reasonable to conclude that the competitive price should be based on the price formed after the cartel (i.e., ex post facto price). However, the above should not apply if there are substantial changes in the factors that affect the ex post facto price. Instead, in such a case, the courts should determine the competitive price by analysing the changes in factors, including characteristics of price formation for the product in question, economic conditions, market structure, terms of the transaction and other economic factors, and eliminating any effects that the changes have had on the formation of the ex post facto price.

Additionally, as a method of calculating a virtual competitive price or overcharged price, an econometric method, especially regression analysis, is generally used. For example, in the cases concerning alleged price fixing of oil supplied to the military and flour, the court used the econometric method to calculate damages. However, the methods the Korean courts use to calculate damages also include other measures such as statistics on overcharged prices caused by price fixing, the volume of damages awarded in similar cases and the amount of profit the defendant gained from the violation, as long as reasonableness and objectivity in the use of these measures is maintained.

Punitive damages are not available under Korean law.

Korean courts may order the losing party to pay a certain amount of the attorney’s fee to the prevailing party, but the actual recoverable amount is limited to the amount calculated based on the formula stipulated in the rules of the Korean Supreme Court.

IX PASS-ON DEFENCES

The Korean Supreme Court does not recognise pass-on defences on the ground that it cannot conclude there is a direct causation between the price of raw materials, intermediary goods, etc. and the price of the final product, or that the price increase in the final product reflects the price increase in raw materials and intermediary goods, in the absence of any special circumstance where the price increase in raw materials and intermediary goods directly results in the price increase in the final product.

Instead, it has taken the position that under the principle of fairness, the possibility that an increase in price for products, etc. will partially reduce the damages can be taken into consideration when determining the amount of damages. In this regard, the legal commentators view that if the above doctrine is applied, it would bring about results that are substantially similar to those of pass-on defences.
X FOLLOW-ON LITIGATION

If a violation of the MRFTA is found, the KFTC may issue a corrective order or an administrative fine or both. The MRFTA also has provisions imposing criminal liability on entities violating the Act.

However, the above measures for private enforcement can be pursued separately from the KFTC sanctions. In other words, despite the KFTC’s administrative or criminal sanctions, a private party may still bring a follow-on lawsuit against the violating entities.

XI PRIVILEGES

Under Korean law, the attorney-client privilege, attorney work product and joint work product defences are not recognised in the litigation process.

XII SETTLEMENT PROCEDURES

There is no separate settlement procedure for antitrust litigation cases, but settlement procedures under ordinary civil procedures will apply. Parties to a lawsuit may settle the case during the litigation procedure, or the court may issue a recommendation for settlement between the parties.

If a settlement is reached by the parties, or the parties do not raise an objection to the court’s recommendation for settlement within two weeks, the settlement will have the same legal effect as a court’s final and conclusive decision.

XIII ARBITRATION

For antitrust cases, there is a procedure seeking mediation before the KOFAIR, a quasi-governmental agency established pursuant to the MRFTA. To handle the mediation procedure, a committee for the mediation of disputes concerning antitrust issues consisting of seven commissioners or less including one chairman, is formed within the KOFAIR.

The cases subject to the KOFAIR mediation procedure include disputes relating to unfair trade practices, disputes between franchisors and franchisees, disputes relating to subcontract transactions, disputes between large retailers and suppliers, disputes between suppliers and agencies, and disputes relating to unfair standard terms and conditions.

The party that alleges it suffered harm from the violation of the MRFTA regarding one of the above specific issues may file a petition for mediation with the KOFAIR. Alternatively, the KFTC may request mediation before the KOFAIR.

The committee may conduct any necessary examination or investigation to verify the facts alleged by the parties, require submission of documents and materials related to the case, or recommend settlement or propose terms of mediation to the parties. Until the mediation proceeding is concluded, the KFTC cannot issue a corrective order against the alleged violating entity.

The mediation is concluded if any of the following occurs: (1) the parties in dispute accept the recommendation or proposal for mediation issued by the committee or the parties voluntarily reach a settlement thereby completing mediation; (2) an agreement between the parties is not reached within 60 days (or 90 days if both parties have agreed to such extension)
from the date on which the petition or the request is filed; (3) one of the parties refuses to mediate the case or file a lawsuit with the court and thus there is no longer any real benefit for the parties to proceed with mediation.

Once an agreement is reached between the parties during the mediation procedure, the committee will prepare a written mediation report setting forth the terms of their mediation agreement, which will be signed by the commissioners of the committee and the parties. Thereafter, the parties must perform their obligations pursuant to the terms of the mediation agreement and submit to the KFTC a written confirmation specifying completion of the obligations under the mediation agreement. If the parties reach a mediation agreement and the performance of their obligations thereunder is completed, the KFTC will not issue a corrective order.

The mediation report issued by the committee will have the same legal effect as a court’s final and conclusive decision. Therefore, if either party fails to comply with the obligations under the mediation agreement, the other party may enforce the agreement without filing a separate lawsuit.

XIV INDEMNIFICATION AND CONTRIBUTION

In principle, joint tortfeasors have joint and several liability. The liability of each joint tortfeasor is proportional to the percentage of his or her negligence contributed to the violation, and when one tortfeasor pays for damages exceeding his or her portion of the liability, he or she can seek indemnity for the exceeding portion from the other tortfeasor.

That said, Article 56, Paragraph (5) of the MRFTA stipulates that where the business entity that has been granted leniency in accordance with the MRFTA is held liable for treble damages, the entity will be held liable as a joint tortfeasor to the extent not exceeding the damages caused to the other from a cartel.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The KFTC formed a special committee consisting of experts and specialists to work on the overall amendment to the MRFTA and prepared a bill for such amendment. The proposed amendment was submitted to the National Assembly in November 2018 by the Korean government and is now pending the National Assembly’s examination and resolution.

The key points addressed in the proposed amendment to the MRFTA in relation to private enforcement are as follows:

a the addition of a provision permitting the damaged party to file a lawsuit with a court seeking an injunction to prohibit or prevent unfair trade practices; and

b the addition of a provision allowing the court in a lawsuit seeking damages caused by unfair trade practices to issue an order against the entity to submit a certain document and prohibiting the entity from refusing to submit the document if it is necessary to prove damage or the amount thereof despite the fact that such documents can be protected as trade secrets (see Section V for a discussion on the limitations of document production because in practice the documents containing trade secrets can be exempted from document production orders).

The proposed amendment is still being examined by the standing committee. Since the current term of the National Assembly will end in May 2020 and the next general election
will be held in April 2020, the possibility that the proposed amendment will be passed prior to the end of the current term is very low. Moreover, as bills that are pending when a term ends are discarded under the National Assembly’s protocol, the above bill will also be scrapped at the end of the current term of the National Assembly.

However, considering the KFTC’s effort to form a special committee to amend the overall MRFTA that was enacted more than 30 years ago and has seen only partial amendments, it is expected that the current proposed amendment will be the basis for future amendments to the MRFTA if the government or the KFTC decides to propose such overall amendment again.

Meanwhile, the number of cases reviewed by the KOFAIR substantially increased in the past three years and it is expected to continue to rise in the future. Most cases brought before the KOFAIR involve unfair trade practices by entities in a superior business position. That is because for many small and medium-sized companies, it is not easy to bring a lawsuit against such entities considering the burden of proving damages, costs for bringing such lawsuit and anticipated amount of damages. But despite the limitation that settlement through the KOFAIR mediation procedure is conditioned upon both parties’ consent and the KOFAIR or the committee cannot force them to settle the dispute, the KOFAIR’s mediation procedure is being recognised as an alternative dispute resolution mechanism worth considering by potential plaintiffs, with the advantage that the cases are subject to direct investigation by the quasi-governmental agency under the KFTC and the investigation can lighten the potential plaintiff’s burden of establishing a case before the KOFAIR. As a result, the mediation procedure before the KOFAIR will be more widely utilised in Korea going forward.
Chapter 15

NETHERLANDS

Rick Cornelissen, Elselique Hoogervorst, Albert Knigge, Paul Sluijter and Weyer VerLoren van Themaat

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Netherlands is a preferred forum for private competition law enforcement cases and connected damages claims. Since 2010, there have been a number of damages claims brought before the Dutch courts, mainly following various Commission decisions. In 2019, several judgments were published in the Airfreight, Trucks, Gas-Insulated Switchgear and Elevators and Escalators cases.

II THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for antitrust damages claims is the Dutch Civil Code (CC) and the Dutch Code of Civil Procedure (CCP), and the specific competition legislation in the Dutch Competition Act (CA) and the TFEU. The CA applies to all agreements between

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1 Rick Cornelissen, Albert Knigge and Weyer VerLoren van Themaat are partners, Paul Sluijter is counsel and Elselique Hoogervorst is a professional support lawyer at Houthoff.
7 Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Mededingingswet).
undertakings, decisions by associations of undertakings and concerted practices that aim to prevent, restrict or distort competition within all or a part of the Dutch market, or that have this effect.

Most cartel damages claims are based on an alleged unlawful act by the defendant. To succeed, a claimant must establish that the defendant has committed an attributable unlawful act which damaged the claimant. Whether a breach of national or European competition law in itself will amount to an unlawful act against the claimant depends on whether the breached rules aimed to prevent the damage allegedly suffered by the claimant.

Some national substantive and procedural rules were amended and added to the CC and CCP when the EU Damages Directive was implemented on 10 February 2017. The added provisions on the stay of proceedings and the disclosure of evidence do not apply to damages actions which the Dutch court was seized of before 26 December 2014. All added provisions apply to damages claims for EU competition law infringements only, and not to damages claims for solely national competition law infringements. The Dutch Supreme Court found it desirable that, if the EU Damages Directive does not apply in a temporal sense, the applicable Dutch law is interpreted so that the outcomes are compatible with the Directive and the Implementing Act.

ii Class actions, assignment of claims and mandate
Mass claims can be bundled in collective actions through assignment or mandate. The most popular models for claiming cartel damages in the Netherlands are the assignment of individual claims to a legal entity acting as a claim vehicle and representation by mandate.

Furthermore, a Dutch foundation or association with full legal capacity that, according to its articles of association, has the goal of promoting and protecting the common and similar interests of various (legal or natural) persons can bring a collective redress claim seeking injunctive or declaratory relief, a declaratory judgment or even specific performance. Since 1 January 2020, damages can also be claimed in a collective action (the Act on Damages Claims in a Collective Action (WAMCA)). This Act has stricter safeguards to prevent abuse of the Dutch collective action system especially in light of the increasing commercial use of collective actions. Third-party funding is available in the Netherlands, but is not explicitly regulated. Therefore, the WAMCA adds stricter requirements for the

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10 A draft bill, which will broaden the scope of the Implementing Act, was published in 2017 to allow interested parties to react to the proposed legislative text: www.internetconsultatie.nl/wijzigingmarktenoverheid. The draft bill has not yet been submitted to the Parliament.
11 Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (Gas-Insulated Switchgear).
12 Article 3:305a of the CC.
13 Wet van 20 maart 2019 tot wijziging van het Burgerlijk Wetboek en het Werboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie), Staatsblad 2019, 130. The date of entry into force was published in Staatsblad 2019, 447.
standing of a claim vehicle. Finally, the WAMCA introduced procedural changes intended to enhance the efficiency and effectiveness of these proceedings, including appointing an exclusive representative, consolidating collective actions if these actions are based on the same events, and the obligation for the parties to try to negotiate a settlement agreement after an exclusive representative has been appointed. Those who do not want to be represented in this collective action can opt out after the appointment of the exclusive representative. Foreign persons can be represented if they opt in. If a settlement is reached and declared binding, there is another opportunity to opt out. The WAMCA applies to collective actions brought on or after 1 January 2020 for events that took place on or after 15 November 2016.

The EU is preparing a directive on representative actions for the protection of the collective interests of consumers (COM(2018)184). It is not clear yet if and to what extent the proposed EU law on representative actions will change Dutch legislation.

### iii Statute of limitations

The Implementing Act has a specific prescription period for competition law-related claims for damages (Article 6:193s CC):

- **a** a five-year limitation period, beginning on the day after the infringement ended and the claimant became aware, or can reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to them and the infringer's identity; and

- **b** a 20-year limitation period, beginning on the day following the day on which the infringement ended.

Regular damages claims become time-barred five years after the claimant becomes aware of the damage and the person liable ('ought to have been aware' is insufficient), or 20 years after the damage-causing event (Article 3:310 CC). Since Article 6:193s CC has no retroactive effect, Article 3:310 CC is still important.

There has been case law on Article 3:310 CC about how publicity around a potential cartel affects a limitation period. These cases have found that if the sole publicity about investigations into a possible cartel is issued in European Commission press releases or in media reports, without information that would show potential claimants the nature of the damage they may have suffered or the identity of those responsible, this will be insufficient to start the limitation period. For example, in the *Elevators and Escalators* case, the Rotterdam District Court found that newspaper articles in 2004, which mentioned that authorities carried out raids and that following these raids Kone conducted an internal investigation that revealed competition-restricting activities in Belgium, Luxembourg and Germany were not concrete enough for the claimants to suspect the existence of a cartel in the Dutch market. Therefore, the newspaper articles did not start the limitation period for the claimants in this case. The limitation period started with the publication of the Commission decision.  

14 Articles 1018b-1018m of the CCP.


16 Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 (*Elevators and Escalators*).
Article 6:193t CC gives two grounds for extending the limitation period. The first ground is an extension between the parties involved during a consensual dispute resolution process. In mediation, this ends when a party or the mediator notifies the other party in writing that mediation has ended or if no actions have been performed for six months pending the mediation. The second ground relates to a competition authority performing an act within the context of an investigation or proceedings with regard to the infringement of competition law. The extension starts on the day following the day that the limitation period has lapsed. The extension equals the period required for establishing the final infringement decision or alternatively terminating the investigation or proceedings about the competition law infringement, extended by one year.

III EXTRATERRITORIALITY

i Applicable law

Regulation (EC) 864/2007 (Rome II) applies when determining which laws apply to antitrust damages claims arising from acts committed on or after 11 January 2009. For acts committed before 11 January 2009, the Unlawful Acts Act (UAA) applies. Under Article 4(1) UAA, claims arising from wrongful acts as a result of illegal competition are governed by the laws of the country in whose territory the competitive act impacted competition. In cross-border cases, this rule of reference may lead to an unavoidable fragmentation of the laws that will apply to parts of the claim. Unlike Article 6(3) Rome II, the UAA has no provision enabling the claimant to choose that only the law of the court seized will apply when the competition distortion has also considerably affected competition in that country. Therefore, in a number of cases, Dutch courts applied several different foreign law systems to parts of the bundled claims. In two recent airfreight cases, the Amsterdam District Court decided differently due to the difficulties in locating the place of the affected territory in cases of international airfreight services: it found that the effectiveness principle and due process required a practical solution and it decided that Dutch law applied to all claims.

ii Jurisdiction

Main rule: defendant’s domicile

Dutch courts generally have jurisdiction to hear antitrust damages claims against parties domiciled in the Netherlands. A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business there.

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17 For acts committed before 1 June 2001, the UAA is applied by analogy, see Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (Elevators and Escalators), Amsterdam District Court, 1 May 2019, ECLI:NL:RBAMS:2019:3392 and 3393 (Airfreight).

18 Inter alia in Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166 (Sodium Chlorate): the applicable law also determines the rules on limitation periods; under a few of the eight law systems applicable, the claims had expired. See also Limburg District Court, 16 November 2016, ECLI:NL:RBLIM:2016:9897 (Pre-stressing Steel).


20 Article 4 of Council Regulation (EU) 1215/2012, which applies to proceedings instituted on or after 10 January 2015 (Brussels I recast), and Article 2 of Council Regulation (EC) 44/2001 (Brussels I (old)), which applies to proceedings instituted before 10 January 2015.

21 Article 63 Brussels I recast.
Alternative jurisdiction grounds: anchor defendant rule or place where the harmful event occurred

Claimants frequently invoke the alternative jurisdiction ground under Article 8(1) Brussels I recast (anchor defendant rule). Under this rule, a cartel damages claim against a company that is not domiciled in the Netherlands may still be brought before the Dutch courts, if it is sufficiently closely connected with a claim against a cartelist that is domiciled in the Netherlands and if it is expedient to do so.\(^22\)

On 21 May 2015, the European Court of Justice (CJEU) issued a landmark decision\(^23\) in Hydrogen Peroxide. The CJEU decided that even when the undertakings have participated in different places and times, the prior case law criterion of the same situation of fact and law is fulfilled, and that Article 6(1) Brussels I (old) can apply if only one defendant is domiciled in the Netherlands. This decision confirmed prior Dutch judgments in which jurisdiction based on Article 6(1) Brussels I (old) was accepted in cartel damages cases.\(^24\) In many cases, Dutch courts have assumed jurisdiction based on the anchor defendant rule,\(^25\) even when the same anchor defendant was summoned for the second time for the same claim.\(^26\) There have been exceptions to this, such as the Beer case in which the Amsterdam District Court did not allow MTC to use Heineken as an anchor defendant for claims, based on the infringement of Article 102 TFEU, against Greek brewery AB. The Greek competition authority had found no evidence of Heineken’s involvement in AB’s competition law infringement and MTC had not substantiated their arguments in a way that made the court accept that Heineken had been involved in the competitive act. Therefore, the claims were not sufficiently closely connected.\(^27\)

Claimants also sometimes invoke another alternative jurisdiction ground: according to Article 7(2) Brussels I recast (Article 5(3) Brussels I (old)), a tort claim can be brought before the courts of the place where the harmful event occurred. This covers both the place where the damage occurred and the place of the event giving rise to it.

In the Hydrogen Peroxide\(^28\) case discussed above, the CJEU decided that in cartel damages cases, the harmful event occurred in relation to each alleged victim on an individual basis. Each victim can choose to bring an action before the courts of (1) the place of the

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\(^22\) It was confirmed in the CRT case, Oost-Brabant District Court, 29 June 2016, ECLI:NL:RBOBR:2016:3484, that the case law of the CJEU with regard to Article 6(1) Brussels I (old) is also relevant for the application of Article 7(1) CCP, which applies when a defendant is not domiciled in an EU or EEA country.

\(^23\) CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (Hydrogen Peroxide).


\(^25\) Midden-Nederland District Court, 27 November 2013, ECLI:NL:RBMBN:2013:5978 (Elevators and Escalators).

\(^26\) Amsterdam District Court, 7 January 2015, ECLI:NL:RBAMS:2015:594 (Airfreight).

\(^27\) Amsterdam District Court, 9 May 2018, ECLI:NL:RBAMS:2018:3203 (Beer).

\(^28\) CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (Hydrogen Peroxide). See for the interpretation of Article 7(2) Brussels I recast in the context of Article 102 TFEU: CJEU, 5 July 2018, C-27/17, ECLI:EU:C:2018:533 (FlyLAL). The non-cartel related Universal/Schilling decision (CJEU 16 June 2016, case C-12/15) is also relevant in this regard: ‘In the context of the determination of jurisdiction . . ., the court seized must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant.’
causal event, which can be the place in which the cartel was definitively concluded, or the place in which the particular agreement was concluded, which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or (2) the place where the damage occurred, which can be the place where its own registered office is located.\textsuperscript{29}

Recently, the CJEU gave a further explanation of ‘the place where the damage occurred’. In \textit{Tibor-Trans}, a Hungarian case concerning the \textit{Trucks} cartel, the CJEU decided that in the case of an Article 101 TFEU infringement consisting of collusive arrangements on pricing and gross price increases for trucks, ‘the place where the harmful event occurred’ covers the place where the affected market is located. That is the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel with whom that victim had not established contractual relations.\textsuperscript{30}

\textbf{Jurisdiction and arbitration clauses}

The CJEU decided in \textit{Hydrogen Peroxide}\textsuperscript{31} that in cartel damages cases, account should be taken of jurisdiction clauses\textsuperscript{32} contained in contracts for the supply of goods, even if this derogates from the international jurisdictional rules provided in Article 5(3) or Article 6(1), or both, of Brussels I (old). However, jurisdictional clauses only cover cartel damages claims if these refer to disputes concerning liability incurred due to a competition law infringement. A clause that abstractly refers to all disputes arising from contractual relationships is therefore insufficiently specific to cover cartel damages claims. This is different in an action for damages based on Article 102 TFEU. In that case, the jurisdiction clause does not have to refer expressly to disputes relating to liability incurred as a result of an infringement of competition law.\textsuperscript{33}

In the \textit{Elevators and Escalators} case, the Amsterdam District Court found that the CJEU’s \textit{Hydrogen Peroxide} decision should also apply to arbitration clauses.\textsuperscript{34} In this case, the arbitration clause only referred abstractly to disputes relating to contractual relationships. Therefore, the court rejected the jurisdiction defence.\textsuperscript{35}

\textbf{IV STANDING}

A claimant bringing cartel damages claims must be a natural or legal person. In general, indirect purchasers have standing to claim cartel damages.

Dutch courts generally accept the standing of claim vehicles (Dutch or foreign legal entities such as limited companies or foundations) that act based on assignment of claims or

\textsuperscript{29} This decision is also relevant for the interpretation of Article 6(e) CCP, which applies when a defendant is not domiciled in an EU or EEA country.

\textsuperscript{30} CJEU, 29 July 2019, C-451/18, ECLI:EU:C:2019:635 (\textit{Tibor-Trans}).

\textsuperscript{31} CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (\textit{Hydrogen Peroxide}).

\textsuperscript{32} Article 23 Brussels I (old) and Article 25 Brussels I recast.

\textsuperscript{33} CJEU, 24 October 2018, C-595/17 (\textit{Apple/eBizcuss}).

\textsuperscript{34} Even though the Brussels I Regulation does not apply to arbitration clauses (Article 1(2)(d) Brussels I).

Pursuant to Articles 1074 (arbitration beyond the Netherlands) and 1022 (arbitration in the Netherlands), the Dutch court rejects jurisdiction if the dispute is covered by an arbitration clause. The national law applicable to the arbitration clause defines whether the dispute is covered by that clause.

\textsuperscript{35} Amsterdam District Court, 23 October 2019, ECLI:RBROT:2019:8230 (\textit{Elevators and Escalators}). See along the same lines the Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006 (\textit{Sodium Chlorate}).
representation by mandate, if they find that the assignments and mandates are legally valid. The burden of proof for a valid assignment is on the claimant.\textsuperscript{36} The sole fact that a claim vehicle is funded by litigation funders and works on a ‘no win, no fee’ basis, which is not allowed for Dutch lawyers, does not make the assignment agreement null and void.\textsuperscript{37}

Standing requirements in class actions (Article 3:305a CC) are stricter. An entity bringing a class action must be a Dutch foundation or association with full legal capacity that is sufficiently representative. When assessing representativeness, emphasis is given to several factors, including the articles of association. These must cover the interests of the group that the entity is promoting. A court will also assess whether the entity is capable of properly safeguarding the interests it represents. A representative entity will also not have standing if it did not try to engage with the defendant before bringing its action. In addition, the interests of the persons that are represented in the action must be sufficiently similar. The WAMCA, which came into force on 1 January 2020 (see Section II.ii), has added stricter requirements for a representative entity’s standing. The entity must meet certain governance requirements, have sufficient resources to conduct the proceedings, have sufficient control of the legal action and have a generally accessible webpage with information about its governance and the collective action including the financial contributions requested. The legal claim must also have a sufficiently close relationship with the Netherlands. In addition, the claim will only be heard if the claim vehicle has sufficiently shown that bringing a collective action is more efficient and effective than bringing individual claims.

V OBLIGATION TO FURNISH FACTS

According to Dutch procedural law, the writ must contain the claim and the grounds for the claim.\textsuperscript{38} Furthermore, claimants must furnish in the writ all the factual elements necessary to grant the relief they request.\textsuperscript{39} These factual elements must be sufficiently substantiated in the writ, and can be substantiated in more detail during the proceedings. In CRT, the Oost-Brabant District Court found that the claimants had sufficiently substantiated their claims in the writ as far as they were based on the alleged infringement of Brazilian competition law, but had not done so for their claims based on the alleged Article 101 TFEU infringement. Since the claimants asserted that they had suffered damage due to an EU competition law infringement, they should have asserted that the alleged infringement related to their purchases and that it had impacted trade in the EEA.\textsuperscript{40}

Claim vehicles that act based on the assignment of individual claims must substantiate the claims of every assignor, because assignment of claims is just a way of bundling individual claims to which no exceptional rules apply.\textsuperscript{41} In Trucks, the Amsterdam District Court ruled that claim vehicles cannot limit their obligation to substantiate their claims by giving just a number of examples, not even if the assumption is made that the ultimate scope of the

\textsuperscript{36} Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 (Elevators and Escalators).
\textsuperscript{37} Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (Elevators and Escalators).
\textsuperscript{38} Article 111(2d) of the CCP.
\textsuperscript{39} Article 149 and 150 of the CCP.
\textsuperscript{40} Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6932 (CRT).
harm will be established in follow-up damages proceedings. The claimants, and the litigation vehicles for each assignor, must assert and substantiate (whether or not with documentation) more regarding when and from whom which trucks (of which makes) were acquired. In any case, sufficient facts must be asserted to be able to assess, for each owner, renter, lessee or user of the truck(s), whether these parties incurred harm as a result of the cartel during the alleged infringement period or the post-infringement period to establish the plausibility of the possibility of harm.42

In Elevators and Escalators, the Arnhem-Leeuwarden Court of Appeal confirmed the ruling of the court in first instance that claim vehicle EWD had not fulfilled its obligation to furnish enough factual elements for each assignor to establish the causal link or the existence of damage. EWD had not explained which contracts were at stake and under which circumstances they were concluded.43 In another Elevators and Escalators case, the Rotterdam District Court found that the claim vehicle did not sufficiently substantiate the plausibility of the possibility of damage suffered by each assignor. However, the Court allowed the claim vehicle to further substantiate its assertions.44

VI THE PROCESS OF DISCOVERY

There is no formal pretrial discovery system in Dutch law. Parties can, however, request disclosure judicially and extra-judicially. A party can assess its case up front through preliminary examination of a witness or a preliminary expert opinion. The Dutch courts have general discretion to order disclosure from either or both parties,45 including disclosure of books and records.46 This power covers both a demand for clarification of certain statements and the submission of specific documents. A party can refuse to cooperate with this demand, but the court may draw adverse inferences from this unless the party can show sufficiently compelling reasons for the refusal. In principle, parties can also request documents under Dutch administrative law (see below).

i Parties’ disclosure options

Article 843a CCP provides a special right to disclosure in addition to the discretionary right of the courts, by way of a motion in ongoing proceedings or in separate proceedings. Parties can demand specific written or digital documents and information from any person who has these documents or data in its custody.

For a claim under Article 843a CCP to be successful, the claimant must (1) establish that it has a legitimate interest in the disclosure. This may be found if the claimant cannot obtain the documents or information in another way, and would be at an unreasonable disadvantage

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42 Amsterdam District Court, 15 May 2019, ECLI:NL:RBAMS:2019:3574 (Trucks). See also Amsterdam District Court, 11 September 2019, ECLI:NL:RBAMS:2019:9965, where the Court has also ordered the litigation vehicles to further substantiate the assertion that the freight forwarders, who directly purchased the air freight services, passed on their overcharges to the shippers, who allegedly assigned their claims to the litigation vehicles (upstream pass on). The air cargo carriers will have to substantiate their assertion that the shippers passed on the overcharge to their customers (downstream pass on).


44 Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (Elevators and Escalators).

45 Article 22 of the CCP.

46 Article 162 of the CCP.
in the proceedings without them. The claimant must (2) show that the requested documents and information relate to a legal relationship – contractual or non-contractual – to which the claimant is a party. Disclosure must (3) relate to specific documents and information so that the court and the other party can identify the requested information and to prevent fishing expeditions. Finally, (4) disclosure can only be sought for documents that are in the custody of the party against whom the order is requested.

Article 843a CCP constitutes the standard legal basis for disclosure in civil proceedings. The newly enacted Articles 844–850 CCP deviate from and add to Article 843a CCP through a subsection regarding the disclosure of information in cartel damages claims transposing Chapter II of the EU Damages Directive into Dutch civil law, including the black-listed and grey-listed exceptions to the right of disclosure. These Articles apply to actions for damages of which the Dutch court was seized on or after 26 December 2014. Article 845 CCP stipulates that disclosure can only be refused for compelling reasons, whereas the grounds for refusal of Article 843a CCP are broader. This means that for cartel damages claims, disclosure cannot be refused because fair and proper administration of justice can be sufficiently secured without disclosure.

The Dutch courts have refused disclosure requests where (1) there was insufficient legitimate interest or (2) where they did not find the information relevant. In both cases, the court indicated that future disclosure could be possible at a later stage in the proceedings if required.

In the field of public antitrust enforcement, there are two noteworthy cases on access to documents.

First, it may be possible to access documents under Dutch administrative law. According to the Government Information (Public Access) Act (PAA), anyone can request an administrative body (including the Dutch Competition Authority (ACM)) to make certain documents publicly available. There are only certain grounds for refusal. The Trade and Industry Appeals Tribunal, however, has held that the Act establishing the ACM (of 28 February 2013) has priority over the PAA. This implies that the ACM has additional grounds to refuse access to documents. If the information is obtained outside its functions under its establishing act, the PAA applies.

Second, the Trade and Industry Appeals Tribunal held that the right of access to documents for defending parties in cartel investigation procedures, as enshrined in Article 6 ECHR, may overrule the protection of leniency documents. The ACM requested that only the Tribunal (and not the parties accused of infringing the cartel prohibition) take notice of certain transcripts of the oral statement of leniency applicants. The Tribunal, however,

50 Trade and Industry Appeals Tribunal, 17 June 2016, ECLI:NL:CBB:2016:169 in which the judgment in first instance (Rotterdam District Court, 13 May 2015, ECLI:NL:RBROT:2015:3381) was overturned because the ACM failed to examine whether the requested information was acquired under the authority of the Act establishing the ACM.
weighed the interests, assessing the interests of a successful leniency programme with the parties’ right to defend themselves, and decided that the limitation of access (for defendants) to transcripts of the oral statement of leniency applicants was not justified.

ii Parties’ right to witness testimony

Parties have a right to present evidence through witness statements. The only persons exempt from testifying in civil proceedings are close blood relatives and professionals required to observe confidentiality obligations.52 Opposing parties can also be witnesses, but their testimony’s strength is limited when proving their own statements. Witnesses are examined by a judge. There is no right to cross-examination. If a witness refuses to answer questions, the court may draw adverse inferences.53

Finally, parties can request preliminary examination of a witness.54 This could facilitate a party clarifying certain facts up front if this party is considering starting proceedings. This request can be refused if the claimant does not make it clear why it has an interest in the examination.55

VII PRIVILEGES

Lawyers must refuse to testify about what they know through their professional relationship with their clients. This includes any request through a disclosure claim under Article 843a of the CCP. Lawyer–client communications, lawyer work product and joint work product that is in the possession of persons other than the lawyer (and clients), however, are not necessarily excluded from production. This professional legal privilege also applies to in-house counsel if they are, inter alia, registered in the Netherlands as a lawyer, except for EU competition law infringements investigated by the European Commission. The latter exception follows from the Akzo judgment of the CJEU.56 A 2013 judgment of the Dutch Supreme Court confirmed that the lack of legal privilege in Akzo does not mean that legal privilege of in-house counsel does not exist generally under Dutch law.57

Article 12g of the Act establishing the ACM acknowledges lawyer–client legal privilege: the ACM may not examine or copy documents that have been exchanged between a company and its lawyer. This also covers in-house counsel if, inter alia, they are registered in the Netherlands as lawyers, except with regard to alleged infringements of EU competition law investigated by the European Commission.

VIII USE OF EXPERTS

Dutch procedural law allows parties to use any means to prove their case. The courts are free in their assessment of the evidence provided.58 Parties can use expert evidence to prove their statements. Parties may also ask the court to appoint one or more independent experts to

52 Article 165 of the CCP.  
53 Article 164 of the CCP.  
54 Articles 186–193 of the CCP.  
56 CJEU, 14 September 2010, case C-550/07 P.  
57 Supreme Court, 15 March 2013, ECLI:NL:HR:2013:BY6101.  
58 Article 152 of the CCP.
give evidence and advice on certain issues, or the court may itself appoint an independent expert, for example for deciding damages. Courts are not obliged to appoint experts: it is discretionary.60

The court can decide the evidentiary value of a party, or a court-appointed expert’s testimony or report. The court may deviate from the conclusions of court-appointed experts but it must provide sufficient grounds for this decision.61

IX CALCULATING DAMAGES

i Cognisable damages

Generally, under the newly enacted Article 6:193l CC, a cartel within the meaning of the EU Damages Directive and the Implementing Act is presumed to cause damage. Dutch civil law aims to compensate a claimant for the damage suffered as a result of another’s wrongful act or failure to perform. Both actual loss and lost profit may be claimed, as well as the claimant’s reasonable costs to prevent or reduce the damage suffered and statutory interest.62 Exemplary or punitive damages are not available. Furthermore, any profits realised by the claimant as a result of the wrongful act will be deducted from any damages award to the extent reasonable. In other words, the basic principle is full compensation but no more (in conformity with the EU Damages Directive).

Damages cannot only be claimed by those who dealt directly or indirectly with the alleged cartelists, but under certain circumstances also by those who purchased products or services in the market allegedly affected by the cartel from non-cartelists (umbrella damages).63 Recently, the CJEU decided that persons who are not active in the market affected by the cartel, but who provided subsidies in the form of promotional loans to buyers of the products offered in that market, may also seek compensation from the cartelists for their losses. These losses may consist of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably.64

ii Method of calculating damages

The court generally determines the most appropriate manner for calculating damages. If the loss cannot be accurately determined, the judge may estimate it.65 In principle, all possible relevant circumstances of the case are taken into account (actual damages calculation). In some cases, the court calculates damages in an abstract way, not taking certain actual circumstances of a case into account. The method chosen depends on the nature of the damages claimed and the liability. Under Article 44a(3) CCP, the court may request the ACM’s guidance in determining the extent of the damage.

60 Supreme Court, 6 December 2002, NJ 2003, 63 (Goedel/Mr Arts qq).
61 Supreme Court, 5 December 2003, NJ 2004, 74 (Wredenburgh/NHL).
62 Article 6:96 of the CC.
63 CJEU, 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (Kone).
64 CJEU, 12 December 2019, C-435/18, ECLI:EU:C:2019:1069 (Otis).
65 Article 6:97 of the CC.
The WAMCA (see Section II.ii) gives the court the possibility to award damages depending on whether a claimant qualifies as part of a certain category of claimants (damages scheduling). Whether this will lead to calculating damages in an abstract way remains to be seen.

As yet, there have been no definitive court decisions on whether an actual or an abstract damages calculation should be used in calculating antitrust claims. In 2015, the Amsterdam District Court shed more light on this topic by indicating specifically that (as regards Airfreight cartel-related claims) to determine the damage suffered, the actual price that was charged in the relevant period to the shippers will be analysed and compared to the hypothetical price they would have paid if the carriers had not acted wrongfully in the way that the claimants asserted.66

In a recent judgment in Gas-Insulated Switchgear, the Arnhem-Leeuwarden Court of Appeal found that the existence of an overcharge had been sufficiently disputed, so it had to assess the question of whether an overcharge was being paid for the GIS Installation and, if so, the extent of the overcharge, by comparing the actual price paid and the hypothetical price that would have been paid without the infringement of competition law.67

The court may also award damages based on the profit made by the defendant due to his or her wrongful act or failure to perform at the claimant's request.68 This power has been used sparingly, mainly in intellectual property disputes. Interestingly, however, in 2015, the Gelderland District Court rejected the objection that a substantial price increase between an offer during a cartel and the agreement after the termination of the cartel could be attributed to a decrease in the cost price.69

iii Statutory interest

A claimant may seek compound statutory interest annually on damages claimed (calculated from the day the loss is suffered until the damages have been paid).70 It is irrelevant whether the claimant actually suffered any loss because it did not immediately received monetary compensation, but a claimant cannot claim more than the statutory interest rate for a delay in receiving monetary compensation.71 The government determines the statutory interest rate. It is currently 8 per cent for commercial transactions and 2 per cent for non-commercial transactions.

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68 Article 6:104 of the CC.
70 Article 6:119 of the CC.
iv Legal costs

Legal costs awards are limited. As a rule, the losing party will be ordered to pay the legal costs of the winning party, but the court may decide to apportion costs if both parties have been found to be wrong on certain aspects of the case.72 Awards for legal costs will cover the full amount of court fees,73 court-appointed experts and witnesses. However, only a limited and fixed amount is awarded for lawyers’ fees, which generally does not begin to cover a party’s actual lawyers’ fees. Lawyers’ fee awards are determined based on points awarded for procedural actions (e.g., two points for an oral hearing) and set tariffs depending on the amount claimed.74

In class actions under the WAMCA (see Section II.ii), the court can award a much higher amount of costs to the winning party in some circumstances. If the court finds that the defectiveness of the claim was summarily apparent, it can order the claimant to pay a higher amount to the defendant, up to five times the fixed amount, unless fairness dictates otherwise. If the court grants damages to the claimant, it can also order, if so requested, that the defendant pay reasonable and proportionate court costs and other costs that the claimant has incurred, unless fairness dictates otherwise.

The courts only award actual compensation for lawyers’ fees in intellectual property cases and exceptional circumstances (e.g., abuse of proceedings).

X PASS-ON DEFENCES

The Implementing Act confirms a party’s right to invoke a pass-on defence in Article 6:193p CC. Given the general principle of compensation for actual loss suffered underlying the Dutch law of damages, defendants in a cartel damages action were in principle already able to raise this defence.

In its judgment of 8 July 2016, the Supreme Court held that generally speaking, a pass-on defence comes down to the assumption that the scope of an injured party’s right to compensation resulting from a competition law infringement is reduced proportionate to the amount of that loss the injured party has passed on to third parties. The Supreme Court also decided that what is ultimately relevant, is that in comparing the actual situation with the situation that presumably would have existed had the standards not been violated, an assessment must be made of which losses and which benefits are related to the event for which the debtor is liable in such a way that they can reasonably be attributed to the debtor as a result of this event. As the EU Damages Directive prevents overcompensation, this reasonableness test will presumably have a limited scope in future cartel damages cases.75

In the Gas-Insulated Switchgear cases, the pass-on defences were rejected in the first instance.76 In the following appeal proceedings, which are still pending, the

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72 Article 237 of the CCP
73 Currently, the highest court fee at first instance is €4,131 (court fees 2020).
74 Currently, the maximum fee is €3,856 per point with no maximum number of points for claims exceeding €1 million.
75 Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (Gas-Insulated Switchgear).
Arnhem-Leeuwarden Court of Appeal appointed three experts to report on questions regarding the pass-on defence, for which, the Court of Appeal pointed out, the defendant has to assert and prove the relevant facts.\textsuperscript{77}

XI FOLLOW-ON LITIGATION

i Evidence of a cartel infringement

So far, most cartel damages claims in the Netherlands have been brought following a decision and a fine by the European Commission or the ACM. Under Article 16 of Council Regulation (EC) 1/2003, European Commission decisions on agreements, decisions or concerted practices under Article 101 TFEU that are no longer open for appeal bind the national courts, effectively meaning that in a claim for cartel damages following such a decision, the Dutch courts must accept and apply the breach of Article 101 TFEU found by the European Commission. However, a European Commission decision and fine for participation in a cartel does not guarantee a successful damages claim. For example, in Elevators and Escalators, the claim was rejected because the claim vehicle did not fulfil its obligation to furnish sufficient facts.\textsuperscript{78}

For the status of ACM decisions in follow-on civil litigation, the Implementing Act has provided for a new Article 161a CCP. This establishes that a competition law infringement established by an irrevocable decision of the ACM provides irrefutable evidence of the established infringement in proceedings in which damages are claimed because of a competition law infringement law in the sense of Article 6:193k(a) CC.

iii European versus national law – parental liability

It follows from CJEU case law as well as from the EU Damages Directive that in the absence of Community rules governing compensation for damage caused by cartel infringements, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of causal relationship, provided that the principles of equivalence and effectiveness are observed.\textsuperscript{79} A cartel infringement established by a competition authority must therefore be transposed into national law on damages.

However, in the Skanska case,\textsuperscript{80} the CJEU clarified the concept of economic continuity. It ruled that the buyer of an entity that infringed EU competition law can be held liable for the damage caused if the infringing entity has ceased to exist. The CJEU pointed out that the decision on who is liable in EU competition law damages actions is directly governed by EU law and not by national law. The CJEU found that the entities that must compensate for the damage caused by conduct prohibited by Article 101 TFEU are the ‘undertakings’, within the

\textsuperscript{77} Arnhem-Leeuwarden Court of Appeal, 29 May 2018, ECLI:NL:GHARL:2018:4876 (TenneT/ABB). See also Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:4876 (TenneT/Alstom) that will use the expert reports submitted in TenneT/ABB.

\textsuperscript{78} Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (Elevators and Escalators).

\textsuperscript{79} CJEU, 13 July 2006, C-295/04 (Manfredi), ECLI:EU:C:2006:461, CJEU, 21 May 2015, C-352/13 (Hydrogen Peroxide) and Recital 11 of the EU Damages Directive.

\textsuperscript{80} CJEU, 14 March 2019, C-724/17, ECLI:EU:C:2019:204 (Skanska).
meaning of that provision, that participated in that conduct. The concept of 'undertaking' has the same meaning in the context of fines imposed by the European Commission as in the context of civil actions for damages, according to the CJEU.

In *Gas-Insulated Switchgear*, the Arnhem-Leeuwarden Court of Appeal applied the findings in *Skanska* when assessing the question of whether Cogelex, an entity that had not been held liable by the Commission and had not been fined, could be held liable for the damage caused by Alstom Holdings, a cartel member. According to the Court, Cogelex’s liability cannot be assessed by national Dutch law, contrary to national case law preceding the *Skanska* ruling. The court ruled that Cogelex and Alstom Holdings (a minority shareholder in Cogelex) form one undertaking in the sense of Article 101 TFEU, because Alstom Holdings exercised a decisive influence on Cogelex’s strategy and market behaviour. The court therefore found that Cogelex could be held liable for the damage caused by Alstom Holdings. However, in contrast to *Skanska*, the concept of economic continuity did not apply in this case. Moreover, the Court held Cogelex, a subsidiary that did not actually participate in the infringement, liable for the actions of its parent company, whereas the Commission so far only held a parent company liable for the infringement of competition law by its subsidiary. The Court did so without any further actual substantiation.

### iv Stay of proceedings until a cartel infringement decision is irrevocable

Dutch courts have allowed a stay of proceedings in cartel damages cases pending the outcome of an appeal of a European Commission decision. This requires reasonable doubt regarding the validity of the European Commission’s decision. If one party invokes a European Commission decision in support of its claims, it is up to the other party who requested a stay for the proceeding to (1) show that it has brought a timely action to annul the European Commission decision; (2) clarify that it reasonably opposes the European Commission decision; and (3) state the defence it would argue in the proceedings, so that the national court can decide whether and to what extent the assessment of these defences depend on the validity of the European Commission decision.

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XII SETTLEMENT PROCEDURES

In principle, the general rules of contract law apply to adopting or imposing settlements. Settlement negotiations between lawyers enjoy legal privilege, so disclosing the contents of such negotiations in proceedings may result in a disciplinary complaint. In addition, the newly enacted Article 6:193o CC contains specific legislation for settlements in private competition law-related cases.

Article 6:193o(1) CC stipulates that the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm that the competition law infringement inflicted on the injured party. This means that the injured party has no recourse against infringers that were not involved in the settlement for the part of the share of the settling infringer that has not been paid out under the settlement (e.g., if the infringer’s share was X, and he or she settles for X minus 20, the injured party cannot take recourse on the other infringers for the remaining 20).

Accordingly, under Article 6:193o(2) CC, the co-debtors who are not involved in the settlement cannot have recourse against the settling infringer. This protects the settling infringer so that as a result of the settlement he or she can no longer be successfully sued by either the injured party or the co-debtors. This generally incentivises infringers to settle. For the settling party one risk remains, which is that he or she can be held liable for the damage caused by the co-debtors in cases where the co-debtors are unable to pay the remaining damages (for example, in cases of bankruptcy). To eliminate this final risk, Article 6:193o(4) CC provides for a possibility for the settling infringer to exclude this possibility in its settlement with the injured party.

Settlement agreements are rarely embodied in a court order. However, one or more associations or foundations that, according to their articles of association, protect and promote the interests of persons who have suffered damage as a result of the acts of another party, and that have reached a settlement agreement with one or more parties to compensate that damage, can request, with the other parties to the settlement agreement, that the Amsterdam Court of Appeal declare the settlement agreement generally binding on an opt-out basis (the Collective Settlement of Mass Claims Act (WCAM)). The court must consider a number of aspects, such as whether the compensation is reasonable, and whether the associations or foundations that agreed to the settlement can be deemed sufficiently representative for the interests of those on whose behalf the settlement was reached. For this test, it is relevant whether the position of the non-active claimants (claimants who did not take part in the collective redress actions leading to the settlement) is sufficiently safeguarded.85

The court’s order declaring a settlement generally binding can be applied in international cases.86 In principle, a decision by the court to declare a settlement generally binding should also have effect against foreign claimants, at least in so far as they are domiciled in a Member

85 The Amsterdam Court of Appeal rejected a settlement proposal on this basis. After adjustments were made, the Court approved the second amended and restated settlement agreement and declared it binding on all investors that would fall within the scope of the settlement class: Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (Fortis/Ageas). More information and the English translation of the ruling can be found at www.forsettlement.com.

State of the EU or the European Free Trade Association, although one cannot exclude the risk that a foreign court (outside or within the EU and the European Free Trade Association) will consider the Dutch opt out a breach under public policy rules (Brussels I recast).

The WAMCA (see Section II.ii) also provides for the possibility to have a settlement declared generally binding when it is reached during the collective proceedings. In that case, foreign claimants have to opt in to be represented in the proceedings, and they have the opportunity to opt out after the settlement is declared generally binding.

### XIII ARBITRATION

Antitrust claims may be arbitrated if the parties agree. The rules for arbitration are provided in Articles 1020 to 1076 of the CCP. The confidential nature of arbitration proceedings may make arbitration preferable, particularly for defendants in antitrust claims. Another advantage is that arbitration can take less time compared to civil proceedings given the caseload of Dutch courts.

Under the CJEU’s judgment in *Eco Swiss v. Benetton*, a decision by arbitrators that is contrary to Article 101 TFEU must be annulled if it is challenged before a national court. After all, one of the available grounds for annulment under Dutch arbitration law is a failure to observe national rules of public policy; according to the CJEU, Article 101 TFEU falls within that scope. It is therefore undisputed that arbitrators must apply provisions such as Article 101 TFEU to disputes before them even when the interested party has not relied on those rules. However, there is some debate within Dutch legal literature about whether this obliges arbitrators to raise, on their own motion, issues of European competition law where examining that issue would oblige them to abandon the passive role assigned to them or the scope of their arbitration task. According to the CJEU in *Van Schijndel*, this obligation does not exist for the national courts if – as is the case in the Netherlands – according to national rules of law they are bound by the ambit of the dispute as defined by the parties themselves and the facts and circumstances upon which parties have based their claims and defences. Whether the *Eco Swiss v. Benetton* judgment implies a farther-reaching and more active obligation for arbitrators than the national courts has yet to be decided.

The validity of arbitration clauses is discussed in Section III.

### XIV INDEMNIFICATION AND CONTRIBUTION

Under Dutch law, if one or more persons are liable for the same damages, the claimant may hold each jointly and severally liable for the full amount. Article 6:193m(2 and 4) CC contain exemptions to this principle for small or medium-sized enterprises and immunity recipients respectively. Assuming that a joint and several liability of each cartel member for the entire damage of the cartel will be accepted by the courts, then a defendant to a cartel damages claim who pays more than its share in the whole of the damages may seek contributions from the other cartel members. Contributions can only be sought for each co-cartelist’s share

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88 CJEU, 1 June 1999, C-126/97.
89 CJEU, 14 December 1995, C-430/93 and C-431/93.
90 Article 6:102 of the CC.
in the damages.\textsuperscript{91} Each party’s share in the damages is determined proportionately to their contribution to the damages.\textsuperscript{92} The courts have not yet clarified how they will determine the size of each party’s contribution in cartel damages claims cases.

Contribution proceedings may be started separately or through a motion in the main proceedings that must be raised before or with the submission of the statement of defence.\textsuperscript{93} The contribution and main proceedings may be dealt with and decided jointly by the court. This is an administrative measure, and both proceedings remain separate cases with the decisions in each proceedings only having binding legal effect against the parties in those proceedings.\textsuperscript{94} Defendants in contribution proceedings therefore do not automatically become parties to the main proceedings, although they may voluntarily join the main proceedings as a party\textsuperscript{95} or can – in exceptional circumstances – be forced to join the main proceedings.\textsuperscript{96}

The statute of limitations for a contribution claim is five years. The Supreme Court has ruled that the statute of limitations for such a claim begins on the date the claimant seeking contribution paid more than its share of the damages. This means that the limitation period may begin many years after the fact and after the claimant was first sued for damages.\textsuperscript{97}

XV  FUTURE DEVELOPMENTS AND OUTLOOK

After the implementation of the EU Damages Directive, the Netherlands is still a preferred venue for claims for private enforcement of European competition law. Many follow-on cartel damages claims have already been submitted to the Dutch courts, and more claims are likely to follow. The Netherlands is fiercely competing with England and Wales and Germany as the preferred forum for bringing this type of claim. This likely originates from the advantages of the Dutch system and practice, including:

\begin{itemize}
\item[a] the relatively low costs of the proceedings and low adverse cost orders, which are not based on the actual costs incurred, but on a court-approved scale of costs;
\item[b] the broad expertise and pragmatic approach of the Dutch judiciary;
\item[c] well-developed possibilities to obtain disclosure;
\item[d] the fact that claim vehicles (and their funding) as such are not regulated, and hence generally face few barriers in starting proceedings based on assignment of claims or representation by mandate; and
\item[e] in addition, the number of private competition law-related claims is likely to increase as a result of the recently introduced WAMCA.
\end{itemize}

\textsuperscript{91} Articles 6:10 and 6:12 of the CC.
\textsuperscript{92} Article 6:102 of the CC.
\textsuperscript{93} Article 210 of the CCP.
\textsuperscript{94} Article 215 of the CCP.
\textsuperscript{95} Article 214 of the CCP.
\textsuperscript{96} Article 118 of the CCP.
\textsuperscript{97} Supreme Court, 6 April 2012, ECLI:NL:HR:2012:BU3784.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

For more than 75 years, the Philippines has been without a comprehensive antitrust law. Instead, the adverse consequences of anticompetitive conduct have been addressed through isolated provisions scattered across various pieces of general legislation, including the Revised Penal Code of 1930. Indeed, despite the clear state policy against combinations in restraint of trade or unfair competition and the mandate to ‘protect Filipino enterprises against unfair competition and trade practices’ in the 1987 Philippine Constitution, more than 25 years lapsed before the Philippine Congress passed a special antitrust statute aimed at consolidating the state’s competition legislation.

In June 2015, the Philippine Congress enacted the Philippine Competition Act. Citing the need to level the playing field for investors and driven by foreign and domestic business groups, the Competition Act was endorsed to the President as a priority bill and finally signed into law on 21 July 2015. Almost a year later, on 31 May 2016, the implementing rules and regulations (IRR) of the Competition Act were signed, adopted and promulgated by the Philippine Competition Commission (PCC). The Rules of Procedure of the PCC (PCC Rules of Procedure) were approved on 11 September 2017 and became effective on 30 September 2017.

Most recently, the Supreme Court issued the Rule on Administrative Search and Inspection under the Philippine Competition Act (the Dawn Raid Rules), which requires the PCC to apply for an inspection order from designated special commercial courts before it may exercise its inspection powers and provides for the manner in which it should implement such inspection order. The Dawn Raid Rules took effect on 16 November 2019.

Like other models of antitrust legislation, the Competition Act covers not only acts of any person or entity engaged in any trade, industry or commerce in the Philippines, but explicitly authorises its extraterritorial application. Thus, the Competition Act will be enforced even against acts in international trade provided the same have direct, substantial and reasonably foreseeable effects in trade, industry or commerce in the Philippines.

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2 Act No. 3815, Article 185 (penalised ‘Machinations in Public Auctions’) and Article 186 (penalised ‘Monopolies and Combinations in Restraint of Trade’).
3 1987 Philippine Constitution, Article XII, Section 19.
4 ibid., Article XII, Section 1.
5 Republic Act No. 10667.
6 AM No. 19-08-06-SC.
The new Philippine antitrust law identifies prohibited anticompetitive agreements.\textsuperscript{7} Proscribed as illegal are agreements, between and among competitors, restricting competition as to price or components thereof, or other terms of trade; and fixing prices at auctions or in any form of bidding.\textsuperscript{8} Moreover, agreements between and among competitors setting, limiting or controlling production, markets, technical development or investments, and through dividing or sharing the market, are deemed violative of the Competition Act if these ‘have the object or effect of substantially preventing, restricting, or lessening competition’.\textsuperscript{9} All other agreements between or among competitors that have anticompetitive effects are also prohibited unless the same ‘contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits’.\textsuperscript{10}

The Competition Act also prohibits abuses of a market player’s dominant position\textsuperscript{11} as well as M&As\textsuperscript{12} where they substantially prevent, restrict or lessen competition.

To implement this legislation, the Competition Act created the PCC, an independent quasi-judicial body attached to the Office of the President of the Philippines.\textsuperscript{13} Established in February 2016, the PCC will act as a central body to police anticompetitive practices. The PCC is conferred with original and primary jurisdiction over the enforcement and implementation of the Competition Act,\textsuperscript{14} and is thus empowered to investigate violations thereof and other existing competition laws \textit{motu proprio} or upon receipt of a verified complaint.\textsuperscript{15} Significantly, included among its various powers is the authority of the PCC to conduct administrative proceedings\textsuperscript{16} as well as institute appropriate civil or criminal proceedings.\textsuperscript{17} To give teeth to the PCC’s authority, the Competition Act expressly empowers the PCC:

\begin{enumerate}  
  \item to issue subpoena \textit{duces tecum} and subpoena \textit{ad testificandum} requiring the production of books, records or other documents or data;  
  \item to summon witnesses;  
  \item to issue interim orders such as show cause and cease-and-desist orders; and  
  \item to deputise any and all government enforcement agencies, or enlist the aid and support of any private institution, corporation, entity or association.  
\end{enumerate}

In addition, the Competition Act recognises the continued existence of the Office for Competition under the Department of Justice (DOJ-OFC),\textsuperscript{18} albeit with the limited power and jurisdiction of conducting preliminary investigations and undertaking the prosecution of all criminal offences arising under the Competition Act and other competition-related laws.\textsuperscript{19}

\textsuperscript{7} Competition Act, Section 14.  
\textsuperscript{8} ibid., at Section 14(a).  
\textsuperscript{9} id., at Section 14(b).  
\textsuperscript{10} id., at Section 14(c).  
\textsuperscript{11} id., at Section 15.  
\textsuperscript{12} id., at Section 20.  
\textsuperscript{13} id., at Section 5.  
\textsuperscript{14} id., at Section 12.  
\textsuperscript{15} id., at Section 12(a).  
\textsuperscript{16} id., at Section 12(e).  
\textsuperscript{17} id., at Section 12(a).  
\textsuperscript{18} Established under Executive Order No. 45, series of 2011.  
\textsuperscript{19} Competition Act, Section 13.
In relation to its power to conduct administrative proceedings and institute civil or criminal suits arising from a violation of the Competition Act, the PCC is conferred with the sole and exclusive authority to initiate and conduct a fact-finding or preliminary inquiry into compliance with the provisions of the Competition Act. The inquiry may be initiated by the PCC at its own initiative, upon the filing of a verified complaint by an interested party or upon referral by a regulatory agency. After due notice and hearing, and on the basis of the facts and evidence presented, the PCC may issue a cease-and-desist order against the respondent entity.

Ultimately, the PCC will conclude its inquiry by either issuing a resolution ordering the closure of the inquiry if no violation or infringement is found or proceeding, on the basis of reasonable grounds, to a full administrative investigation. Where warranted by the evidence, the PCC may also file a criminal complaint with the Department of Justice.

The law requires the PCC to complete its preliminary inquiry, in all cases, within 90 days reckoned from the submission of the verified complaint, referral or date of initiation by the PCC. Although drafted in mandatory terms, the Competition Act itself does not prescribe the consequences for the PCC’s failure to complete the preliminary inquiry stage within the stated period. The PCC Rules of Procedure, however, clarify that if the facts and information available at the end of the 90-day period are insufficient to proceed to the conduct of a full administrative investigation the PCC’s Enforcement Office shall terminate the preliminary inquiry by issuing a resolution closing the preliminary inquiry without prejudice.

The initiation, conduct and termination of the preliminary inquiry of the PCC are significant milestones in private enforcement litigation because by express provision of the Competition Act no independent civil action for violation of the Competition Act may be instituted in court by a private party until the PCC has completed its preliminary inquiry. The lack of sanctions for the PCC’s failure to complete its preliminary inquiry within the prescribed 90-day period, and the absence of any clear suspensive or tolling effect of such inquiry on the statute of limitations to commence a civil suit, adversely impact on the private enforcement of the Competition Act. Significantly, the Competition Act authorises the PCC to institute civil suits. Unfortunately, the law does not prescribe the requirements for, as well as the procedure leading to, such civil action on the part of the PCC. Indeed, it fails to even state what relief the PCC would be entitled to demand in such civil suits.

In addition to administrative fines, the PCC may, upon finding that an entity has entered into an anticompetitive agreement or abused its dominant position, provide redress for such anticompetitive conduct by issuing injunctions; requiring adjustment, divestment or corporate reorganisation; and directing the disgorgement of excess profits under such reasonable parameters to be prescribed in the law’s implementing rules and regulations.

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20 ibid., at Section 31.
21 id.
22 id.
23 id.
24 id.
25 id.
26 PCC Rules of Procedure, Rule II, Art. 1, Section 2.6 (b).
27 Competition Act, Section 45.
28 ibid., at Section 12(a).
29 id., at Section 12(d) in relation to Section 12(h).
Violation of the Competition Act may also expose the erring persons to civil liability to private persons injured by reason thereof. On the issue of private rights and remedies, the Competition Act contains a singular provision – Section 45 – which authorises the filing of an independent civil action arising from violations of the Competition Act but only after the preliminary inquiry conducted by the PCC has been completed. Significantly, although Section 45 does not specifically recognise the continuing availability of other causes of action to private parties seeking redress for anticompetitive conduct, the entire Competition Act repeatedly refers to other existing competition laws and other competition-related laws, which phrases implicitly acknowledge that there are statutes, other than the Competition Act, from which legal rights may spring and under which redress in damages and other relief may be obtained.

As the Competition Act has just recently been passed, there has been no occasion for Philippine courts to interpret the same. It is expected that the passage of the Competition Act and the recent coming into effect of its IRR will result in an increase in both public and private antitrust litigation. However, only when the provisions of the Competition Act are clarified through more specific and detailed implementing rules and regulations, and are interpreted by the courts, particularly the Supreme Court, will the parameters of private enforcement suits within the Competition Act be clearly delineated.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Even before the Competition Act, civil suits for damages arising from anticompetitive conduct, although infrequent, were commenced in the Philippines. These suits have mostly centred on the enforcement of non-compete clauses in contractual agreements. Jurisprudence shows that the validity and enforceability of non-compete provisions in employment and service contracts have been litigated in the Philippines since the early 1900s. In resolving against objections that such non-compete clauses constitute an undue restraint of trade, the Supreme Court has relied on general principles of Philippine contract law as provided in the Civil Code of the Philippines (including the freedom of parties to enter into contractual stipulations that are not contrary to law, morals, good customs, public order or public policy) and basic fairness.

In addition, civil actions for damages arising from unfair trade practices and other acts of unfair competition have been commenced and maintained on the basis of Article 28 of the Civil Code, which states: ‘Unfair competition in agricultural, commercial or industrial enterprises or in labour through the use of force, intimidation, deceit, machination or any other unjust, oppressive or high-handed method shall give rise to a right of action by the person who thereby suffers damage.’

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30 id., at Section 45.
31 id., at Section 12(a).
32 id., at Sections 13 and 44.
33 The IRR of the Competition Act took effect on 18 June 2016.
34 Competition Act, Section 50.
35 Act No. 386 (1950).
36 Civil Code, Article 1306.
Explaining its appropriate application, the Supreme Court stated that what is prevented under Article 28 of the Civil Code is ‘not competition per se but the use of unjust, oppressive or high-handed methods which may deprive others of a fair chance to engage in business or to earn a living. Plainly, what the law prohibits is unfair competition and not competition where the means used are fair and legitimate’. To be able to recover damages under Article 28 of the Civil Code, the following requirements must be met: ‘it must involve an injury to a competitor or trade rival’, and ‘it must involve acts which are characterised as ‘contrary to good conscience’, or ‘shocking to judicial sensibilities’, or otherwise unlawful’. In 2014, the Supreme Court affirmed that the defendant engaged in unfair competition for which the plaintiff was entitled to recover damages and attorneys’ fees when faced with the following conduct:

\[ a \] the defendant suddenly shifting his or her business from manufacturing kitchenware to plastic-made automotive parts, the plaintiff’s line of business;
\[ b \] the defendant luring the plaintiff’s employees to transfer to his or her employ;
\[ c \] the defendant trying to discover the plaintiff’s trade secrets;
\[ d \] the defendant deliberately copying the plaintiff’s products; and
\[ e \] the defendant selling those products to the plaintiff’s customers.

As such, in the absence of an antitrust statute, Article 28 of the Civil Code has been the cornerstone of private antitrust enforcement litigation where the dispute is between competitors. Where the action is between parties who are not competitors or trade rivals and no other special law applies, a civil case may generally be brought under Articles 19, 20 and 21 of the Civil Code. Together with Article 28, Articles 19, 20 and 21 of the Civil Code all form part of the ‘Human Relations’ chapter of the Civil Code.

Admittedly, the Competition Act was meant to consolidate, to the extent possible, all competition-related laws and, for that reason, expressly repealed an array of Philippine laws including Article 186 of the Revised Penal Code, which prohibits monopolies or combinations in restraint of trade. As a catch-all, the Competition Act repeals ‘all other laws, decrees, executive orders and regulations, or part or parts thereof inconsistent with’ any of its provisions.

The Competition Act does not expressly repeal Article 28 of the Civil Code. Considering that Article 28 and the rest of the ‘Human Relations’ chapter of the Civil Code are not inconsistent with, much less repugnant to, the provisions of the new competition law, these provisions continue to exist and to be available as bases for redress, notwithstanding the Competition Act. Hence, one may take the view that an injured individual may still file a civil complaint for damages against a defendant under these general provisions of the Civil Code.

38 ibid.
39 id.
40 Civil Code, Article 19, which provides: ‘Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.’
41 id., at Article 20, which provides: ‘Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.’
42 id., at Article 21, which provides: ‘Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.’
43 Competition Act, Section 55.
44 ibid.
Indeed, it is possible that private damage actions premised on, among others, Article 28 of the Civil Code may continue to be instituted, despite the passage of the Competition Act, especially because of the express prohibition against commencing an independent civil action for violation of the Competition Act until the preliminary inquiry conducted by the PCC under Section 31 is terminated. Should the conduct complained about not be within the purview of the PCC, however, there appears to be nothing that legally bars private parties from instituting independent civil suits for damages arising from anticompetitive behaviour.

Any action arising from a violation of any penal provision of the Competition Act shall be barred unless commenced within five years from the time the criminal violation is discovered by the offended party, the authorities or their agents. With respect to administrative and civil actions, the five-year prescriptive period runs from the time the cause of action accrues, which is when the anticompetitive conduct that caused the alleged damage or injury occurred.

On the other hand, the separate civil action under Articles 19, 20, 21 or 28 of the Civil Code, which is akin to a tort under the Philippine legal system, prescribes within four years from the time the cause of action accrues.

As mentioned earlier, the institution of an independent civil action arising from a violation of the provisions of the Competition Act is prohibited until the PCC has terminated its preliminary inquiry into the conduct of the allegedly erring person or entity. Significantly, the preclusive effect appears to be limited to civil actions founded on violations of the Competition Act, and thus seemingly excludes civil actions brought under other laws, including the Civil Code. However, there is basis to argue that the period to file any civil case for damages arising from anticompetitive conduct, even if premised under Article 28 of the Civil Code, is suspended when the PCC is already conducting a preliminary inquiry. In GMA Network, Inc v. ABS-CBN Broadcasting Corporation, et al., the Supreme Court sustained the dismissal of a complaint for damages premised on unfair competition on the ground that it failed to state a cause of action. The complainant, GMA Network, Inc (GMA), alleged that the defendants took advantage of their common control and ownership, and thereby arbitrarily re-channelled GMA’s cable television broadcast on 1 February 2003, caused distortions to its signal transmission, reduced the quality of its programmes and thereby caused business interruptions to, and injured the operations of, GMA. In sustaining the dismissal of the complaint, the Supreme Court ruled that the issues of whether the conduct of the defendant cable companies had been committed and were unfairly done were within the primary jurisdiction of the National Telecommunications Communication, before which a similar complaint, also filed by GMA, was pending. In applying the doctrine of primary jurisdiction to dismiss the damage suit, the Supreme Court held that the questions underlying an award of damages entail specialised knowledge in the fields of communications technology and engineering, which courts do not possess. Thus, although regular courts

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45 id., at Section 46(a).
46 id., at Section 46(b).
47 Civil Code, Article 1146.
49 ibid.
50 id.
51 id.
have jurisdiction over actions for damages, per the Supreme Court, it would nonetheless be proper for the courts to yield their jurisdiction in favour of an administrative body with specialised expertise. 52

The doctrine laid down in GMA Network, Inc v. ABS-CBN Broadcasting Corporation, et al. may be applied to civil actions for damages grounded on the Civil Code, including Article 28 on unfair competition, and filed even before the preliminary inquiry of the PCC has been terminated. The PCC being the exclusive agency statutorily tasked to police anticompetitive conduct, the doctrine of primary jurisdiction may readily be invoked to dismiss such civil actions.

III EXTRATERRITORIALITY

From a criminal law perspective, the Philippines adheres to the territoriality principle, 53 such that its penal laws are generally enforced only within its territory. 54 From a civil law perspective, it is possible for a person found in the Philippines to file a case against another entity or person outside the country, even for acts committed abroad. The plaintiff is only required to prove that he or she has a right, such right was violated by the defendant, and he or she incurred damage by reason of the violation, the place of the commission of the violation being a non-issue. Acquiring jurisdiction over a defendant abroad or enforcing a Philippine judgment against him or her may pose certain challenges.

The Competition Act expressly prescribes the extraterritorial effect of its provisions. Thus, the Competition Act is made applicable (and enforceable) to international trade, including acts done outside the country provided they have ‘direct, substantial, and reasonably foreseeable effects in trade, industry or commerce in the Philippines’. 55 Accordingly, wrongful acts done outside the Philippines would be considered violations of the Competition Act, and thus actionable, whether criminally or civilly, if the effects of such acts are manifested or experienced within the Philippines.

52 id.
53 Act No. 3815 (1930), otherwise known as the Revised Penal Code, Article 2, provides:

Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:
1. Should commit an offense while on a Philippine ship or airship;
2. Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations and securities issued by the Government of the Philippine Islands;
3. Should be liable for acts connected with the introduction into these islands of the obligations and securities mentioned in the preceding number;
4. While being public officers or employees, should commit an offense in the exercise of their functions; or
5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code.

54 Civil Code, Article 14, which states: ‘Penal laws and those of public security and safety shall be obligatory upon all who live or sojourn in Philippine territory, subject to the principles of public international law and to treaty stipulations.’
55 Competition Act, Section 3.
As the Competition Act was only signed into law in July 2015, the parameters of the extraterritorial application of the Competition Act and the practical implementation of such extraterritoriality have not yet been clarified. And while the IRR reaffirmed the extraterritorial application of the law, they do not provide the much-needed elaboration on the extraterritorial scope of the Competition Act, a concept that deviates from the general territorial concept of Philippine penal laws. Nonetheless, the PCC Rules of Procedure expressly state that foreign corporations, partnerships, associations or other entities – regardless of whether registered in the Philippines, resident of the Philippines or not found in the Philippines – may be served with summonses in the specific manner provided therein.

IV STANDING

For private enforcement actions under the Competition Act, any person who suffers direct injury by reason of any violation of said law may institute a separate and independent civil action. Similarly, the provisions of the Civil Code, including Article 28 thereof, vest the right of action on the person who suffers damage by reason of the act complained about. The statutory requirement that the plaintiff be the party directly injured is consistent with the provisions of the Rules of Court, which require that a civil action be prosecuted in the specific manner provided therein. A real party in interest is defined as ‘the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit’. Per the Supreme Court, the interest contemplated by the Rules of Court is ‘material interest or an interest in issue to be affected by the decree or judgment of the case, as distinguished from mere curiosity about the question involved’. A case that is not prosecuted by a real party in interest is dismissible.

The requirement of locus standi of a party plaintiff has been relaxed by the Supreme Court in exceptional cases, such as where the case raises an issue of transcendental significance or paramount importance to the people; where it advances constitutional issues that deserve the attention of the High Court in view of their seriousness, novelty and weight as precedents; or where to do so would achieve substantial justice.

Although the prohibition on anticompetitive conduct and the consequent promotion of free and fair competition are significant state policies, it is doubtful that a plaintiff’s lack of legal standing in a civil case for damages would be excused as an exception to the general rule.

56 IRR, Rule 1, Section 2(a).
57 PCC Rules of Procedure, Rule IV, Article 3, Section 4.18 (c), (f), (g).
58 Competition Act, at Section 45.
59 ibid.
60 ibid.
62 ibid.
V THE PROCESS OF DISCOVERY

The Rules of Court set out rules on discovery, which are available in any civil proceeding. The recognised discovery modes include the following.

i Deposition pending action

Provided there is leave of court after jurisdiction has been obtained over any defendant or over property that is the subject of an action, or even without such leave as long as an answer has already been served, the testimony of any person, whether a party or not, may be taken, at the instance of any party, by deposition upon oral examination or written interrogatories. The attendance of such witnesses at the deposition may be compelled by the use of a subpoena. As to the scope of examination, the deponent may be examined regarding any matter, as long as not privileged, which is relevant to the subject of the pending action.

ii Interrogatories to parties

Under the same conditions as the foregoing, a party desiring to elicit material and relevant facts from any adverse party may do so by filing in court and serving upon the adverse party written interrogatories to be answered by the party served. The scope of written interrogatories is the same as depositions pending action.

iii Written request for admission

At any time after issues have been joined, a party may file and serve upon any other party a written request for the admission by the latter of the genuineness of any material and relevant document described in and exhibited with the request, or the truth of any material and relevant matter of fact set forth in the request. Unless otherwise allowed by the court, a party who fails to file and serve a request for admission on the adverse party of material and relevant facts at issue which are, or ought to be, within the personal knowledge of the latter, shall not be permitted to present evidence on such facts.

iv Production or inspection of documents or things

Upon motion of any party showing good cause therefor, the court in which an action is pending may:

1. order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books,
accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his or her possession, custody or control; or

order any party to permit entry upon designated land or other property in his or her possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated relevant object or operation thereon.\textsuperscript{75}

\textbf{v Deposition before action}\textsuperscript{76}

Even before a court case is commenced, a person who wishes to perpetuate his or her own testimony or that of another person regarding any matter that may be cognisable in any court of the Philippines may file a verified petition in the court for such purpose.\textsuperscript{77} In such petition, which shall be served on all identified potential adverse parties, the petitioning party must state, among others, the facts that he or she desires to establish by the proposed testimony and his or her reasons for desiring to perpetuate it.\textsuperscript{78}

The foregoing modes of discovery are devices to narrow and clarify the basic issues between the parties, and for ascertaining the facts relative to those issues,\textsuperscript{79} including those known to one’s adversaries. According to jurisprudence, the main purposes of discovery are to enable the parties to obtain the fullest possible knowledge of the issues and facts and thus prevent trials from being carried on in the dark (subject, of course, to recognised privileges),\textsuperscript{80} and to enable a party to discover the evidence of the adverse party and thus facilitate an amicable settlement or expedite the trial of the case.\textsuperscript{81} Accordingly, it is well settled that an objection that the discovery motion is a fishing expedition is no longer a reason to prevent a party from inquiring into the facts underlying the opposing party’s case through the discovery procedure.\textsuperscript{82}

\textbf{VI USE OF EXPERTS}

There is a dearth of jurisprudence on the use of experts and economists to establish the existence of anticompetitive conduct or to prove the existence, and extent, of damage. In acknowledgment of the need for experts in resolving antitrust issues, the Competition Act expressly authorises the PCC to commission consultants or experts in connection with an investigation.\textsuperscript{83} Of note, the PCC established a component Economics Office that is tasked to, among other things, ‘provide economic analysis to support the detection and investigation of anticompetitive behaviour’.\textsuperscript{84}

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\textsuperscript{75} id., at Section 1.
\textsuperscript{76} id., at Rule 24.
\textsuperscript{77} id., at Section 1.
\textsuperscript{78} id., at Section 2.
\textsuperscript{80} ibid.
\textsuperscript{81} Ong v. Mazo, et al., GR No. 145542, 4 June 2004.
\textsuperscript{82} ibid.
\textsuperscript{83} Competition Act, Section 33.
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The Rules of Court authorise the admission of expert opinions – that is, opinions of a witness on a matter requiring special knowledge, skills, experience or training, which he or she is shown to possess. Courts have also relied on testimony of actuaries as proof, for example, of the actual loss of a deceased’s person earning capacity.

Jurisprudence on Article 28 of the Civil Code, however, does not involve testimonies of experts and economists. Rather, the commission of acts amounting to unfair competition has been attested to by fact witnesses, and persons with personal knowledge of the plaintiff’s business and the defendant’s unlawful conduct. For private enforcement under the Competition Act, it is highly likely that experts and economists will have to be engaged to provide, inter alia, evidence on what is the relevant market, whether a particular player has a dominant position in such market and the impact of the alleged conduct on such market.

VII CLASS ACTIONS

In the Philippines, when the subject matter of a controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. In class actions, any party in interest shall have the right to intervene to protect his or her individual interest.

A class action is beneficial as it creates an impression that the effects of a defendant’s anticompetitive conduct are pervasive, impacting more than just one individual, which may influence a quasi-judicial officer or a judge hearing a case to rule against the defendant. Moreover, this may give the plaintiffs the opportunity to claim a substantial (if not the maximum) amount of actual damages, including exemplary damages as a matter of public good. Finally, prosecuting a damages case as a class action spreads the potentially substantial costs and expenses (especially where experts are engaged) across all said plaintiffs, and thus affords litigants without resources an opportunity to recover damages when they would not have had the capacity to initiate the suit.

The downside to class actions is that they are difficult to commence and maintain due to the strict requirements for their propriety: community of interest, substantially numerous class membership and adequacy of representation.

In one case, the Supreme Court affirmed the dismissal of a class action brought by several stockholders arising from an alleged violation of their pre-emptive rights because the damage suffered by the complaining stockholders is limited to their respective proportion of the unsubscribed shares and not to that portion corresponding to the shares of the other stockholders. Thus, the wrong suffered by each of them would constitute a wrong separate from those suffered by the other stockholders, and hence would not create the required common or general interest in the subject matter. Following the foregoing, it is possible that the courts would opine that, in certain instances, class actions are not permissible insofar as anticompetitive conduct is concerned because an injury suffered by some consumers or competitors may not necessarily be the same as the injury sustained or to be sustained by the others in the same class. In addition, a class action suit may be dismissed more easily as all

85 Rules of Court, Rule 130, Section 49.
86 ibid., at Rule 3, Section 12.
it takes is one disagreeable member of that class. The Supreme Court has ruled that a class action will not prosper if there is a conflict of interest or opinion between those represented and those who filed the action.  

**VIII CALCULATING DAMAGES**

A violation of the Competition Act or an act of unfair competition under Article 28 of the Civil Code renders the defendant liable for ‘all damages which are the natural and probable consequences of the act or omission complained of’, whether such damages have been foreseen or could have reasonably been foreseen by the defendant.  

As to what types of damages are recoverable, neither the Competition Act nor Article 28 of the Civil Code specifies. Thus, the general provisions of the Civil Code, which enumerates the types of damages that may be awarded by a court given a set of facts, and which specifies instances when court fees, legal costs and other litigation expenses may be recovered, are applicable.

Under the Civil Code, if proven by sufficient evidence, among the damages recoverable are actual, moral, nominal, temperate or moderate, or exemplary or corrective. Actual damages, which are awarded only when duly proved, comprehend not only the value of the pecuniary loss suffered but also the profits that the plaintiff failed to obtain.  

Attorneys’ fees and litigation expenses are recoverable as actual damages and may be awarded in reasonable amounts under certain circumstances, including when the case is a separate civil action to recover civil liability arising from a crime.

On the other hand, no proof of pecuniary loss is necessary for moral, nominal, temperate or exemplary damages to be awarded. The assessment of such damages is left to the discretion of the court, according to the circumstances of each case.

Moral damages compensate the injured party for physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar injury that are the proximate result of the defendant’s wrongful act or omission. Moral damages are expressly recoverable in Article 28 regarding unfair competition litigation.

Nominal damages are awarded to vindicate or recognise a right of the injured party that has been violated, and not to indemnify him or her for any loss suffered. In one Article 28 unfair competition case that was resolved by the Supreme Court in 2014, an award of nominal damages (in the amount of around US$4,400) was granted in recognition and vindication of the violation of the plaintiff’s rights and in view of its failure to quantify its losses arising from the defendant’s acts of unfair competition (initially alleged as around US$44,000).  

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89 Civil Code, Article 2202.
90 ibid., at Article 2199.
91 id., at Article 2200.
92 id., at Article 2208.
93 id., at Article 2208(9).
94 id., at Article 2216.
95 id., at Article 2217.
97 Civil Code, Article 2221.
Temperate damages may be granted when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty. An award of nominal damages precludes the recovery of temperate damages.

The Civil Code also authorises courts to award exemplary damages, which are imposed in addition to moral, temperate, liquidated or compensatory damages, by way of example or correction for the public good. Exemplary damages are not a matter of right but are left to the discretion of the court.

Significantly, in 1917, the Philippine legislature enacted Act No. 3247, ‘An Act to Prohibit Monopolies and Combinations in Restraint of Trade’, which authorises an award of treble damages and reasonable attorneys’ fees as civil liability arising from the prohibited anticompetitive behaviour therein penalised (such as entering into price-fixing agreements or employing monopolies to restrain free competition). Sections 1, 2, 3 and 5 of Act No. 3247, which defined the prohibited acts thereunder, were expressly repealed by the Revised Penal Code. The acts prohibited by Act No. 3247 were, however, restated in Article 186 of the Revised Penal Code. The Competition Act expressly repeals Article 186 of the Revised Penal Code, but essentially restates the prohibited anticompetitive acts thereunder. Section 6 of Act No. 3247, on the availability of treble damages, has never been expressly repealed and does not appear to be inconsistent with any of the provisions of the Revised Penal Code or the Competition Act. Thus, unless clarified by the Supreme Court or the legislature to the contrary, a private litigant may arguably assert a right, under Act No. 3247, to treble damages and reasonable attorneys’ fees for a violation of the provisions of the Competition Act.

Section 6 of Act No. 3247, however, has not been interpreted by the courts to date.

**IX  PASS-ON DEFENCES**

The concept of pass-on defences has not been recognised by the Competition Act. Moreover, there is no law, rule or jurisprudence in the Philippines which provides that damage suffered by a purchaser, and thereby the damages he or she is entitled to claim, by reason of an overprice of a cartelised product, are reduced or mitigated if he or she passes on some of the overcharge to his or her own customers. Notably, however, an award of actual damages is intended to compensate the plaintiff for pecuniary loss actually suffered by him or her as he or she has duly proved, and covers any profits that he or she had failed to obtain. Thus, it is theoretically possible for any defendant to raise the pass-on defence to disprove the actual amount of losses that the plaintiff has suffered. Significantly, however, every plaintiff under Philippine law is duty-bound to exercise the diligence of a good father of a family to minimise

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99 Civil Code, Article 2224.
101 Civil Code, Article 2229.
102 ibid., at Article 2233.
103 Act No. 3247, Section 6, which states: ‘Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.’
104 Revised Penal Code, Article 367.
105 See Competition Act, Sections 14 and 15.
106 Civil Code, Article 2199.
107 ibid., at Article 2200.
the damages resulting from the act complained of. 108 Hence, any passing on of the overcharge may be asserted as legally justified. Whether courts should take such passing on into account and thereby reduce the damages recoverable by the plaintiff is an undecided issue.

X FOLLOW-ON LITIGATION

Because the Competition Act was only signed into law in 2015 and its IRR only took effect in June 2016, follow-on antitrust litigation has yet to materialise in the Philippines. Instead, to date private damage suits arising from anticompetitive conduct have been stand-alone civil litigation, wherein the parties solely rely, and the courts review and decide based on, the parties’ respective evidence and the applicable law. Given that an independent civil action for violation of the Competition Act may not be instituted by a private injured party until the PCC has terminated its preliminary inquiry, 109 it is highly likely that there will be a surge in follow-on litigation, and especially where the PCC has, after the termination of a preliminary inquiry or the completion of an administrative proceeding, determined that there is substantial evidence to conclude that a defendant has engaged in prohibited, if not criminal, anticompetitive conduct that violates the Competition Act. Significantly, the competition law does not expressly bar the filing of a private damages suit in cases where the PCC has determined that the defendant has not engaged in any anticompetitive conduct. However, in view of the specialised know-how of the PCC, it is likely that the findings of the PCC, whether adverse to the defendant or otherwise, will be given great weight by the courts.

The Competition Act fails to provide for the tolling of the five-year prescriptive period during the PCC’s preliminary inquiry, which is supposed to be completed within 90 days. Because of the silence of the Competition Act, private injured parties must guard against prescription from barring any cause of action. As an Article 28 unfair competition case must be filed within four years from the time the cause of action accrues, should the PCC not yet have terminated its preliminary inquiry, a plaintiff would have to decide whether to file an Article 28 unfair competition case in court, or wait for the PCC to close its preliminary inquiry and be limited to a civil case founded on the Competition Act.

Note also Section 35 of the Competition Act, which mandates the PCC to develop a leniency programme to extend leniency to participants in an anticompetitive agreement that voluntarily disclose information to the PCC. The leniency that may be extended, subject to compliance with certain requirements, ranges from ‘immunity from any suit or charge of affected parties and third parties, exemption, waiver, or gradation of fines and/or penalties’. 110 Such immunity may be granted prior to or during PCC fact-finding or preliminary inquiry proceedings. The DOJ-OFC may likewise grant immunity or leniency in the event that there is already a preliminary investigation for a criminal offence pending before it. Note, however, that under the PCC Rules of the Leniency Program, the immunity from civil suit that may be granted under the Program relates only to ‘civil actions initiated by the PCC on behalf of affected parties and third parties.’ 111 It remains to be seen whether an entity granted immunity under the Leniency Program may still be subject to independent civil actions by injured third parties.

108 id., at Article 2203.
109 Competition Act, Section 45.
110 ibid., at Section 35.
111 PCC Rules of the Leniency Program, Section 1.
XI PRIVILEGES

The Philippines strictly enforces the attorney–client privilege, particularly a lawyer’s duty to maintain inviolate client confidences, which is mandated in the Code of Professional Responsibility. Recognising this duty, the Rules of Court provide that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of, or with a view to, professional employment; nor can an attorney’s secretary, stenographer or clerk be examined, without the consent of the client and his or her employer, concerning any fact the knowledge of which has been acquired in such capacity. An attorney who divulges the secrets of his or her clients may be subject to disciplinary sanctions and possibly criminal penalties. The attorney–client privilege extends to any work product that the lawyer has provided his or her client that the client and lawyer intended to remain confidential. The privilege, however, applies only to communication between the client and his or her counsel concerning a crime already committed, and not one that the client intends to commit in the future. This privilege may be raised to oppose a compulsory process issued by the PCC in the course of its preliminary inquiry as well as discovery measures in private enforcement litigation.

The Code of Professional Responsibility and the Rules of Court fail to distinguish between private practitioners and in-house lawyers. Moreover, the Supreme Court has not had occasion to rule on the extent that an in-house lawyer may invoke the attorney–client privilege to prevent disclosure or discovery. Nevertheless, the Supreme Court has acknowledged that being a corporate lawyer (or an in-house counsel) constitutes the practice of law. Thus, it should necessarily follow that the ethical obligations in the Code of Professional Responsibility are similarly imposed on in-house lawyers.

Regarding confidential documents and business information submitted by an entity to the PCC in the course of a preliminary inquiry or an investigation, the Competition Act states that the same shall not in any manner be directly or indirectly disclosed, published, transferred, copied or disseminated, unless the entity consents to the disclosure, or the document or information is mandatorily required to be disclosed by law or by a valid order of a court or a government or a regulatory agency. Thus, should a court in a private antitrust suit order the production of the submitted documents, it appears that the PCC may disclose the same, whether or not the same was privileged in nature before its submission. Moreover, the PCC Rules of Procedure provide that disclosure of confidential business information to government agencies outside of the Philippines shall be made only upon waiver of the entity claiming confidentiality or pursuant to a cooperation or information sharing arrangement between the government agencies concerned. In stark contrast, the PCC Merger Rules expressly provide that such disclosure to government agencies outside of the Philippines shall be made only upon waiver of the entity claiming confidentiality. Significantly, facts, data and information supplied in connection with a binding ruling, show cause order or consent order, as well as all admissions made, documents filed and evidence presented, shall not be

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112 Canon 21.
113 Rules of Court, Rule 130, Section 24(b).
116 Competition Act, Section 34.
118 PCC Merger Rules, Clause 9.15.
admissible as evidence in any criminal proceeding arising from the same act subject of the binding ruling, show cause order or consent order.\textsuperscript{119} A plea of nolo contendere cannot be used against the defendant entity to prove liability in a civil suit arising from the criminal action, nor in another cause of action.\textsuperscript{120}

Rule 4, Section 13 of the IRR of the Competition Act specifically provides for the treatment of confidential information submitted in the course of the notification and review process of a covered merger or acquisition. The Rule requires the party or entity submitting the information to clearly identify any material that it considers to be confidential, provide a justification for the request of confidential treatment of the information supplied and the time period within which confidentiality is requested, as well as to provide a separate non-confidential version thereof. In the event the PCC deems that the justification for confidential treatment provided by the entity or party is insufficient or not grounded, it may decide to make the information accessible. These rules are reiterated in the PCC Merger Rules.\textsuperscript{121} Similar rules on confidentiality are provided in the PCC’s Rules of Procedure with respect to all proceedings other than M&As.\textsuperscript{122} Considering the wording of Section 34 of the Competition Act (i.e., confidential treatment of confidential business information), the PCC may insist that, in all proceedings before it, it has the authority to determine whether or not particular information is confidential in nature. In this regard, note that the Competition Act imposes a fine for any violation of the confidentiality rule,\textsuperscript{123} and the officers of the PCC – including the chairperson, commissioners or any of its staff – may be penalised thereunder if the violation of the confidentiality rule results from any act or omission done in evident bad faith or gross negligence.\textsuperscript{124}

\section*{XII SETTLEMENT PROCEDURES}

Private actions for damages, whether for antitrust claims or otherwise, are generally allowed to be settled.\textsuperscript{125} In addition, civil liability arising from an offence may also be compromised, but the same shall not extinguish the public action for the imposition of a legal penalty.\textsuperscript{126} The Competition Act itself does not prevent private parties from entering into any settlement of their antitrust dispute. The Supreme Court has adopted a policy encouraging private settlements and, towards this end, mandates that all civil cases (except those that cannot be

\textsuperscript{119} Competition Act, at Section 37.
\textsuperscript{120} ibid., at Section 36.
\textsuperscript{121} See PCC Merger Rules, Clauses 9.1 to 9.16.
\textsuperscript{122} See PCC Rules of Procedure, Article XI.
\textsuperscript{123} Competition Act, at Section 34.
\textsuperscript{124} ibid., at Section 42.
\textsuperscript{125} Civil Code, Article 2035 provides:
\textit{No compromise upon the following questions shall be valid:}
(1) \textit{The civil status of persons;}
(2) \textit{The validity of a marriage or a legal separation;}
(3) \textit{Any ground for legal separation;}
(4) \textit{Future support;}
(5) \textit{The jurisdiction of courts;}
(6) \textit{Future legitime.}
\textsuperscript{126} ibid., Article 2034.
compromised) be referred to the Philippine Mediation Center for court-annexed mediation (CAM) as part of the pretrial process. Should mediation fail, the parties would be required to go through what is called judicial dispute resolution (JDR), which effectively serves as a secondary tier of mediation conducted by the trial judge. Should a settlement be reached, whether in mediation or JDR, the compromise agreement may be submitted to the court for approval and for issuance of a decision based thereon. The decision based on the compromise agreement is immediately final and executory and, if not performed, may be enforced like a court judgment. Under the provisions of Republic Act No. 9285 (ADR Act) and Supreme Court issuances, mediation proceedings are considered strictly confidential; thus, information or evidence obtained through mediation proceedings shall not be subject to discovery and shall be inadmissible in any adversarial proceeding (unless such evidence or information was otherwise admissible or discoverable prior to being submitted in the mediation).

While settlements under CAM and JDR are pursuant to processes mandated by the Supreme Court, parties are free to explore, and conclude, a settlement outside court proceedings (and even before an actual case is filed). In doing so, parties may agree to mediate their dispute. If a settlement is reached before a court case is filed, the agreement may be deposited by the parties with the appropriate trial court. In the event of a breach, a petition may be filed with the court where the agreement was deposited, which court shall summarily hear the petition and, where warranted, enforce the mediated settlement agreement.

Settlement of claims of third parties may likewise occur without private suits being instituted in a consent order proceeding. The consent order is a non-adversarial remedy whereby an entity under inquiry may, at any time prior to the conclusion of the PCC’s inquiry and without in any manner admitting a violation of competition laws, submit to the PCC a written proposal for the entry of a consent order. The law expressly provides that the proposal shall include, among others, ‘payment of damages to any private party/parties who may have suffered injury’. Thus, consent order proceedings may be a venue for entities under inquiry and prospective private litigants to settle civil claims.

127 Supreme Court Resolution in A.M. No. 01-10-5-SC-PHILJA dated 16 October 2001.
128 Supreme Court Resolution in A.M. No. 04-1-12-SC dated 20 January 2004.
130 Civil Code, Article 2037.
131 ADR Act, Chapter 2 (Mediation), Section 9.
132 ibid., at Section 9(c). Note, however, exceptions to the confidentiality rule are found in Section 11 of the ADR Act.
133 id., at Section 17.
134 Competition Act, Section 37 (c); see also PCC Rules of Procedure, Section 3.18.
XIII ARBITRATION

The ADR Act does not include private antitrust claims among those disputes that may not be resolved through the various alternative dispute mechanisms. 135 Subject to the requirement of consent, therefore, such claims may be resolved through binding arbitration, mediation, conciliation, early neutral evaluation or mini-trial, or through any combination thereof. 136

Private antitrust suits with a seat in the Philippines may be subject to domestic or international commercial arbitration. International commercial arbitration is governed by Chapter 4 of the ADR Act, which expressly adopts the UNCITRAL Model Law. Domestic arbitration is governed by Chapter 5 of the ADR Act, Republic Act No. 876 and certain identified provisions of the UNICTRAL Model Law. One difference between domestic and international commercial arbitration is found in the grounds upon which the award may be vacated. Following the UNCITRAL Model Law, the grounds to vacate an international commercial award rendered in the Philippines are limited, but include the public policy exception. 137 Although domestic awards may be vacated on more grounds, the same does not specifically include a public policy exception. 138 This is significant, because awards in antitrust suits may impact the state policy against anticompetitive conduct.

To date, the Supreme Court has not had occasion to decide on arbitral awards relating to private damage suits involving competition issues.

XIV INDEMNIFICATION AND CONTRIBUTION

The Civil Code specifically provides that the responsibility of two or more joint tortfeasors is solidary. 139 Thus, the injured party may proceed against any one or all of said tortfeasors simultaneously in seeking civil damages for unfair competition under Article 28 of the Civil Code. The Competition Act does not have an analogous provision.

Under the Rules of Court, third-party complaints and cross-claims against a co-defendant are allowed in civil actions. A cross-claim is any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. 140 Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. 141 A third (fourth, etc.) party complaint is a claim

135 id., at Section 6 provides:
The provisions of this Act shall not apply to the resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended, and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.
136 id., at Section 18.
137 id., at Section 19 in relation to UNCITRAL Model Law, Article 34(2)(b)(ii). See also ADR Act Implementing Rules and Regulations, Article 4,34(b)(ii)(bb).
138 id., at Sections 32 and 41 in relation to Republic Act No. 876, Section 24.
139 Civil Code, Article 2194.
140 Rules of Court, Rule 6, Section 8.
141 ibid.
that a defending party may, with leave of court, file against a person not a party to the action, calling the third (fourth, etc.) party defendant for a contribution, indemnity, subrogation or any other relief, in respect of his or her opponent’s claim.  

Per the Supreme Court, a defendant may implead a third-party defendant on an allegation of liability of the latter to the defendant for contribution, indemnity, subrogation or any other relief; on the ground of direct liability of the third-party defendant to the plaintiff; or on the ground of the liability of the third-party defendant to both the plaintiff and the defendant. In all cases, there must be a causal connection between the claim of the plaintiff in his or her complaint and a claim for contribution, indemnity or other relief of the defendant against the third-party defendant. Thus, the Supreme Court prescribed the following tests to determine the propriety of a third-party complaint:

a whether it arises out of the same transaction on which the plaintiff’s claim is based, or whether the third-party claim, although arising out of another or different contract or transaction, is connected with the plaintiff’s claim;

b whether the third-party defendant would be liable to the plaintiff or to the defendant for all or part of the plaintiff’s claim against the original defendant, although the third-party defendant’s liability arises out of another transaction; and
c whether the third-party defendant may assert any defences that the third-party plaintiff has or may have to the plaintiff’s claim.

Where there is no connection between the third-party claim and the plaintiff’s claim (such as where the plaintiff’s claim is the defendant’s non-payment of rentals for equipment leased under a contract and the defendant’s third-party claim is the third-party defendant’s non-payment of its billings for construction work rendered using leased equipment), the third-party complaint may be dismissed.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

In view of the relatively recent enactment of the Competition Act, developments anticipated in the area of antitrust will be related to the effective and expeditious implementation thereof. In this regard it should be noted that, while the Competition Act took effect on 15 August 2015, the PCC was only formally organised on 1 February 2016, and the IRR only became effective in June 2016. Moreover, the PCC Rules of Procedure, which govern all proceedings before the PCC other than M&As, only became effective on 30 September 2017, and the PCC Merger Rules only on 8 December 2017. While these PCC administrative issuances provide much-needed procedural guidance, nonetheless, much remains to be done in terms of establishing standards and parameters for the proper implementation, interpretation and application of the statute, especially in terms of private enforcement.

The apparent emphasis on transactional review should not be equated with a lack of enforcement activity. In its 2018 Annual Report, the PCC reported that it received 11 informal complaints, commenced five preliminary inquiries (four of which were *motu proprio*

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142 id., at Section 11.
144 ibid.
145 id.
146 id.
while one was based on a verified complaint), and commenced five full administrative investigations. In its 2017 Annual Report, it reported having acted on 11 stakeholder complaints, four preliminary inquiries, two recommendations for motu proprio investigation, one full administrative investigation, and 45 queries and requests from the public. In its 2016 Annual Report, it stated that it had acted on six complaints or queries, three preliminary inquiries, and one full administrative investigation.

On 30 September 2019, the PCC rendered its first decision involving abuse of dominant position. The case, PCC Enforcement Office v. Urban Deca Homes, was initiated by ‘numerous unit owners and tenants’ of Urban Deca Homes Manila (UDHM), a condominium corporation, claiming that they were prevented from engaging other internet service providers (ISP), and were limited to the in-house ISP whose service was slow, expensive and unreliable. After the full administrative investigation, UDHM submitted a proposal for settlement whereby it admitted to having abused its dominant position and offered to undertake several commitments. The PCC subsequently issued a decision approving the settlement. The PCC ordered UDHM and its ultimate parent entity to cease and desist from its abuse of dominant position, to pay administrative fines of more than 21 million Philippine pesos, and to comply with the terms and conditions of the settlement such as actively inviting other ISPs to offer their services to the unit owners and tenants not only of UDHM but of eight other condominiums owned by UDHM’s ultimate parent entity. Significantly, the PCC’s decision did not order the disgorgement of UDHM’s profits in favour of its tenants who suffered injury from UDHM’s abuse of dominant position. No follow-on litigation has been initiated to date.

Other developments also indicate that the PCC is gearing up for more enforcement activities. In its enforcement strategy and prioritisation guidelines issued on 29 August 2018, the PCC declared that it shall prioritise potential anticompetitive practices for enforcement action based on considerations of:

- public interest;
- resource allocation;
- likelihood of a successful outcome; and
- other reasonable grounds to conduct enforcement action.

The PCC also identified priority sectors for 2018: manufacturing, rice, poultry and livestock, pharmaceuticals, land transportation, air transportation, rural finance, e-commerce, retail, telecommunications, bakery products, milk products and fertilisers. For 2019, the PCC’s priority sectors were:

- the logistics supply chain;
- corn milling and trading;
- refined petroleum manufacturing and trading;
- sugar; and
- pesticides.

153 ibid., Paragraph 8 (a).
154 id., Paragraph 8 (b).
Recently, the PCC publicly announced that for 2020 its competition analysis and enforcement will focus on the telecommunications, retail, energy and electricity, transportation, construction, health and pharmaceuticals, and food sectors. It remains to be seen if there would be any public or private enforcement in these priority sectors soon.

In any event, the field of Philippine antitrust litigation, both private and public, is expected to grow exponentially. The first case to be tried under the Competition Act is the much-publicised 69.1 billion peso joint acquisition of a telecommunications entity by the Philippines’ first and second-largest telecommunications entities. The case is now ripe for a decision by the Philippine Supreme Court. While the issue in that case is largely procedural in nature (i.e., whether the PCC is correct in subjecting the joint acquisition to its review process notwithstanding that it was executed prior to the coming into effect of the IRR of the Competition Act), it is highly likely that the Supreme Court will make pronouncements as to the nature, extent and scope of the powers of the PCC. Following such pronouncements in a landmark case, the PCC may well be more active in exercising the full breadth of its regulatory functions, which in turn could spur private competition enforcement actions.

Moreover, the much-publicised 2018 case of the acquisition by Grab Holdings, Inc and MyTaxi.PH Inc of Uber BV and Uber Systems, Inc in the Philippines (as well as in South East Asia) has brought to fore the potential of competition law and the power of the PCC to protect the interests of the consuming public. When reports of the acquisition surfaced, the consumers of the ride-hailing mobile applications invariably expressed concerns that the transaction would lead to monopolistic behaviour by Grab to the detriment of the consuming public. The PCC reacted by subjecting the transaction to motu proprio review. It also ordered interim measures, requiring Grab and Uber to maintain the independence of their business operations and other prevailing conditions ex ante, pending the review. When the parties implemented their transaction despite the PCC’s interim measures, the PCC imposed monetary penalties on Grab and Uber. Ultimately, the PCC issued a commitment decision, clearing the transaction but binding Grab and Uber to their voluntary undertakings of service quality and price conditions, among others. On 12 November 2019, more than a year after its commitment decision, the PCC issued a new decision extending most of Grab’s commitments to at least another year. It also imposed new monetary penalties on Grab for breaching its original pricing undertaking, and ordered the disgorgement of Grab’s excess profits and the refund thereof to the customers. The significant public attention generated by this case has brought awareness of the remedies under competition law that are available to general consumers.

156 PCC Commission Resolution No. 08-2018 dated 3 April 2018.
158 PCC Case No. M-2018-001, Resolution dated 11 October 2018. The PCC imposed administrative penalties of 8 million pesos on Grab, 4 million pesos on Uber, and 4 million pesos jointly on Grab and Uber.
The PCC also worked with the Supreme Court towards the issuance of the Dawn Raid Rules, which took effect recently. While the information collected pursuant to dawn raids may only be used in administrative proceedings before the PCC, the discovery of such information will certainly help prospective private litigants to prove their claims before the courts.

Further, non-governmental organisations (NGOs) have been active in the promotion of consumers’ rights and, in a case before the Supreme Court involving the increase in electricity distribution rates, NGOs have alleged collusion among the distributor and suppliers in the wholesale electricity spot market aimed at artificially increasing the spot prices to the disadvantage of consumers. Although tainted with procedural defects, the Supreme Court has taken cognisance of the case, and the DOJ-OFC was reported to have commenced an investigation into the collusion allegations. With the Competition Act as law, NGOs will likely initiate more suits for the protection of consumers, even before any PCC inquiry can be commenced. In addition, since the PCC is required to proactively conduct a consumer information programme, consumers may become more aware of their rights and may initiate complaints with the PCC.

Finally, it is also possible that court actions will be filed to assail certain provisions of the Competition Act. These cases would provide an opportunity for the courts to interpret the meaning of the provisions of the law and thereby contribute to the body of knowledge of Philippine competition laws and policies.

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161 Rule on Administrative Search and Inspection under the Philippine Competition Act, Section 17.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY


The Polish lawmakers decided to implement the Damages Directive in one comprehensive piece of legislation devoted specifically to antitrust litigation – the Act of 21 April 2017 on the private enforcement of competition law (Private Enforcement Act) – and amended the general civil law liability provisions concerning enforcement, as appropriate. Minor amendments were also introduced, among others, to the Act of 16 February 2007 on Competition and Consumer Protection (Competition Act) concerning the discovery of evidence. The new regime became effective on 27 June 2017.

The Private Enforcement Act systematised and introduced important changes to the Polish private antitrust enforcement regime, setting some new rules of evidence in the Polish civil court proceedings facilitating claims by parties harmed by competition law infringements. Notwithstanding, while these amendments came into force in mid-2017, we have not observed a visible increase in the amount of private antitrust litigation activity in Poland.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The key regulation enabling private antitrust enforcement in Poland is currently the Private Enforcement Act. Private antitrust enforcement is founded on the principle of the culpability of the infringer of the competition law.² As such, there are three requirements for an infringer to be liable under the Act:

a culpability: that is, that a defendant’s behaviour infringing the competition law is illegal, unless the defendant is not at fault;

b harm incurred by the claimant; and

c the causal link between the defendant’s behaviour and that harm.

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1 Natalia Mikołajczyk and Wojciech Podlasin are senior associates at Linklaters C Wiśniewski i Wspólnicy.
2 Article 3 of the Private Enforcement Act.
Whether an infringer is at fault for an infringement of the competition law is determined on the basis of two premises: whether such behaviour is illegal (objective test) and whether the defendant was at fault (subjective test). Under the Private Enforcement Act, an infringement of competition law, which is understood as an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or their Polish equivalents (i.e., Articles 6 and 9 of the Competition Act, respectively), fulfills the illegality requirement.³

For liability to arise, a defendant must be liable for the infringement of the law, and the Private Enforcement Act introduces a statutory rebuttable presumption that the undertaking infringing the competition law is liable for that infringement.⁴ Consequently, it is the defendant who has to prove his or her non-liability. Further, Polish competition law provides for a statutory presumption that any infringement of the competition law causes harm,⁵ which includes both actual loss (damnum emergens) and lost revenue (lucrum cessans).⁶ To establish liability for an antitrust violation, there also must be a causal link⁷ between the infringement of the competition law and the harm incurred by the claimant. Under the applicable general provisions of Polish law, the infringer is therefore liable only for the ordinary consequences of its actions (objective test).

Cases concerning private antitrust litigation are heard before the district courts, regardless of the value of the claim.⁸

The limitation period in cases of private antitrust enforcement is five years from the date the claimant became aware of the loss resulting from the competition law infringement, or should have become aware of it if it had exercised due diligence. The limitation period cannot, however, be extended to longer than 10 years from the date of the occurrence of the infringement.⁹ The limitation period starts running only if the competition law infringement ceases to exist or is suspended if proceedings regarding the case are launched by the President of the Office of Competition and Consumer Protection (OCCP), the European Commission or any national competition authority within the EU.¹⁰ That suspension is automatically lifted and the limitation period continues to run one year after the proceedings before the relevant authority are concluded.¹¹ Unlike the Damages Directive,¹² the Private Enforcement Act does not provide for a suspension of the limitation period while parties attempt to resolve a dispute amicably.

The Private Enforcement Act provides that an infringement of competition is deemed to be established by a final infringement decision of the OCCP or a final judgment rendered by a court as a result of an appeal of a decision of the OCCP.¹³ The finding of an infringement in a legally valid decision of the OCCP or judgment should be regarded as proven for the purposes of actions for damages related to that infringement filed in Polish courts. The court is bound by an infringement decision insofar as it covers the nature of the infringement and

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³ Article 2 Point 1 of the Private Enforcement Act.
⁴ Article 3 of the Private Enforcement Act.
⁵ Article 7 of the Private Enforcement Act.
⁶ Article 361 Paragraph 2 of the Civil Code.
⁷ Article 361 Paragraph 1 of the Civil Code.
⁸ Article 11 of the Private Enforcement Act.
⁹ Article 9 Paragraph 1 of the Private Enforcement Act.
¹⁰ Article 9 Paragraph 2 of the Private Enforcement Act.
¹¹ Article 9 Paragraph 3 of the Private Enforcement Act.
¹² Article 18(1) of the Damages Directive.
¹³ Article 30 of the Private Enforcement Act.
its material, personal, temporary and territorial scope, as determined by the OCCP in the exercise of its jurisdiction. Moreover, the court is only bound by final infringement decisions of the OCCP or final judgments rendered by a court as a result of an appeal of a decision of the OCCP. Therefore, the final infringement decision means a decision that finds the competition law infringement and that is not a subject to ordinary appeal remedies.

Furthermore, under Polish law the OCCP can present the court with an opinion on the case in question, particularly in matters concerning competition and consumer protection, when it is justified by the public interest. The OCCP’s opinion may relate to the factual circumstances of a court case or the legal assessment of those circumstances. The opinion cannot be considered as evidence in the case and is not binding on the court. Providing the court with an opinion does not make the OCCP a party or any other participant to the court proceedings.

The provisions of the Private Enforcement Act apply in their entirety only to competition law infringements that took place after 27 June 2017, that is after the Private Enforcement Act entered into force. However, procedural rules set out in the Private Enforcement Act apply to all civil proceedings concerning antitrust damages initiated after 27 June 2017, regardless of when the competition law infringement occurred, if it remains within the limitation period.

III EXTRATERRITORIALITY

As a general rule, the application of the Competition Act extends to all actions where the anticompetitive effect took place on the territory of Poland. Thus, the Competition Act applies to both Polish and foreign entities. Moreover, the Competition Act applies each time that an agreement or a concerted practice has had an impact on competition in Poland irrespective of whether the conduct occurred in Poland or overseas (both in EU Member States and in third countries). The choice of substantive law in the private enforcement antitrust proceedings should follow the rules set out under the Rome II Regulation. According to Article 6(3) of Rome II, as a general rule, Polish law applies to all non-contractual obligations arising out of a restriction of competition that had effects in Poland.

As far as jurisdiction is concerned, in Polish private enforcement litigation, defendants may be domiciled in Poland, or domiciled outside of Poland if the infringement took place in Poland.

14 Article 31d of the Competition Act.
15 Article 31d of the Competition Act.
16 Article 36 Paragraph 1 of the Private Enforcement Act.
17 Article 36 Paragraph 2 of the Private Enforcement Act.
18 Article 1 Paragraph 2 of the Competition Act.
21 Article 7(2) of the Brussels I bis.
IV STANDING

Any entity with legal capacity that has suffered loss, directly or indirectly (e.g., customers), from the competition law infringement can bring a claim against the infringer.

The Private Enforcement Act presumes that competition law infringements cause harm. Competition law is understood as Articles 101 or 102 TFEU or their Polish equivalents (i.e., Articles 6 and 9 of the Competition Act). Therefore, the scope of this statutory presumption applies to cartels as well as prohibited vertical agreements and instances of abuse of a dominant position. Consequently, the application of the Private Enforcement Act in Poland is wider than the Damages Directive, which mandatory application is limited to cartel infringements.

V THE PROCESS OF DISCOVERY

The general rule in Polish civil court proceedings is that the burden of proof relating to a fact shall rest on the person who attributes the legal effects to that fact, except in the case of rebuttable presumptions (e.g., in cases of contractual liability), where the reversed burden of proof is on the defendant.

There are no limitations on the form or kinds of evidence that can be presented, but the court can exclude evidence submitted only for the purposes of delaying the proceedings. The non-exhaustive list of forms of evidence in civil proceedings includes documents (official and private), witness statements, expert opinions, inspections and hearings.

The Private Enforcement Act introduces an entirely new, simplified procedure for obtaining evidence in antitrust civil litigation, including the claimant’s right to file a request for disclosure of evidence.

Where the claimant has presented a request for the disclosure of evidence with a reasoned justification of the plausibility of its damages claim and undertook to use the obtained evidence solely for the purposes of pending antitrust proceedings, the court may order the defendant to produce the relevant documents in its possession and custody. Failure by the defendant to produce documents may result in the claimant’s full reimbursement of the costs of the proceedings (regardless of the outcome of the case), or the court’s discretion to draw adverse inferences, or both. The defendant is also entitled to file a request for evidence subject to the same requirements and limitations.

Under the Private Enforcement Act, the court may also order disclosure of evidence by a third party, including the competition authority. The competition authority is under an obligation to disclose such evidence only if obtaining the relevant information in any other way is practically impossible or excessively difficult. The provision does not, however, provide the court with discretion to order disclosure of leniency statements and settlement submissions made by the infringer. The Act exempts such documents from disclosure as privileged. Even if the settlement submission is withdrawn it must be kept confidential, at least until the antitrust proceedings before the relevant competition authority are concluded. The same rule applies to information prepared by the party in the antitrust proceedings if prepared specifically for such proceedings.

22 Article 6 of the Civil Code.
23 Article 17 of the Private Enforcement Act.
24 Article 17 Paragraph 2 of the Private Enforcement Act.
The decision of a court on disclosure of evidence can be appealed to the second instance court and legally binding decision ordering disclosure of evidence constitutes an enforcement order. Misuse of disclosed evidence will result in the court disregarding that evidence and a party requesting the disclosure of evidence in bad faith may be subjected by the court to a non-discretionary fine of up to 20,000 zlotys.

VI USE OF EXPERTS

There are no specific provisions governing the use of experts in private antitrust enforcement proceedings, and the general rules of the Civil Procedure Code apply accordingly.

In matters requiring specific expertise, the court may appoint experts (one or more, as it finds appropriate) from the official list of court expert witnesses, or request an expert report from a scientific or specialised institution. The assessment of expert evidence is left for the court and the only statutory requirement for an expert opinion is for it to have a justification. The court may appoint an expert witness at its own discretion or at a party’s request, however in the latter case the decision ultimately rests with the court. In any case, expert witnesses must remain impartial.

Since Polish law does not recognise party-appointed expert witnesses in civil court proceedings, the evidentiary value of opinions prepared by such experts is limited – that is, that of a party position or a private document – and is subject to procedural rules applicable to any other evidence. Such opinion will not have the evidentiary value of an opinion issued by an expert witness appointed by the court.

After the reform of the Civil Procedure Code that became effective in November 2019, the courts may permit the use of the expert opinion prepared by the administrative body in a separate proceedings. This means that upon the party’s motion in the private enforcement litigation the court may rely on the expert opinion ordered by the competition authority during the administrative proceedings concerning private competition law infringement.

Although the Private Enforcement Act introduces rebuttable legal presumptions specific to private antitrust enforcement, such as the presumption of harm, the use of experts remains key for proving other factors relevant to the claim, such as the amount of damage.

VII CLASS ACTIONS

In Poland, there is no specific class action procedure related to competition law infringements. However, the harmed parties may rely on the class action provisions in the Group Proceedings Act.

Under the Group Proceedings Act, class action suits may be brought in cases where at least 10 persons pursue the same type of claims based on the same or similar factual background. The closed list of categories of cases permitted under the Group Proceedings Act includes, among other torts (e.g., competition law infringements), liability suits for

26 Article 278 Paragraph 1 of the Civil Procedure Code.
27 Article 285 of the Civil Procedure Code.
non-performance or improper performance of contracts, unjust enrichment and consumer protection claims. Class action suits can also be brought by groups of entrepreneurs or groups of entrepreneurs together with other entities. In the proceedings, the group is represented by a sole representative who acts in his or her own name on behalf of the group and must be approved by all group members.\textsuperscript{31}

In addition, the Private Enforcement Act introduces two instances where non-governmental organisations (NGOs) can bring actions on behalf of claimants, subject to their written consent. NGOs can represent entrepreneurs or consumers, respectively, as long as their statutory tasks include market protection against practices that violate competition law or consumer protection.\textsuperscript{32} Both instances require the claimant’s written consent.

Although currently class actions in Poland are subject to lower court fees and allow for the court to award attorneys’ contingency fees of up to 20 per cent, not many such suits for competition law infringements have been initiated so far. This may be partially due to group proceedings taking considerably longer than typical civil court cases and the court’s discretion to order security for costs, if warranted.

\section*{VIII CALCULATING DAMAGES}

The Private Enforcement Act establishes a rebuttable presumption that any competition law infringement (domestic or EU) results in harm.\textsuperscript{33} Thus, to seek damages in private enforcement, in principle, the injured party will only have to prove the extent of the harm incurred.

The key element for each damages claim is the quantification of loss (both the actual loss and lost profits) resulting from the competition law infringement. The Private Enforcement Act does not provide a specific quantification method in this regard. Rather, it refers the court to the recommendations set out in the relevant Commission guidelines.\textsuperscript{34}

However, those guidelines are in no way binding on the Polish court. In its damages calculation, the court must only follow the mandatory provisions of Polish civil law (i.e., award the appropriate monetary damages based on the court’s assessment and consideration of all the circumstances of the case).\textsuperscript{35} Under the general provisions of Polish civil law, the damages awarded are designed to restore the claimant to the position in which it would have been had the breach (e.g., the competition law infringement) not been committed. Thus, the court cannot award damages exceeding the amount of loss actually incurred by the claimant, and punitive or exemplary damages are not available under Polish law. With the reform of the Civil Procedure Code that became effective in November 2019, the courts now have wider discretion to apply equity considerations when the circumstances of the case prove it

\begin{footnotes}
\item[31] Article 4 Paragraph 2 of the Group Proceedings Act.
\item[32] Article 14 of the Private Enforcement Act.
\item[33] Article 7 of the Private Enforcement Act.
\item[34] Article 31 Paragraph 2 referencing the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/08).
\item[35] See Article 361 Paragraphs 1 and 2 of the Civil Code; Article 362 Paragraphs 1 and 2 of the Civil Code; and Article 322 of the Civil Procedure Code.
\end{footnotes}
impossible, excessively difficult or inexpedient to precisely prove the value of the claim. It remains to be seen how the courts will apply this wider discretion to private enforcement claims.

Notwithstanding, under the Private Enforcement Act, the court can request assistance in the calculation of damages from the OCCP or a competition authority from another Member State. None of these organs, however, are legally bound to assist; nor is the court bound by their recommendation.

In addition, the Private Enforcement Act establishes a mechanism for corrections of interest in cases where compensation is determined based on a price from a date different than the date on which the compensation was fixed. In such cases, the aggrieved party is entitled to claim additional statutory interest for the period from the date used for the determination of the price until the date on which the claim becomes due and payable.

Finally, under the Private Enforcement Act the court is bound by orders and decisions of competition authorities confirming infringements of competition law regarding each specific case, which cannot be overruled in the compensation proceedings.

With regard to attorneys’ fees, retainer costs can be reimbursed according to payment rates specified in separate regulations, but awarded costs cannot exceed these rates. Awarding a retainer contingency fee of up to 20 per cent is permitted in class actions.

**IX PASS-ON DEFENCES**

The Private Enforcement Act contains a statutory pass-on presumption, according to which any competition law infringement resulting in an overcharge for a direct purchaser is presumed to be passed on to the indirect purchaser who bought the products. However, the pass-on presumption can be claimed and used only by the indirect purchaser seeking compensation from the antitrust infringer. The presumption is rebuttable, and the infringer has the right to contest it. To benefit from this presumption the initial competition law infringement must be proven, for instance by a decision of a competition authority (i.e., the OCCP, the European Commission or a competition authority of the EU Member State) or by a court’s judgment.

The pass-on presumption cannot be used by the infringer to defend him or herself from the compensation claims. The infringer, when raising such a defence charge, must always prove that the overcharge was passed on by the direct purchaser and therefore he or she should be awarded limited damages or no damages.

**X FOLLOW-ON LITIGATION**

A private enforcement claim can be brought in civil proceedings on a follow-on basis in respect of any type of practice that might be deemed anticompetitive under Polish or EU competition law. The Private Enforcement Act provides that an infringement of competition is deemed to be established by a final infringement decision of the OCCP or a final judgment.
rendered by a court as a result of an appeal of a decision of the OCCP.41 The Act does not provide any limitation on private actions or awards against parties who have been subject to public enforcement actions.

XI PRIVILEGES

The Private Enforcement Act does not explicitly mention all the circumstances establishing the privilege, that is, the obligation not to disclose information during the course of private antitrust enforcement proceedings. Nevertheless, the provisions of other legislative acts regarding confidentiality of information apply.

Polish courts must respect the confidentiality of communications between an attorney admitted to the bar and his or her client.42 Consequently, the content of correspondence between a client and an attorney and the content of legal advice are privileged. Requests for disclosure of such evidence during a private antitrust litigation should be rejected by the court. The same principle applies to other kinds of information considered as confidential under Polish law, such as classified information, medical secrets, banking secrets or information falling within the scope of press privilege.

The Private Enforcement Act provides that the court shall refuse requests for the disclosure of evidence when it does not meet the proportionality requirement.43 When deciding whether the disclosure would be proportional, the court must consider the extent to which the evidence relates to information constituting a business secret or other secret subject to legal protection under separate regulations, and the means available to protect such information.44 At a party’s request, the court can allow such evidence and at the same time restrict access to it during the proceedings.45

In addition, the Private Enforcement Act provides that in private antitrust enforcement proceedings, the Polish courts cannot order a party or a third party to disclose leniency statements and settlement submissions, including settlement proposals.46

XII SETTLEMENT PROCEDURES

Settlement procedures applicable to private antitrust enforcement are governed by the general rules of Polish civil procedure and parties to a damage claim in relation to a competition law infringement can settle the case. In cases where an amicable settlement is admissible, the court should strive to reach an amicable settlement at any stage of the proceedings, in particular by encouraging the parties to use mediation. If a court settlement is reached, it must be signed by the parties and reflected in the court record.

Additionally, the Private Enforcement Act states that an injured party that has settled with one of the co-infringers can only claim from the other co-infringers an amount of damages reduced by the amount that the settling co-infringer would have been liable for if

41 Article 30 of the Private Enforcement Act.
42 Article 261 Paragraph 2 of the Civil Procedure Code.
43 Article 21 Paragraph 2 of the Private Enforcement Act.
44 Article 21 Paragraph 2 Point 4 of the Private Enforcement Act.
45 Article 23 of the Private Enforcement Act.
46 Article 18 Paragraph 1 of the Private Enforcement Act.
not for the settlement. Under the general Polish law provisions, the amount of the antitrust settlement does not have to be revealed. Rather than being based on the actual amount settled, the reduction is based on the co-infringer’s share of damages taking into account all circumstances of the case, including the fault of the settling co-infringer and the extent of the co-infringer’s contribution to the damage that occurred.

The indirect consequence of the rule set out in Article 6 of the Private Enforcement Act is also that the settling co-infringer is no longer jointly liable with the remaining co-infringers and cannot be subject to any recourse claims from them. Therefore, it is in the jointly liable infringer’s interest to have the settlement reflected in the claimant’s statement of claim or put on the record during the court proceedings.

Finally, the settling co-infringer is not released from joint and several liability for the entire damage that has occurred in cases where the claimant cannot recover the damages from the other non-settling co-infringers. The inability to recover from other co-infringers must meet an objective test, that is, that objective circumstances exist that foreclose the claimant’s ability to effectively and fully recover damages in their entirety (e.g., due to bankruptcy). In such cases, the claimant is entitled to recover the damages also from the infringer from which it previously obtained a settlement and such a co-infringer retains the recourse rights against the others.

XIII ARBITRATION

Under Polish law, proprietary claims are admissible in arbitration and so parties can agree to submit a dispute involving infringements of competition law to the arbitration courts, provided that such disputes arise from contractual relations. The most recognised arbitral institutions in Poland are the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Polish Confederation Lewiatan.

In the past few years, very few cases concerning breaches of competition law (e.g., in conjunction with intellectual property law) have been heard by arbitral tribunals. Due to the confidential nature of the proceedings, no detailed information about those cases is publicly available.

XIV INDEMNIFICATION AND CONTRIBUTION

In Poland, undertakings that have infringed the competition law through joint behaviour are jointly and severally liable for the harm caused by that infringement and the claimant is thus entitled to seek full compensation from any of the co-infringers.

The Private Enforcement Act introduces two exceptions to this rule: small or medium-sized enterprises (SMEs) and infringers granted immunity under a leniency programme.

An SME will only be liable to its own direct and indirect purchasers and providers if:

\( a \) its market share in the relevant market was below 5 per cent at any time during the infringement;

\( b \) the application of the normal rules of joint and several liability would irretrievably jeopardise its liquidity or cause loss of value of its assets;

47 Article 6 of the Private Enforcement Act.

48 Article 441 Paragraph 1 of the Civil Procedure Code.
c the SME has not led the infringement;
d the SME has not coerced other undertakings to participate therein; and
e the SME has not previously been found to have infringed the competition law.

An undertaking that has been granted immunity under a leniency programme is jointly and severally liable only to its direct or indirect purchasers or providers, or if full compensation cannot be obtained from the other co-infringers.

Where an injured party contributed to the occurrence or increased the extent of the damage, the court has the right, but not the duty, to reduce the amount of damages.49 The court may award full damages even in the event of contributory negligence.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Private Enforcement Act introduces a number of solutions that should facilitate seeking compensation from competition law infringers through private enforcement. Yet despite the Act being in force since mid-2017, such cases remain relatively rare in Poland.

Many suggest that this is due to the limited awareness of potential claimants of the availability of private enforcement actions, the relatively expensive and lengthy litigation, and the lack of the required expertise in Polish civil courts. Private enforcement enthusiasts believe that new discovery rules, the availability of class actions and the simplified procedures introduced under the Private Enforcement Act will increase the popularity of such cases in the coming years.

Certainly, with those procedures applicable to all kinds of competition law infringements (cartels, but also vertical agreements and abuse of dominant position) and competition authority’s decisions being binding on the Polish courts, it may be the OCCP’s active role in the pursuit of competition law infringements that determine the future caseload of antitrust disputes.

It will also be interesting to see whether injured parties will look in a more favourable manner at arbitration as a forum to seek compensation for competition law infringement. The more lenient procedural rules governing the arbitration proceedings and the arbitrator’s greater discretion in awarding damages and representation fees may compensate the likely higher cost of such a solution.

It remains to be seen how the November 2019 reform of the Civil Procedure Code will impact private enforcement proceedings. Although the reform did not have any direct impact on private enforcement rules and the Private Enforcement Act itself, litigation between undertakings is now governed by stricter procedural rules that could negatively influence antitrust litigation in Poland.

49 Article 362 of the Civil Code.
Chapter 18

PORTUGAL

Gonçalo Anastácio and Catarina Anastácio

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private enforcement has been a reality in Portugal for some time, with a sound number of precedents, and is gaining in significance. The two major initial proceedings of note involve follow-on cases.2

The first case relates to a Portuguese Competition Authority (PCA) 2009 decision establishing that Portugal Telecom (PT) had abused its dominant position in the wholesale and retail broadband access markets through a margin squeeze and a discriminatory rebate policy. Following that decision, NOS (PT’s major competitor) launched a damages action with the Lisbon Judicial Court in 2011.3 In November 2016, the Court handed down its ruling, dismissing the case on the grounds that NOS had not sufficiently established the infringement. Nevertheless, this is a novel case in the Portuguese private enforcement landscape due to the infringement involved – margin squeeze – and also due to the Court’s extensive reasoning and proximity to the jurisprudence of the Court of Justice of the European Union (CJEU).

The second case is still pending before the Portuguese courts. It involves Sport TV, a Portuguese sports-oriented premium cable and satellite television network operating in the market for premium pay-TV sports channels, which was found by the PCA to have abused its dominant position for several years by imposing discriminatory conditions on operators, and concurrently having limited development and investment in the market. Following the decision, three separate damages actions were filed with the court, one of which is a class action, representing the first of its kind in competition matters in Portugal.4 After some setbacks, the Court finally decided on the admissibility of the action and gave the consumers 30 days to opt out.

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1 Gonçalo Anastácio is a partner and Catarina Anastácio is a consultant at SRS Advogados. The authors would like to thank Rita Lynce de Faria, professor of civil procedure at Universidade Católica and of counsel at SRS Advogados, for her comments on this chapter, and Luís Seifert Guincho and Maria Stock da Cunha, from the competition law department of SRS Advogados, for their research support.

2 Both PCA decisions were also appealed. The first was annulled by the Court because the administrative sanction had become time-barred; the second was upheld by the Court, although the fine was reduced.

3 Around the same time NOS filed its action, Onitelecom also sued PT for damages. However, the case was first dismissed by the Lisbon Judicial Court on the grounds that the statute of limitations had expired. The Court applied the three-year statute of limitations foreseen in Portuguese tort law, and considered that the deadline started running from the day the plaintiff filed its complaint before the PCA. The Lisbon Appeal Court confirmed the initial ruling.

4 This is, in fact, the second class action in Portugal where competition law issues have been raised. However, in the first case, DECO v. Portugal Telecom, competition law issues were not discussed because the case was decided based on specific telecom rules.
The Portuguese court deciding on one of those damages actions has submitted a referral for a preliminary ruling to the CJEU relating to the time frame for the enforceability of the Antitrust Damages Directive and the compatibility of a number of national rules applying to antitrust damages cases in the pre-harmonisation era (C-637/17). It was the first CJEU referral concerning the EU Damages Directive.

In particular, the Portuguese court asked for guidance on the application of limitation rules for the Damages Directive relating to facts arising before the deadline for implementation and before the country transposed the law. The CJEU ruled that when a Member State decides that the Directive’s provisions are not applicable to actions for damages brought before the transposition, these actions remain governed exclusively by the national procedural rules in force. Since the Cogeco action was lodged before the transposition deadline and effective implementation in Portugal, the Damages Directive was inapplicable to the case.

However, the European Court also said that national legislation laying down limitation periods and rules for suspension or interruption must not undermine the full effectiveness of Article 102 TFEU, which might happen if the national legislation specifies that the limitation period in respect of actions for damages is three years and starts to run before the injured party has all the necessary information. Also, the judgment concluded that the principle bans national legislation that does not include any possibility of suspending or interrupting the limitation period during the competition authority proceedings. In conclusion, Article 102 TFEU and the principle of effectiveness preclude the Portuguese limitation rules for abuse of dominance cases. This was a very important ruling that helped to clarify terms not only for this case but in general, resulting in several actions being time barred.

With Sport TV’s actions pending, there have been no clear-cut awards of damages on the grounds of competition law infringements to date. 6

Nevertheless, there are already many general private enforcement precedents (even if competition law is typically only one of the legal angles in question), and the number of these is constantly increasing. 7 In most cases, the competition rules were brought into the litigation sphere not by the plaintiffs but rather by the defendants as a means of defence, most of the precedents having a vertical restraints nature, 8 and often the validity of agreements or of particular clauses thereof being the leitmotif for the redress.

Furthermore, since the transposition of the Damages Directive, 70 damages actions have been launched with the specialised competition court: 68 following the European Commission decision on the Trucks cartel case (AT.39824), one following a decision of the Portuguese Competition Authority on a cartel in the sector of pre-fabricated modules and one allegedly partially following a European Commission decision on abuse of dominance. In addition, there are others lodged with several civil courts.

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5 Leonor Rossi and Miguel Ferro refer to the existence of one precedent, with the caveat that it can be argued as essentially an unjustified enrichment case (Revista de Concorrência e Regulação, No. 10, April–June 2012, p. 113).
6 There is already one recent res judicata precedent, specifically for damages, as regards the PIRC (the unfair competition regime), under Decree-Law No. 370/93, of 29 October.
7 According to Miguel Sousa Ferro in Jurisprudência Portuguesa de Direito da Concorrência, Capítulo 7: Jurisprudência de Private Enforcement, there were 106 judicial rulings between 2011 and 2015, and there was an increment of 212 per cent more judicial rulings in 2015 than in 2011.
8 On these and other conclusions, see the above-mentioned paper.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Directive 104/2014 (Directive) was transposed into the Portuguese legal system by Law No. 23/2018 of 5 June, which came into force two months later. In addition to Law No. 23/2018, the legislative framework for private antitrust enforcement in Portugal includes, besides the substantive rules on competition (laid down in the Portuguese Competition Law (PCL)), the general rules on civil liability provided for in the Civil Code (CC) (regarding substantial issues not covered by Law No. 23/2018) and the procedural rules of the Code of Civil Procedure (CCP).

Despite following the Directive very closely, Law No. 23/2018 goes beyond it in certain aspects and contains some innovative solutions.

First, Law No. 23/2018’s scope is broader than the Directive’s in two aspects:

a) it applies not only to damages actions, but also to other requests based on infringements of the competition law (thus including, inter alia, declarations of nullity of agreements or contractual clauses, actions aimed at obtaining a judicial declaration or an injunction, and actions on unjust enrichment); and

b) it applies not only to damages actions for infringements of EU competition law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)), with or without parallel application of equivalent national rules (in Portugal, Articles 9 and 11 PCL), but also to damages actions exclusively based on infringements of the Portuguese competition law or of equivalent provisions of other Member States. In Portugal, this includes damages actions for abuse of economic dependence (Article 12 PCA).

An important substantive aspect that Law No. 23/2018 has innovated regards the scope of liability for damages. It states that in addition to the undertaking that committed the infringement, whoever has exercised a dominant influence over the infringer during the infringement shall also be liable. In addition, there is a presumption of dominant influence by the parent company if it holds 90 per cent or more of the subsidiary’s share capital.

Another aspect in which Law No. 23/2018 goes beyond what is prescribed by the Directive concerns the effect of national decisions. In addition to giving the effect of an irrefutable presumption of the existence of an infringement to the final decisions of the PCA and of Portuguese courts, Law No. 23/2018 also gives the effect of a refutable presumption to the final decisions of competition authorities and courts of other Member States.

Regarding jurisdiction, Law No. 23/2018 introduced a major novelty within the Portuguese legal system. Before its entry into force, the competence to decide on private competition actions lay with the judicial courts, as there was no specialised court for such matters.

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9 The Portuguese Competition Law, approved by Law No. 19/2010, of 8 May.
10 The Portuguese Civil Code enacted by Decree No. 47344, of 25 November 1966, as amended.
11 The new Portuguese Code of Civil Procedure was enacted by Law No. 41/2013, of 26 June.
12 Article 1(1) and 2(1) of Law No. 23/2018.
13 Article 3(1)(2) of Law No. 23/2018.
14 Article 3(3) of Law No. 23/2018.
15 Article 9 of the Directive.
16 Article 7 of Law No. 23/2018.
This has changed, as Law No. 23/2018 attributes the competence for hearing claims arising from competition infringements to the specialised Competition, Regulation and Supervision Court (CRSC), whose jurisdiction in competition law matters had been limited to public enforcement (as a first instance court of appeal from PCA decisions\(^{17}\)). It is important to note that this competency only exists regarding actions arising purely from competition law infringements.\(^{18}\) It is also established that appeals from decisions of the CRSC in private enforcement cases shall be centralised in the same civil section of the Lisbon Appeal Court and of the Supreme Court.\(^{19}\)

### III EXTRATERRITORIALITY

The PCL applies to all anticompetitive practices that take place on Portuguese territory or that have, or may have, an anticompetitive effect in Portugal.\(^{20}\)

The applicability of Portuguese law in cases of private enforcement concerning non-contractual obligations is regulated by the Rome II Regulation,\(^{21}\) and concerning contractual obligations by the Rome I Regulation.\(^{22}\)

Regarding damages actions, pursuant to the CC,\(^{23}\) the law applicable to extracontractual civil liability is the law of the state where the main cause of the damage occurred. If the law of the state where the harm occurred considers the defendant liable, while the law of the state in which the activity took place does not, the former will apply, on the condition that the defendant could have foreseen that the act or omission could result in damage in that state.

Contractual liability cases are, according to the CC,\(^{24}\) ruled by the law agreed on by the parties, provided that such law corresponds to a real interest of the parties or is connected with some elements of the contract. Where the parties have not agreed upon a specific law, the applicable law will be the one of the state of their common residence or the law of the state where the contract was signed.

Regarding the territorial jurisdiction of national courts, Brussels I\(^{25}\) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention\(^{26}\) are applicable in Portugal.

If such regulations do not apply, Articles 59 to 62 of the CCP give authority to the Portuguese courts in international matters on the following grounds: the possibility of bringing the action in Portugal according to the Portuguese rules on territorial jurisdiction;\(^{27}\) the fact that the main ground of the action, or any of the facts substantiating it, occurred in Portugal; and the fact that the right claimed cannot be effectively enforced in courts other

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\(^{17}\) Article 84(3) of the PCL.

\(^{18}\) Article 22 of Law 23/2018, which amends Article 112 of the Law on the Organization of the Judicial System (LOJS).

\(^{19}\) Article 22 of Law 23/2018, which amends Articles 54 and 67 LOJS.

\(^{20}\) Article 2(2) of the PCL.


\(^{23}\) Article 45 of the CC.

\(^{24}\) Articles 41 and 42 of the CC.


\(^{27}\) Territorial jurisdiction is regulated in Articles 70 to 84 of the CCP.
than the Portuguese courts, provided there is a relevant link, of an objective or subjective nature, with the Portuguese legal order. The parties are able to agree on the competence of the courts of a given state provided the question to be decided is linked to more than one jurisdiction.  

IV STANDING

There are no special rules in relation to the standing requirement to bring competition law actions. According to the general rules on liability, any legal entity or natural person who suffered harm within the Portuguese territory as a result of an unlawful act (an infringement of competition law, for the purposes of this chapter) has the right to be compensated for the harm suffered. Whether the plaintiff has a direct contractual relationship with the infringing party is not relevant for standing purposes. Thus, even an indirect purchaser may have standing, provided he or she claims to have suffered harm as a result of an infringement of competition law. In this regard, no changes have been introduced by Law No. 23/2018.

That is not true, however, as regards collective redress, as Law No. 23/2018 grants standing to associations of undertakings whose members have been harmed by a competition infringement when filing popular actions (which is not foreseen in the popular action legislation).

V THE PROCESS OF DISCOVERY

Under the general civil procedure in Portugal, there is no discovery procedure as it is understood in common law systems. The courts have discretionary power to request the disclosure of information that they may consider important to the final decision of a given case from any of the parties or third persons.

In competition cases, access to the PCA’s files is regulated by Articles 32 and 33 of the PCL, according to which private parties may claim access to the PCA’s file so long as the file is not protected by judicial secrecy.

As regards private enforcement, Law No. 23/2018 is in line with the Directive meaning that the parties may ask the court to order the other parties, third parties to the proceedings or public entities to disclose documents or other means of evidence in their possession. However, it has gone beyond it in two aspects: the right of access is extended to pretrial situations in order to assess the existence of a cause of action or to prepare actions (which is an exceptional solution in the Portuguese legal system); and it has been clarified that urgent conservatory measures may be ordered by the court when deemed necessary to prevent the destruction of evidence.

28 Articles 59 and 94 of the CCP.
29 Article 483 of the CC.
30 Articles 11 and 30 of the CCP.
31 Article 19(2-a) of Law No. 23/2018.
32 Articles 12 and 14 of Law No. 23/2018.
33 Article 13 of Law No. 23/2018.
34 Article 17 of Law No. 23/2018.
If the proceedings are covered by judicial secrecy, the parties involved may only have access to the file after the notification of the statement of objections by the PCA. Third parties shall only have access to the file after the final decision has been issued.

VI USE OF EXPERTS

Under Portuguese law, parties may, unless otherwise provided, use any means to prove their allegations. The judge must take into account all the evidence presented by the parties, and may freely make or order the production of any kind of evidence deemed necessary for the truth to be reached. A defence hearing with the party to whom it is opposed is required. Expert evidence is admissible. It can either be requested by the parties or ordered ex officio by the court. Most commonly, a panel of experts is appointed, with the court appointing one expert and each of the parties appointing another expert each. The probative value of the expert evidence is left to the appreciation of the judge.

Despite the lack of experience in Portugal concerning the use of experts in the context of an action for damage arising from a competition infringement, it is expected that in the future, such expertise will mostly be requested on economic issues (as an action for damages frequently requires a complex economic analysis), namely for the quantification of damages or to demonstrate the effects of the infringement.

VII CLASS ACTIONS

The form of class action available for damages claims is the ‘popular action’ established in Article 52 of the Constitution of the Portuguese Republic and regulated by Law No. 83/95 of 31 August, amended by Decree Law 214-G/2015 of 2 October. According to that Law, citizens (companies and professionals being excluded) or associations or foundations promoting certain general interests (including the promotion and respect of competition) have the right to file a popular action to protect those interests. The claiming party will have the right to obtain redress for harm suffered in violation of the general interest concerned.

The system provided for in the above-mentioned Law may be considered to be an opt-out system. Holders of the interests covered by the popular action that do not intervene in the action are notified through a press announcement, and shall decide whether they accept representation in that action.

Law No. 23/2018 expressly refers to the popular action and provides for several new specific rules not contemplated in the popular action law, namely in respect of standing (it grants standing to associations of undertakings), identification of the harmed parties, quantification of damages, and management and payment of compensation.

This type of action continues to be very rare, but in March 2015, a landmark follow-on class action for damages was filed by the Observatório da Concorrência, an association that represents consumers in class actions related to competition infringements, in civil court, based on a June 2013 PCA decision. In this decision, the PCA imposed a fine of €3.7 million.
on Sport TV, having found that it had abused its dominant position in the market for premium pay-TV sports channels for a period of at least six years by imposing discriminatory conditions on operators and limiting development and investment in the market.

This much-anticipated case represents an important step forward in private enforcement in Portugal, as it is one of the first private competition cases, and the first class action in which damages for an infringement of competition law are being claimed. After some setbacks, including a decision (which has been challenged) that Observatório da Concorrência had no standing to file the action, the Court finally decided on the admissibility of the action; the consumers were given 30 days to opt out. Further developments in the case are expected soon.

VIII CALCULATING DAMAGES

Law No. 23/2018 does not make any significant changes as regards the calculation of damages, as Portuguese law already complies with the main features of the Directive in this matter.

Damages awarded are purely compensatory, as punitive damages are not commonly available, although doctrine and jurisprudence have accepted punitive damages that have been contractually provided for. The amount of the compensation to be awarded shall correspond to the difference between the current patrimonial situation of the injured party and the patrimonial situation of such party if the damage had not occurred. Monetary compensation includes the amount of the damage caused by the illicit conduct plus interest.

Compensation covers the harm actually suffered by the injured party (actual loss, damnum emergens) and the loss of profit or the advantages that, as a result of the illicit act, will not enter the patrimony of the injured party (loss of profits, lucrum cessans).

The loss of a chance can also be indemnified, in particular if expenses were undertaken in light thereof. The indemnity also allows for the compensation of moral harm suffered by an individual only, and future harm suffered that the judge may foresee.

Despite the rules regarding the calculation of damages provided for in the CC, the judge has a significant amount of discretion. Considering the complexity of quantifying antitrust harm, assessing the exact amount of the damages may be impossible or extremely difficult in a given case. In that event, the judge may decide in accordance with equity, within the limits of the evidence produced.

However, Law No. 23/2018 changed the legal landscape in respect of these cases by providing that the court may resort to the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, and, as per the Directive, that the PCA may assist the court in calculating the damages.

If the injured party has contributed to the occurrence of the injury, the court may decide, considering the seriousness of both parties’ conduct and the consequences thereof, that the amount of the compensation shall be reduced or even totally excluded.

Contingency fees are not allowed, as the by-laws of the Bar Association do not consent to fees exclusively dependent on the result (palmarium) or to fees consisting of a percentage of

40 Article 9(2) of Law No. 23/2018.
41 Article 9(3) of Law No. 23/2018.
42 Law No. 15/2005, of 26 January.
the result (*quota litis*). Fees should be calculated based on several factors related to the service provided, such as the importance and complexity of the cause, the urgency of the matter, the time spent and, to a certain extent, the results obtained. 43

**IX PASS-ON DEFENCES**

In line with the Directive, Law No. 23/2018 expressly states that the defendant may argue that the harm allegedly suffered by the plaintiff has been passed on to the claimant. 44 Law No. 23/2018 also provides that the court deciding on a private enforcement claim shall take into account proceedings initiated by parties at different levels of the production or distribution chain. 45 Additionally, it includes three examples of factors to be considered by the court: (1) damages claims referring to the same infringement filed by the plaintiffs at different levels of the production chain; (2) public information regarding the enforcement of competition law by public entities; and (3) judicial decisions rendered in respect of the damages actions foreseen in (1) and (2).

**X FOLLOW-ON LITIGATION**

Judicial and administrative proceedings before the PCA are completely independent from each other, according to the constitutional principle of the separation of powers. In this regard, it is relevant to note that a large majority of the Portuguese private enforcement precedents (not typically claims for damages) are either stand-alone actions or hybrid actions partially related to the subject matter of a PCA decision but wider in scope.

Therefore, the existence of a decision from the PCA establishing an infringement of competition law is not required for a private enforcement action to be initiated. The judicial court decides upon an action for damages arising from an infringement of the competition rules irrespective of any previous decision already issued by the PCA on the same matter and relating to any other pending proceedings.

Before the entry into force of Law No. 23/2018, there were no rules regulating the way in which proceedings before the PCA and judicial actions for damages related to the same infringement of competition rules should be coordinated. This has now changed: Law No. 23/2018, in line with the Directive, foresees that a final condemnatory decision issued by it or by a Portuguese appeal court shall be deemed an irrefutable presumption of the existence of the infringement. In addition, Law No. 23/2018, going beyond the Directive, states that a final condemnatory decision issued by a foreign competition authority or appeal court shall be deemed as a refutable presumption of the existence of the infringement, thus giving it a qualified evidentiary value (whereas the Directive merely requires that such decisions be considered as *prima facie* evidence). 46

The judicial limitation period is different from the administrative limitation period, i.e., for the PCA to initiate proceedings (the limitation period for non-contractual liability is three years after the injured party becomes aware of his or her right to claim damages, while the limitation period for the PCA to initiate proceedings for antitrust infringements

43 Article 101 of the by-laws of the Portuguese Bar Association.
44 Article 8(1) of Law No. 23/2018.
45 Article 12 of Directive 104/2014 and Article 10(1) of Law No. 23/2018.
46 Articles 7(1) and (2) of Law No. 23/2018(Article 9 of Directive 104/2014).
is five years), 47 which could make it more difficult in practice for the plaintiff to usefully conciliate both proceedings. That problem has now been solved with the transposition of the Directive: Law No. 23/2018 provides for rules on the beginning, duration (five years, as per the Directive, and not three, as in general cases), suspension or interruption of limitation periods to allow for conciliation between judicial and administrative proceedings. 48

XI PRIVILEGES

Attorney legal privilege is protected before judicial courts and administrative authorities (including the PCA) by the Portuguese Bar Association by-laws, and both external and in-house counsel are protected as long as they are validly registered with the Portuguese Bar Association.

Some questions will arise when plaintiffs to an action for damages intend to access the PCA’s files to obtain documents deemed necessary to sustain their action. Despite the principle of publicity, access may be denied by the PCA either in relation to certain categories of documents or to the entire file. The PCA may declare that the entire file remain under legal secrecy in order to protect the investigation or the defendant’s interests.

The PCA may also declare some documents confidential on the grounds of its obligation to protect business secrets 49 or otherwise confidential information, including professional secrets 50 (attorneys, medical doctors, bank secrecy, etc.).

Documents submitted within the scope of a leniency application are also protected during the administrative proceedings. 51 The PCA shall declare a request for immunity or for a reduction of the fine as well as all the documents and information presented by the leniency applicant as confidential. Access to those documents and information is granted to the co-infringers for right of defence purposes, but they will not be allowed to obtain copies thereof unless duly authorised by the leniency applicant. Access by third parties to these documents will only be granted when authorised by the leniency applicant.

Before the transposition of the Directive, Portuguese law protected not only leniency documents (as is binding under the Directive) but also pre-existing documents. In this context, Law No. 23/2018 foresees that, for damages action purposes, only leniency documents are protected; for all purposes other than damages actions, pre-existing documents continue to be protected under Portuguese competition law. Therefore, a practical consequence of the Directive in Portugal is that, for the purpose of damages actions, pre-existing documents are not to be protected anymore.

As regards joint and several liability, the rule is set out in the CC for infringements in which multiple companies take part, and therefore the rule provided in Article 11(1) of the Directive already exists. The same, however, is not true for the two exceptions provided for in

47 Article 74 of the PCL.
48 Article 6 of Law No. 23/2018.
49 Article 195 of the Criminal Code.
50 Article 195 of the Criminal Code and Article 87 of the Bar Association by-laws.
51 Article 81 of the PCL. Here the Pfleiderer doctrine will surely be very relevant. For a Portuguese language review and comment on the 2011 Pfleiderer ruling by the European Court of Justice, see Catarina Anastácio in C&R – Revista de Concorrência e Regulação, No. 10, April–June 2012, pp. 291–314.
Article 11(2) and 11(4) of the Directive. In this respect, Law No. 23/208 2018 has followed the text of the Directive, which is rather challenging for the Portuguese legal system as these exceptions may create conflicts with classic rules and principles of extracontractual liability.

No protection exists in relation to documents issued in a proceeding before the PCA that has ended in a settlement decision.\textsuperscript{52}

Note that the entire file may have been declared to be under judicial secrecy by the PCA.\textsuperscript{53} In that case, third parties (namely plaintiffs in an action for damages) may only be allowed to access the file after a final decision has been issued.\textsuperscript{54}

\section*{XII SETTLEMENT PROCEDURES}

Unlike public enforcement by the PCA,\textsuperscript{55} there is no specific judicial settlement procedure available within the scope of a damages action.

According to the CCP, parties can reach a settlement both before and during a court proceeding\textsuperscript{56} provided that no non-disposable rights are involved.\textsuperscript{57} The settlement may be reached by agreement of the parties or through conciliation (which can take place at any stage of the proceedings further to the parties’ joint requirement or when the court finds it appropriate).\textsuperscript{58}

Any settlement between the parties during a court proceeding must be subject to confirmation by the court to have the value of a judicial ruling.

\section*{XIII ARBITRATION}

Competition law issues can be resolved through private arbitration\textsuperscript{59} and, despite the fact that arbitration is in principle not public, there seem to be a number of precedents\textsuperscript{60} and at least one significant arbitral decision that was appealed before the Lisbon Court of Appeals and confirmed by such upper court in 2014 (declaring an abuse of dominance in the health sector).

Any dispute with an economic value and not mandatorily submitted to judicial courts or to necessary arbitration by a special law can be submitted to an arbitral tribunal by way of an arbitration agreement. The agreement can relate to current disputes even if such are

\begin{itemize}
\item \textsuperscript{52} Outside the leniency regime, protection for documents follows the general rule, as established in Articles 30, 32 and 33 of the PCL.
\item \textsuperscript{53} Article 32(1) of the PCL.
\item \textsuperscript{54} Article 32(2) of the PCL.
\item \textsuperscript{55} See Articles 22 and 27 of the PCL and respective commentaries by Gonçalo Anastácio and Marta Flores and Gonçalo Anastácio and Diana Alfafar, respectively, in \textit{Lei da Concorrência Anotada, Comentário Conimbricense, Almedina}, 2013.
\item \textsuperscript{56} Article 283 of the CCP.
\item \textsuperscript{57} Article 289 of the CCP.
\item \textsuperscript{58} Article 594 of the CCP.
\item \textsuperscript{59} See Law No. 63/2011, of 14 December: the Arbitration Law.
\item \textsuperscript{60} See Leonor Rossi and Miguel Ferro, \textit{Revista de Concorrência e Regulação}, No. 10, April–June 2012, p. 93 and footnote 4).
\end{itemize}
being dealt with in a judicial court (submission agreement\textsuperscript{61}) or to events that may occur in the future, whether arising from a contractual or non-contractual relationship (arbitration clause).\textsuperscript{62}

Arbitrators shall decide in accordance with the law, unless the parties have authorised them to decide according to equity \textit{(ex aequo et bono)}.\textsuperscript{63} The award given by arbitrators has the same legal force as a first instance court decision and cannot be submitted to an appeal unless otherwise agreed by the parties.\textsuperscript{64}

Arbitration procedures are confidential unless otherwise decided by the parties,\textsuperscript{65} appealed to the state courts\textsuperscript{66} or subject to enforcement actions\textsuperscript{67} by a state court (as state proceedings are public by nature).\textsuperscript{68}

**XIV INDEMNIFICATION AND CONTRIBUTION**

Under Portuguese law, there is joint and several liability in relation to actions for damages.\textsuperscript{69} Therefore, if the damage was caused by several persons, the plaintiff may recover the full amount of damages from any one of them. If one defendant pays the full award, he or she then retains a right of redress against the other defendants, claiming the corresponding parts from them. The contribution of each infringer is determined by the court on the basis of its individual guilt and the effects arising from it. As regards private enforcement, Law No. 23/2018 (under Article 5(5)) changes the general presumption under the CC (Article 497) that all infringers share equal guilt, replacing it, for the purposes of competition damages actions, with a market share-based allocation.

The contribution by a defendant to whom immunity from fines has been granted shall not exceed the amount of harm it has caused.

\textsuperscript{61} Pursuant to Article 277(b) of the CCP, the court will stay its proceedings in the event the parties reach an arbitration agreement.

\textsuperscript{62} Article 1(3) of the Arbitration Law.

\textsuperscript{63} Article 39 of the Arbitration Law.

\textsuperscript{64} Article 39(4) of the Arbitration Law.

\textsuperscript{65} Article 30(5) of the Arbitration Law.

\textsuperscript{66} Article 46 of the Arbitration Law.

\textsuperscript{67} Article 47 and 48 of the Arbitration Law.


\textsuperscript{69} Article 497 of the CC. The government’s legislative proposal is in line with previous legislation and jurisprudence.
The transposition of the Directive into the Portuguese legal system constituted an important legal development. Despite the fact that the general legal framework applicable to civil liability and invalidity of contracts already provided sufficient tools for private antitrust enforcement in Portugal, it is undeniable that some of the provisions introduced by Law No. 23/2018, both those necessary to implement the Directive and the most innovative ones, represent an important step forward.

We would point out the following:

a the regime is also applicable to purely national competition law infringements, including those consisting of abuses of economic dependence;

b jurisdiction to decide on private enforcement actions that are exclusively based on competition law infringements and on all other civil claims also exclusively based on competition law infringements was attributed to the specialised tribunal, the CRSC;

c the civil responsibility of economic groups and the right of recourse are now regulated;

d measures are foreseen to preserve the means of evidence where a serious infringement capable of harming the plaintiff is suspected; a request for such measures will also interrupt the statute of limitation;

e the general presumption under the CC that all infringing parties share the same guilt has been replaced, for the purposes of damages actions, with a market share-based allocation;

f the scope of application of competition private enforcement to collective redress has been clarified through the introduction of several specific rules not provided for in the general legislation; and

g specific information systems to facilitate the intervention of the PCA in relation to observations on the proportionality of requests for access to documents included in its files as provided for in the Directive, and in relation to amicus curiae interventions pursuant to Article 15(3) of Regulation 1/2003, were introduced. This possibility already existed under general law, but the introduction of specific information systems is expected to make a major difference in the level of actual intervention of the PCA.

A further information exchange mechanism set out in Law No. 23/2018 and relevant to private enforcement (although unrelated to the Directive) aims at facilitating the obligation set out under Article 15(2) of Regulation 1/2003, pursuant to which Member States must inform the European Commission of all written decisions where Articles 101 or 102 of the TFEU were applied. To date, this rule has rarely been enforced, and the new rule (introduced by means of an amendment to the PCL) states that the courts must inform the PCA, which will inform the European Commission.

Despite these important steps forward, the dramatic increase in and uncertainty about court fees in Portugal as a consequence of the country’s financial crisis, and the respective international bail-out at the beginning of the decade, pose a serious constraint to actions for damages, as they very much raise the financial risk in bringing such actions. Such increased risk (the extent of which is yet to be determined), together with the uncertainty of the
outcome due to factors such as a lack of precedents, the passing-on defence and the Bar Association limits on contingency fees, may indeed act as deterrents to the development of actions for damages in the country.

Considering the above and the fact that there is only so much public enforcement any competition authority can conduct, together with the importance of private enforcement for the overall level of compliance with the competition law in a developed economy, the PCA is likely to play an increased and friendlier role in the advocacy and promotion of private enforcement. As its public enforcement profile is constantly increasing and its leniency programme is bearing fruit (thus alleviating the fear that private enforcement could jeopardise the appetite for leniency), the PCA is now expected to follow in the footsteps of the European Commission by supporting private enforcement as a key complementary dimension of its mission.

71 The PCA has become increasingly active in the fight against cartels. In general terms, there has been a dramatic increase in the number of dawn raids conducted in recent years. Since 2017, 22 investigations involving 56 facilities have been conducted involving several sectors. This increase in activity has already seen results: in 2019, the PCA adopted two important final decisions in the financial sector. In the first, the PCA fined six insurance companies a total of €54 million for cartel activity. In September 2019, after a long-running investigation, the PCA fined 12 banks €225 million over sensitive information exchanges about commercial offers in the mortgages and personal and commercial loans sectors. The PCA also issued three statements of objections against several companies active in the retail and drinks industries.

72 This could, inter alia, include information on private enforcement; development and publicity on the website of a list of precedents on private enforcement; public availability for a role of amicus curiae; quantification of damages within public enforcement cases (already done under very limited precedents); and the development of training for judges and other magistrates that has occurred over the past decade.
Chapter 19

ROMANIA

Mihaela Ion and Laura Ambrozie

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Currently, private enforcement tools remain relatively underused, as public enforcement still prevails in Romania. The entry into force in 2017 of the Government Emergency Ordinance No. 39/2017, (the Ordinance) has removed a lot of the obstacles to private enforcement of competition law, facilitating the full reparation of harm caused by competition law infringements. Despite this significant improvement of the legal framework and the active promotion of the private enforcement tool conducted by the Competition Council, there has been no visible increase in the amount of private antitrust litigation activity in Romania.

To date, the level of private antitrust litigation activity has been relatively low in comparison with other Member States. In one landmark case, the Bucharest Court of Appeal approved a claim and obliged the defendant to pay the plaintiff approximately €930,000 as compensation; this decision was upheld by the High Court of Cassation and Justice.

However, as claims for damages may be brought as a result of European competition regulation infringements, whenever such infringements arise, there is a tendency for the parties to seek relief before national courts from jurisdictions that have greater experience with respect to private enforcement. In other words, there is a tendency towards forum shopping as claimants seek to bring their claims before the courts most likely to render a favourable judgment.

For this reason, the National Union of Road Hauliers from Romania organised the framework under which Romanian transport companies initiated a private enforcement claim following the trucks cartels before courts in Germany.

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1 Mihaela Ion is a partner and Laura Ambrozie is a managing associate at Popovici Nițu Stoica & Asociații.
3 Court of Appeal of Bucharest, Decision No. 1701/2015 of 30 October 2015.
4 High Court of Cassation and Justice, Decision No. 1979/2016 of 23 November 2016.

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II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The legal framework for cartel damages claims is the specific competition legislation set out in the Romanian Competition Act No. 21/1996 (the Competition Act) and in the Ordinance, the Council Regulation on the analysis and resolving of complaints regarding breaches of Articles 5, 6 and 9 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),\(^6\) as well as Articles 101 and 102 of the TFEU. The specific validity conditions for the relevant legal actions and applicable procedural rules are supplemented by the Romanian Civil Code (the Civil Code)\(^7\) and the Romanian Civil Procedural Code (CPC).\(^8\)

The Council Regulation on the analysis and solving of complaints regarding breaches of Articles 5, 6 and 9 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),\(^9\) as well as Articles 101 and 102 of the TFEU.

In a nutshell, the Competition Act prohibits:

\(a\) any express or tacit agreement between undertakings or associations of undertakings, any decisions taken by the associations of undertakings and any concerted practices that have as their object or effect the restriction, prevention or distortion of competition on the Romanian market or on part of it; and

\(b\) the abusive use of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it that may harm competition through anticompetitive actions.\(^10\)

Both Article 3 of the Ordinance and Article 66 of the Competition Act state that both legal and natural persons, as well as associations, harmed directly or indirectly by anticompetitive practices are entitled to seek relief in court. It is expressly provided in the Ordinance that such claims may be brought based on infringements of both national and European rules – Articles 101 and 102 of the TFEU.

The Ordinance sets out the existing principles regarding private enforcement actions:

\(a\) any person responsible for any conduct (practice, act or deed) that caused damage to another person has the obligation to repair the damage;

\(b\) if the damage was caused by more than one person, they will be held jointly liable;

\(c\) legal persons may also be held liable for their representatives’ infringements; and

\(d\) losses caused by the infringement are to be recovered in full, including the effective loss \((damnum emergens)\), lost profits \((lucrum cessans)\) and interest. Indeed, the Ordinance states that damages are awarded according to the principle of full reparation for the harm suffered.

Claims may be filed both before (stand-alone actions) and after (follow-on actions) the issuance of a sanctioning decision by the Council.

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\(^6\) Approved by Order No. 499/2010 of the President of the Competition Council.

\(^7\) The current Civil Code entered into force on 1 October 2011.

\(^8\) The current Civil Procedural Code entered into force on 15 February 2013.

\(^9\) Approved by Order No. 499/2010 of the President of the Competition Council.

\(^10\) In accordance with the provisions of Article 6(3) of the Competition Act, it is presumed, until proven otherwise, that one or several undertakings are in a dominant position if the accumulated market share on the relevant market, registered for the analysed period, is over 40 per cent.
For follow-on claims, there is a presumption of the existence of an infringement if a final decision has established an infringement. One specific distinction is made here: while the definitive decisions issued by the Competition Council, a national court or the European Commission represent conclusive evidence, sanctioning decisions issued by other competition authorities or definitive decisions issued by other national courts than those where the action for damages is introduced represent only rebuttable presumptions of competition law violations.

In both stand-alone and follow-on actions damage claims must be brought within five years from when the infringement ceased; and from when the plaintiff knew or should have known of the behaviour and the fact that it constituted an infringement of competition law, the damage and the person responsible for it. If the victim of a competition law infringement submits a complaint to the Competition Council, the statute of limitations will start running as it will be considered that when it submitted the complaint, the plaintiff knew of the infringement.

The limitation period will be suspended for the period of the administrative measures taken by the competition authority in view of opening an investigation and for the period when the investigation is ongoing. Also, the time limit will elapse one year after the infringement decision becomes final or after the proceedings are otherwise terminated. Moreover, the limitation period will not start or will be suspended for the duration of the consensual dispute resolution process.

Another essential presumption aims to facilitate private enforcement claims. The establishment of a cartel creates a rebuttable presumption of the existence of harm suffered by the plaintiff. Thus, in this case the burden of proof shifts, and the defendant has to demonstrate that no harm was caused.

To be compensated for damage, the victim of an anticompetitive practice must prove that all of the following conditions triggering tort liability are met:

a. an infringement of national or EU competition rules has occurred;
b. the defendant is at fault, regardless of the form (e.g., negligence or wilful misconduct);
c. the damage caused to the claimant; and
d. the link between the infringement and the damage caused to the claimant.

In the case of stand-alone actions, the burden of proof of an infringement of the competition legislation and the harm caused to a person lies with the plaintiff. In contrast, in follow-on actions, as final decisions of the Competition Council, a national court or the European Commission constitute conclusive evidence, the infringement no longer needs to be proved by the plaintiff. Therefore, in cases where a final decision has been issued, the plaintiff has only to prove that a final decision truly exists (i.e., he or she did not challenge the decision). Afterwards, the plaintiff will only have to demonstrate points (b) to (d).

The exclusive subject matter over the award of damages to individuals, as well as territorial jurisdiction, belongs to the Bucharest Tribunal and on appeal to the Bucharest Court of Appeal.

III EXTRATERRITORIALITY

The Competition Act is clear on its extraterritorial application to anticompetitive acts and practices committed by Romanian or foreign undertakings in Romania, or committed abroad but having effects in Romania; therefore, nationality or location have no relevance as long as
the infringement has effects in Romania. Based on these principles, the Council has issued a series of decisions sanctioning foreign undertakings for having breached the provisions of the Competition Act and of the TFEU. In all cases, the Council imposed the fine directly on the foreign undertakings.

Thus, infringements of competition law committed by foreign undertakings in Romania or committed abroad but having effects in Romania may serve as the basis for damages claims introduced before the Bucharest Tribunal.

IV STANDING

As mentioned above, claims for relief in courts are governed by Articles 3 and 14 of the Ordinance, Article 66 of the Competition Act and Article 10 of the Competition Council Procedure Regulation, under which both the persons directly and indirectly affected by an anticompetitive behaviour may bring a private antitrust action to seek compensation for any damage incurred due to a prohibited practice under the provisions of the Competition Act or of Articles 101 or 102 of the TFEU.

Third parties, either natural or legal persons, may intervene in a case in accordance with the CPC if they can prove an interest. Furthermore, if the judge considers that it is necessary to involve third parties in the case, he or she will bring up this issue with the parties.

The Competition Act expressly provides for the Council’s right to intervene in competition cases before the national courts. In addition, under Article 16 of the Ordinance, the Competition Council may assist the court with respect to the determination of the quantum of damages if the court requests it.

V THE PROCESS OF DISCOVERY

Before the entry into force of the Ordinance, the legal framework was set up under general civil procedure rules that did not provide for an extensive or specific discovery procedure. The Ordinance has extended the scope of discovery and has set up specific conditions under which disclosure of evidence can be ordered by courts.

As a general rule, the principle of proportionality is the main condition under which disclosure of evidence can be ordered. To establish whether a disclosure claim is proportional, the court takes into consideration all parties’ legitimate interests. The Ordinance also provides the measures and instruments for ensuring that the confidential nature of the information subject to the disclosure procedure is observed.

In addition, to ensure the effectiveness of court orders for disclosure, the Ordinance provides sanctions related to the non-disclosure and destruction of evidence that apply to individuals, legal entities and even their legal representatives. Indeed, the court may sanction a defendant, a plaintiff, other third parties and their legal representatives with a fine ranging from 500 to 5000 lei for individuals, and from 0.1 to 1 per cent of the turnover realised in the year preceding the sanctioning for corporations. The Ordinance specifically mentions the deeds that may be sanctioned:

a) failure or refusal to comply with the disclosure order;
b) destruction of relevant evidence;

failure or refusal to comply with the obligations imposed with respect to the protection of confidential information; and

breaches of the limits on the use of evidence provided in the Ordinance.

i General rules regarding evidence disclosure

As previously mentioned, the principle of proportionality governs the disclosure procedure regardless of the moment at which it takes place (i.e., before or during the action for damages).

Under the Ordinance, when a plaintiff provides a reasoned justification containing facts and evidence sufficient to support the plausibility of its claim for damages, the court can order the defendant or a third party to disclose relevant evidence that lies in their control. Likewise, the court, if requested by a defendant, can order a plaintiff to produce relevant evidence. The criteria set out by the Ordinance for assessing the proportionality of the disclosure include, inter alia, the extent to which the claim or defence reasonably justifies the disclosure of evidence, the scope and cost of disclosure, and the confidential character of the information requested to be disclosed.

To ensure the confidential nature of the disclosed information is protected, the court may use one or more of the following measures:

- removing the sensitive information from the document disclosed;
- holding hearings without a public presence;
- limiting the number of persons that may have access to the evidence to appointed experts and legal representatives of the parties;
- issuing expert appraisals to ensure the protection of confidential information; and
- taking any other measures provided by law to ensure the protection of confidential information.

In addition, note that under the general civil procedure rules, the court may reject a request for evidence disclosure if the documents could expose personal issues regarding a person’s dignity or personal life, if producing the evidence would violate the legal duty to keep the document secret or if such disclosure could trigger criminal prosecution of the party, its spouse or its relatives or in-laws until the third degree. 12

ii Specific rules applicable to disclosure of evidence included in the Competition Council’s file

The Ordinance details the legal framework of claims of disclosure of evidence contained in the Council’s file. Besides the general rules described above, specific rules apply.

When assessing the proportionality of the claim, the court will take into consideration whether the evidence requested is specific, and is not merely an attempt to gain access to the file; whether the party requesting disclosure is doing so in relation to an action for damages before the court; and the need to safeguard the effectiveness of the public enforcement of competition law. The Competition Council can also submit observations regarding the proportionality of the request for evidence disclosure.

Only when the court cannot obtain some proof from another party can it request that the Council provide evidence, including proof of the basis on which a sanctioning decision

12 Article 294, Civil Procedure Code.
was issued. If one of the parties provides evidence contained in the Council’s file obtained exclusively through exercising his or her right to access to the file, such proof is deemed inadmissible if the Council has not yet finalised its investigation.

The court must ensure that confidential information and business secrets considered under the competition law are protected. However, the reasons for which the Council has granted confidentiality for certain documents or information may not subsist in the litigation phase (i.e., financial data, information regarding costs or prices) if they are qualified by the court as historical data, and the Council may be bound to disclose the documents or information in question.

Thus, the court can order disclosure of various types of evidence included in the Competition Council’s file. Nonetheless, besides the observance of the proportionality principle, some limits are set out concerning specific categories of evidence that are included on the ‘grey list’: observations submitted by the parties, investigation reports and written recognition statements of anticompetitive practices that were withdrawn. Such evidence may be disclosed only when the administrative proceedings before the Council are finalised.

In addition, certain categories of evidence are included on the ‘blacklist’, which means that they shall never be disclosed: leniency statements and recognition statements. Indeed, these types of proof are deemed to be inadmissible and thus cannot be used in actions for damages. Nonetheless, the plaintiff can provide a reasoned request to obtain access to these documents, but for the sole purpose of ensuring that their contents correspond to the definitions set by the Ordinance.

VI USE OF EXPERTS

In court actions, in the absence of relevant case law and specific legal provisions, it should be determined how and what type of experts will be used in private competition law litigation in addition to certified accountants. The CPC provides general principles that allow judges to request the opinion of one or more experts in the relevant field, and one or all of the parties to produce experts’ reports or opinions that support their allegations. Nevertheless, to date, in contrast with the accounting field, there have been no certified experts officially acknowledged in the competition field.

Therefore, we have to rely once again on general principles provided by the CPC that state that, in domains that are strictly specialised, and where there are no authorised ex officio experts or experts requested by any of the parties, the judge may request the viewpoint of one or more independent specialists in such field. The members of the Competition Council Plenum may not be appointed as experts or arbitrators by the parties, the court or any other institution, as they lack independence. Interestingly, the courts have increasingly tended to appoint experts, both national and European specialists. Under the general rules, the court may also order an appraisal of the damage in which experts appointed by the parties may also participate. Due to damage quantification difficulties, the need for economic expertise is expected to increase.

Experts’ or specialists’ opinions are not binding, so the court will consider them together with all other evidence. In addition, the court has the right to refer a case to the Council to obtain a specific opinion on competition aspects (e.g., relevant market definition).
VII CLASS ACTIONS

The Competition Act expressly regulates the rights of specified bodies (i.e., registered consumer protection associations and professional or employers’ associations having these powers within their statutes or being mandated in this respect by their members) to bring representative damages actions on behalf of consumers. The regulator seems to have chosen the opt-in system for collective damages claims based on the Competition Act. Unlike individual actions, class actions are exempted from the obligation to pay stamp duty.\(^\text{13}\)

VIII CALCULATING DAMAGES

The Ordinance has set out a unitary legal framework regarding damage determination. Also, some useful clarification regarding damage appraisal has been brought. In this sense, it is provided that the court will evaluate the quantum of the damages awarded, ensuring that the burden and standard of proof necessary for damage appraisal does not render impossible or excessively difficult the right to full reparation. As in the past, the fines imposed by the competition authorities do not represent a criterion for settling damages in private enforcement claims.

The general principles of tort law are followed, including the main principle of full reparation of the harm suffered. In this respect, the damage caused by breaching competition law shall be fully repaired so as to put the victim in the position it would have been in if the infringement had not happened. In line with this principle, the victim is entitled to recover both the actual losses suffered, any lost profits, as well as interest. Moreover, the Civil Code provides that if the illegal act caused the loss of an opportunity to obtain an advantage or to avoid harm, the victim shall be entitled to recover damages to compensate for this. Future damage, if certain to occur, can also be compensated. Moreover, the victim may also request penalties for delay calculated as from the date when the judgment became final up to the date of the actual payment of the damages. Punitive damages are not allowed under Romanian law.

The CPC provides for the potential to recover attorneys’ fees. In general, legal costs are imposed on the losing party upon the request of the winning party. To qualify for recovery, damages have to be proven and they may not have been already recovered (e.g., under an insurance policy).

In practice, the reference date for calculating the value of damages is still uncertain. Some court decisions take into consideration the value available when the actual damage was caused, while others consider the prices applicable at the time of the court decision awarding damages.

The Council proposed that for class actions, a representative consumer should be found and the principles applying to him or her should apply to a broader range of plaintiffs, including undertakings subject to exclusionary practices. Thus, the damage suffered by this consumer would be used as a reference when calculating compensation for a whole class of plaintiffs. In this manner, plaintiffs will have to show that they suffered damage without being required to quantify the exact value of the damage, which most of the time implies a costly analysis.\(^\text{14}\)

\(^{13}\) Article 29(f) of the Government Emergency Ordinance No. 80/2013.

\(^{14}\) The Council’s standpoint on quantification of harm suffered because of an infringement of Article 101 or Article 102 of the TFEU.
IX PASS-ON DEFENCES

Specific provisions on passing-on defences are set out in our legal framework. In this sense, under Article 14 of the Ordinance, the indirect buyer has to prove that the harm was passed on to him; more precisely, he must prove that the defendant has committed an infringement of competition law; the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

An indirect buyer can bring before the courts an action for damages, but only if he did not pass on the overcharged price generated by the competition law infringement. If he overcharged in his prices, the defendant can invoke the pass-on defence against him: in other words, the indirect claim is deemed to be ungrounded as the indirect buyer has already repaired the harm suffered. In such cases, damages actions might be introduced by the next indirect buyer. If all buyers have overcharged in their prices, then the one who is entitled to bring an action for damages will be the final consumer. In this scenario, the discovery procedure will likely be a reciprocal one involving all parties on the sale chain until the last buyer.

X FOLLOW-ON LITIGATION

In follow-on actions, since liability arises from the prior infringement decision, the claimant must establish that he has suffered a loss as a result of the infringement. The statute of limitations, both for stand-alone actions and for follow-on actions, starts running from the date where the plaintiff knew or should have known about the infringement, the damage and the identity of the infringer and not before the anticompetitive practice has ceased.

The decision of the Council becomes final if the term during which the Council decision may be challenged expires and no interested party challenged it; or, after being challenged, the decision is upheld (totally or partially) or annulled and declared by the court as final. National legislation does not make a distinction between the court actions through which a party challenges the existence of the anticompetitive deed itself, and the imposition of a penalty and the amount thereof. If no appeal is filed against the decision or the decision is upheld by the courts, the Council decision will have all the effects of a court judgment, including a res judicata effect. The res judicata effect establishes a legal presumption that is twofold: on the one hand, the losing party will not be able to re-examine the right in another dispute and on the other, the winning party can avail itself of the recognised right in another dispute.

XI PRIVILEGES

As mentioned above, leniency and recognition statements are included in the black list and thus may never be disclosed.

In addition, the information and documents contained in the Council’s investigation file are also protected by the Council’s confidentiality obligation. The following are deemed confidential:
a business secrets (technical or financial information relating to the know-how of an undertaking, costs evaluation methods, production processes and secrets, supply sources, manufactured and sold quantities, market shares, lists of customers and distributors, marketing plans, cost and price structures, sale strategy); and

b other confidential information (such as information communicated by third parties about the respective undertakings that could exert a significant economic and commercial pressure on competitors or commercial partners, customers or suppliers) that may cause access to the file to be totally or partly restricted.

Moreover, general rules acknowledge the privilege of confidentiality of communications between lawyers and their clients.

XII SETTLEMENT PROCEDURES

Given the nature of claims for damages, parties are allowed to use settlement negotiations either before or even during litigation proceedings. Settlement procedures include mediation and negotiations that arise during transactions.

Parties may agree upon the value of the damages and method of reparation. If the parties settle their dispute, the court cannot be called on to rule on such legal action; the court accepts the settlement without analysing the merits. Furthermore, the parties are able, at any time during a trial, even without being summoned, to go to court and request a judgment acknowledging their settlement. Such settlement must be submitted in writing to the court, which will include it in the operative part of the judgment.

The effect of the settlement procedure on the quantification of damages when there are various infringers and only one is involved in the settlement procedure is also regulated. In this case, the victim can claim only the part of the prejudice caused by the infringers that did not participate in the settlement procedure. Also, the national court may suspend its proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by the action for damages.

In addition, the payment of damages following a settlement procedure is qualified as a mitigating circumstance by the Competition Council when individual sanctions are imposed for competition law infringements. Competition law infringements may lead to the exclusion of the infringers from future public tenders under Law No. 96/2016 on public acquisitions. In order to avoid exclusion, the infringers may try to prove their rehabilitation (known as the self-cleaning procedure). In this sense, payment of damages caused by competition law infringements may qualify as self-cleaning measures.15

XIII ARBITRATION

The parties may agree to the conduct of arbitration by a permanent arbitration institution or a third party. The Ordinance does not refer to arbitration separately from settlement procedures. Thus, the provisions regarding the suspension of court proceedings and determination of the damages described in Section XII also apply to arbitration.

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XIV INDEMNIFICATION AND CONTRIBUTION

The rule established by the Civil Code and also by the Ordinance is that the defaulting party must repair any damage caused to another party. Where an infringement may be attributed to more than one party, they should be held jointly liable towards the victim, who may initiate legal proceedings against any of them for the full amount of the damages. Before the entry into force of the Ordinance, the successful applicants for leniency could not be held jointly and severally liable for their participation in anticompetitive practices. Under the Ordinance, this exemption no longer exists: the company that benefited from full leniency can be held jointly liable towards its own indirect and direct suppliers and buyers, and other injured parties, but only in cases where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of the competition law. As regards the infringing parties, the division of liability should be made on a pro rata basis according to the seriousness of each party’s fault. When one of the companies has benefited from a fine exemption, its contribution cannot be higher than the prejudice suffered by its direct or indirect suppliers or buyers.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Romanian parliament is currently debating amending the Ordinance. The aim of the proposed amendment is to facilitate private enforcement claims from two perspectives:

First, the proposed amendment sets up a rebuttable presumption according to which abuse of a dominant position causes harm. Thus, like in cartel cases, the defendant is the one who must demonstrate that no harm was caused.

Second, the proposed amendment intends to shed more light on the quantification of prejudices caused by cartels. In this sense, it would set up another rebuttable presumption according to which the harm caused by cartels consists of price increases of 20 per cent to the products or services subject to the cartel.

We do not expect significant changes in the extent to which private enforcement tools are used, at least in the short term. Nonetheless, as mentioned above, we expect to see more cases in which parties from Romania will bring private enforcement claims before jurisdictions more experienced in private enforcement matters – the ‘preferred’ forums for private competition law enforcement matters.

Moreover, from our perspective, it would be useful for the following additional amendments to be brought in order to clarify and ensure the effectiveness of the private enforcement legal framework:

a as the Ordinance include only general guidelines, precise and clear guidelines with respect to the proportionality principle should be further developed to protect the confidential information subject to disclosure claims;

b as there is no pre-action disclosure procedure independent of a trial already brought before a court under the Ordinance or under general civil rules, it would be useful to regulate these specific issues. Otherwise, providing evidence to bring a private enforcement claim may be hindered; and

it should be clarified whether decisions issued by the Competition Council accepting the commitments proposed by alleged infringers may serve as a basis for follow-on claims as the existence of the infringement is not expressly ascertained by the Council, which only states the competition concerns identified.
Chapter 20

SINGAPORE

Matthew J Skinner, Sushma Jobanputra, Prudence J Smith and Mitchell O’Connell

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2010, the then assistant chief executive of the Competition Commission of Singapore (now renamed the Competition and Consumer Commission of Singapore (CCCS)), Mr Toh Han Li, stated that he expected private actions to be a trend to watch. However, to date there have been no private actions in Singapore for antitrust infringements. The only matter attempting to bring a private action was in 2010, in which a breach of Section 34 of the Singapore Competition Act was unsuccessfully raised to support a fair dealing argument, in a defence and counterclaim against copyright infringement proceedings – Global Yellow Pages Ltd v. Promedia Directories Pte Ltd [2010] SGHC 97.

Under Singapore law, the right to private action is contingent on a prior infringement decision. Accordingly, in order to bring about private actions through follow-on litigation, infringement decisions issued by the CCCS are a prerequisite. In recent times, the CCCS has engaged in increasingly rigorous enforcement actions, which suggests that private enforcement activity through follow-on actions may reasonably be expected to increase in the future.

The CCCS’s recent enforcement activity has been wide ranging and has included:

a an infringement decision against two ride-hailing firms, Grab and Uber, in relation to a proposed merger;

b prosecuting cartel conduct for seven years by 13 fresh chicken distributors. The conduct included coordinating the amount and timing of price increases, and agreeing not to compete for each other’s customers in the market for the supply of fresh chicken products in Singapore;

c an action against four hotel operators for exchanging commercially sensitive information in relation to hotel room accommodation in Singapore supplied to corporate customers; and

d accepting voluntary commitments from a number of lift companies for refusal to supply spare lift parts for maintenance in public housing estates, which were alleged to be in breach of the prohibition against abuse of a dominant position.

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1 Matthew J Skinner and Sushma Jobanputra are partners, Prudence J Smith is of counsel and Mitchell O’Connell is an associate at Jones Day.

2 Section 34 prohibits agreements or concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition within Singapore.

3 The CCCS was renamed effective from 1 April 2018 when it took on an additional function of administering the Consumer Protection (Fair Trading) Act. It was previously known as the Competition of Singapore.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Competition law in Singapore is governed by the Singapore Competition Act (the Act), and is enforced by the CCCS. The CCCS states that its mission is ‘making markets work well to create opportunities and choices for businesses and consumers in Singapore’ and its vision is ‘a vibrant economy with well-functioning and innovative markets’ to underscore that its work benefits both businesses and consumers alike.

Section 86 creates the statutory follow-on action as a right of private action in Singapore. It appears that stand-alone actions are precluded by the Act, although there has never been any formal pronouncement of that position. Pursuant to the Act, the express statutory right to private action arises in limited circumstances and requires three elements. Those elements are:

- a final determination;
- that an entity has infringed Section 34, 47 or 54 of the Act; and
- that the victims have suffered loss directly.

A final determination is an infringement decision that is not subject to any further right of appeal. A determination may be made by the CCCS but is subject to the entity’s rights of appeal. A decision of the CCCS may be appealed to the Competition Appeal Board (CAB), which in turn is appealable to the High Court of Singapore, and from there to the Court of Appeal, within prescribed time limits.

Additionally, the right to private action only arises when a final determination is issued stating that an operative provision of the Act has been infringed, including:

- Section 34, agreements that have as their intended objective or result in the prevention, restriction or distortion of competition within Singapore;
- Section 47, abusing a dominant position in a market in Singapore; and
- Section 54, where a merger with another entity results or is expected to result in the substantial lessening of competition in a market in Singapore.

Finally, Section 86 of the Act provides for private actions offering remedies for victims of anticompetitive conduct for loss and damage suffered directly. As the Act explicitly refers to loss or damage suffered ‘directly as a result of an infringement’, it is unlikely that indirect purchasers will have standing to bring a claim. Therefore, by way of example, where there is conduct with an anticompetitive effect, such as a price increase that is passed along the supply chain, subsequent purchasers, including end-consumers, are unlikely to be afforded any recourse as their loss is not direct and therefore does not meet the requirement of the Act.

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6 Act Section 86(2) and (3); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.2.
7 Act Section 86(1); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.1.
i  **Timing of private action**

Due to the requirement of a final determination, third parties have to wait until an entity exhausts all its rights of appeal before they are permitted to pursue a private action. A private claim for damages arising from an infringement of the Act must be brought within two years from either the time that the infringement decision is made or from the determination of any such appeal, whichever is later.\(^8\)

Of course, the application of this rule is straightforward where there is only one addressee to an infringement decision. However, increasingly, and particularly in the case of cartels or anticompetitive contract cases, involving more than one entity or party complications may arise. A difficulty is likely to arise where one party appeals the infringement decision but a private applicant seeks to claim against a defendant who does not appeal. By operation of Section 86 of the Act, a private action is prohibited in the period when a right of appeal remains. It would therefore appear that an appeal by any of the parties who are subject to an infringement decision triggers the temporal restriction on commencing a private action.

### III  **EXTRATERRITORIALITY**

The Act explicitly extends the prohibition on anticompetitive conduct beyond Singapore. The CCCS has exercised this extraterritorial jurisdiction over a number of foreign-registered companies.

In order for a private action to be pursued against foreign-registered companies, an applicant requires the leave of court to effect service of process out of Singapore. As an initial matter, pursuant to the Supreme Court of Judicature Act 1999 and the Subordinate Courts Act 1999 there must be a legal connection between a case or the defendant and Singapore. In its application for leave, the applicant must satisfy the court that the Singapore court is the most appropriate forum to hear the dispute. This may pose difficulties with increasingly globalised commerce and increasingly cross-border competition law breaches such as an international cartel.

Sections 33 and 34 of the Act provide jurisdiction to regulate anticompetitive behaviour with effects or consequences in Singapore. Accordingly, a claimant who has suffered loss in Singapore as a result of an infringement established by the CCCS is likely to establish that a Singaporean court is the appropriate forum for the application. One final matter is that Section 86(7) provides that a final determination of an infringement decision is binding on the Singapore court, reducing some burden on an applicant in establishing the competition law breach.

### IV  **STANDING**

Singapore’s private action regime means that the prerequisite CCCS action will be critical to whether a victim of anticompetitive harm can bring a private action. Assuming a final determination, only a person who suffers loss or damage directly as a result of anticompetitive conduct prohibited by the Act can bring an action. In this way, the victim is within the class of persons intended to be protected by the Act, and the damage falls within the scope of the protection of the Act.

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\(^8\) Act Section 86(6); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.3.
As there have yet to be any private actions brought in Singapore for breaches of the Act, it is yet to be determined whether umbrella damages are also a basis for standing for private claimants against an entity in Singapore. Umbrella damages are mainly experienced in relation to a price-fixing cartel, where a loss is experienced by persons dealing with a non-conspiring industry participant who sets its price just under the umbrella of the cartel. The customer of the non-conspiring firm suffers the overcharging in a similar fashion to the customers of the cartel members. Clearly the question for such an applicant will be establishing the ‘direct loss’, given that such loss arguably only shares an indirect causal relationship with the infringement.

V THE PROCESS OF DISCOVERY

Order 24 of the Rules of Court provides the procedures for discovery in civil proceedings in Singapore. The rule provides that parties to the proceedings will be required to provide discovery of documents in their possession, custody or power, that are relevant to and necessary for the fair disposal of the proceedings and the saving of costs, unless the documents are privileged.

Relevant documents include any that:

\[ a \] the disclosing party relies or intends to rely on;
\[ b \] could adversely affect its own or another party’s case; and
\[ c \] could support another party’s case.

There is also limited scope for pre-action and third-party discovery in appropriate circumstances. A party can also apply to the court for specific discovery if it has reason to believe that an incomplete list of documents has been furnished.

Applications for discovery can also be made against non-parties such as the CCCS after the commencement of an action. However, the ability of private applicants to apply for discovery against companies or the CCCS to obtain documents – such as confidential versions of decisions, proffers and leniency materials – is unprecedented and is likely to be met with some resistance, possibly requiring special disclosure regimes including strict confidentiality. An exception to this would be where the proffers are cited in the CCCS’s determination.

The process of discovery by private parties is a recognised threat to the global practice of regulators to offer leniency or immunity regimes to parties engaging in anticompetitive conduct to come forward in exchange for immunity, including from third-party actions. Equally, the need for the private applicant to obtain necessary evidence to advance its claim is recognised by courts and is a basis for discovery processes. Balancing these tensions is a significant matter of public policy. In recognition of this, the CCCS has provided that access to a leniency corporate statement is only granted to addressees of a provisional infringement decision, provided that the addressee undertakes not to make any copy by mechanical or electronic means. While yet to be tested, it appears that the effect of this guideline is to quarantine leniency documents from claimants in private actions.

VI USE OF EXPERTS

Expert evidence is common in proceedings in Singapore and evidence law in Singapore admits the opinion of an expert witness in order to assist the court in reaching a proper conclusion on a matter which requires the application of special skill or knowledge. Parties will often seek to appoint their own expert rather than rely on a single joint expert. Expert evidence must be given in a written report signed by the expert and exhibited in a sworn or affirmed affidavit, unless otherwise directed by the court. The court can limit the number of expert witnesses who can be called at trial. These expert reports are also required to contain a statement that the expert understands that in making a report, their paramount duty is to assist the court on matters relevant to their expertise and they certify that they have complied with that requirement.

Additionally, Singapore’s civil procedure rules provide for a concurrent expert evidence procedure, which allows for expert witnesses to question each other, answer questions from the judge and be cross-examined together.

VII CLASS ACTIONS

Singapore does not have a class action regime. However, Order 15, Rule 12 of the Rules of Court provides for representative actions. Under this regime, claimants who wish to pursue a claim as a representative action must agree to do so; that is, opt in.

There is no formal requirement to certify a class in a representative action under the rules. However, the Singapore Court of Appeal has held that for a representative action to be brought, the class of represented persons must be capable of clear definition and identification. Additionally, the represented claimants must have the ‘same interest’ in the proceedings, and even where this requirement is satisfied, the court has the discretion to refuse to permit proceedings to continue as a representative action if it finds that they are not suitable.

As a representative action for a breach of the Act is yet to proceed, it remains to be seen whether a representative action will provide a satisfactory route for group litigation of infringements of competition law in Singapore, especially since each claimant must still individually establish that it has suffered the loss directly as a result of the infringement as required by the Act.

VIII CALCULATING DAMAGES

It is unlikely that the Singapore courts will award exemplary or punitive damages in relation to a private action for a competition law contravention. This is because the result might be that the offender is punished twice, owing to the earlier finding of the CCCS. Additionally, it is arguable that the Parliament did not intend Section 86 to include exemplary damages as they had been removed during the bill drafting process. Additionally, as there are as yet no private actions in Singapore, it is as yet unclear whether a court would award restitutionary

10 Order 40A Rule 1, Rules of Court.
11 Order 40A Rule 6, Rules of Court.
12 Order 15 Rule 12, Rules of Court.
damages or an account of profits. Section 86(1) of the Act empowers the court to grant ‘such other relief as the court thinks fit’; however, in Singapore, damages are assessed on compensatory principles to cure the harm or loss directly suffered.

In a private action, it is fundamental that the party claiming damages must prove the actual damages suffered from the contravention of the Act. This is consistent with the general approach that damages are intended to compensate the party for its losses, which include:

- lost profits on actual and potential sales;
- lost sales (due to consumers turning to available substitute goods);
- lost market share;
- interest;\(^\text{14}\) and
- to restore a litigant to the position they would have enjoyed had the contravening conduct or breach not occurred. The level of compensatory damage would depend on the remoteness of the loss of the applicant to the infringement.

In this respect, the assessment of the counterfactual, or the application of the ‘but for’ test, will be relevant. The counterfactual will identify the difference between the counterfactual scenario where the infringing activity did not occur and the actual scenario created by the anticompetitive behaviour, and thereby provides the measurement of damages. Identification of the most appropriate counterfactual can on occasions be tricky and the CAB has accepted that a counterfactual is not a legal requirement in assessing an abuse of dominance.\(^\text{15}\)

As the right to private action arises only as a follow-on action, it is unlikely that there will be a substantial challenge to the conduct in question. Accordingly, proof of the damage is likely to be a substantial area of focus of the applicant and of the defence. However, in Robertson Quay, the court held that ‘[t]he law, …, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered’.\(^\text{16}\)

The court noted that in relation to proof of damages ‘a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss and the evidence is cogent, the court should allow it to recover the damages claimed.’ As in other jurisdictions, when seeking to prove loss from a competition law violation, complex economic evidence will likely form a substantial component of the applicant’s evidence and may, in the end, be an exercise in estimation as opposed to establishing the precise quantum.

**IX PASS-ON DEFENCES**

There is no established pass-on defence in Singapore. The defence has clear application in jurisdictions where compensation is a primary purpose. As victims who suffer indirect loss are not eligible for compensation in Singapore, the court may need to consider the competing considerations of over-compensating the claimant and under-penalising the infringing party.

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\(^\text{14}\) Section 12 of the Civil Law Act.

\(^\text{15}\) In the matter of: Notice of Infringement Decision issued by the Competition Commission of Singapore, Abuse of a Dominant Position by SISTIC.com Pte Ltd, Case No. CCS 600/008/07 (SISTIC) 4 June 2010 at [315].

The court is also likely to need to consider the question of mitigation of losses. When awarding damages, the court may also have to take into account effects that result from the conduct of the claimant. In particular, that the claimant ought to have taken reasonable steps to prevent or reduce the loss arising from the wrong that the defendant committed.

X FOLLOW-ON LITIGATION

Only after the CCCS has found a party to be in breach of Singapore’s competition laws and after the expiry of any applicable appeal period, can third parties bring an action. This approach is likely in recognition of the fact that a generalist court is not always the best qualified to undertake determinations of alleged contraventions of competition law that often involve very technical analysis. Additionally, as noted above, Section 86 of the Act specifically states that the right to private action is only available to ‘any person who suffers loss or damages directly as a result of any infringement’.

XI PRIVILEGES

Singapore recognises the concept of legal professional privilege with two limbs, legal advice privilege and litigation privilege. Documents that are protected by legal professional privilege are exempt from disclosure requirements and will not be required to be produced to another party through compulsory court process.¹⁷

Singapore law recognises legal advice privilege. Under legal advice privilege, communications for the purposes of obtaining legal advice are protected from disclosure. The main sources of Singapore law for legal advice privilege are several provisions in the Evidence Act. Legal advice privilege applies to correspondence between the party and its solicitor and extends to communications with in-house counsel.¹⁸

Litigation privilege is intended to maintain the confidentiality required by parties to prepare their case and strategy in litigation. The main source of Singapore law for litigation privilege is common law and has been explicitly recognised in past Singapore Supreme Court cases.

XII SETTLEMENT PROCEDURES

In respect of private civil claims, an offer to settle can be made (and accepted) at any time before the court finalises the matter.¹⁹ There is no requirement for leave of the court to be obtained before accepting an offer to settle. Where an offer is accepted, the court can incorporate any of its terms into a judgment.²⁰

An offer to settle is not filed with the court and no statement of the fact that such an offer has been made will be contained in any court document. Where an offer to settle is not accepted, no communication in respect of the offer can be made to the court until all questions of liability and the relief have been determined.²¹

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¹⁷ Sections 128 and 131, Evidence Act, Chapter 97.
¹⁸ Section 131, read with Section 128A, Evidence Act.
¹⁹ Order 22A, Rule 6(3), Rules of Court.
²⁰ Order 22A, Rule 6(3), Rules of Court.
²¹ Order 22A, Rule 5, Rules of Court.
XIII ARBITRATION
A party may apply to the court for an order referring all or part of the proceedings to mediation or arbitration and to have the proceedings stayed. If the court orders that the parties proceed to arbitration, then either party may apply to the court to have an arbitrator appointed and make orders about how the arbitration is to be conducted, including how the arbitrator's fees will be paid and when the arbitration must be completed. If the arbitration is successful, the parties may apply to the court to make an order in terms of the award set out by the arbitrator. Of course, as there have yet to be any private actions for breaches of competition law, it is an unresolved question whether arbitration would be popular for private competition law litigation in Singapore.

XIV INDEMNIFICATION AND CONTRIBUTION
A private litigant can bring a claim for a breach of the Act against any person named in the CCCS's determination and that caused his or her loss or damage.

XV FUTURE DEVELOPMENTS AND OUTLOOK
As the right to private action is contingent on a prior infringement decision of the CCCS, the likelihood of such a claim arising is inevitably linked to the number and frequency of infringement decisions issued by the CCCS. Increasing activity is also dependent on the awareness of third parties of their right to private action, and the degree to which the conditions for bringing a civil claim for private damages are attractive to a plaintiff.

The CCCS takes the view that cartels are one of the most harmful forms of anticompetitive conduct, and that cartels will remain a high enforcement priority. Accordingly, the most likely avenue for private actions is actions arising out of cartel conduct.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Few civil claims for damages related to contraventions of antitrust legislation have been brought to date in South Africa. One example is the claim by South African airline Nationwide against national carrier South African Airways (SAA), arising from findings that SAA had abused a dominant position through anticompetitive agreements it entered into with South African travel agents. Nationwide’s claims arose out of two complaints against SAA. The first claim was settled by means of a confidential out-of-court settlement; the second is the first of its kind in which follow-on damages have been awarded by the High Court in South Africa.²

In 2019, Comair Ltd entered into a settlement with SAA for approximately 1.1 billion rand³ in respect of the decision of the High Court in 2017⁴ that confirmed that Comair was also entitled to damages as a result of SAA’s abuse of dominance. The judgment confirmed that a person found to have engaged in prohibited anticompetitive conduct is liable for damages to any person harmed by that conduct. The methodology used to calculate damages is the lost revenue less avoided costs.

The city of Cape Town has taken steps to institute action against certain construction companies for civil damages arising from their agreement to rig bids in relation to the construction of the Green Point Stadium in Cape Town. This arises from the rigging of bids by construction companies for the 2010 FIFA World Cup stadiums and other major infrastructure projects.

On 31 March 2017, the City of Cape Town was granted leave to amend its particulars of claim in relation to its claim for damages. The amendments were largely designed to include allegations that the various collusive agreements were implemented and to indicate what resulted from the implementation thereof (and thus what prejudice was sustained by the City of Cape Town). These amendments were required to assist in the claim for damages.⁵ The High Court action for civil damages has been set down for hearing in 2020.

¹ Rosalind Lake is a director at Norton Rose Fulbright South Africa Inc.
³ The confirmation of the settlement agreement by the Supreme Court of Appeal is unreported, see the news article at https://www.fin24.com/Companies/comair-gets-r11bn-in-final-competition-settlement-with-saa-20190215.
Private actions in the form of class actions are expected to increase following a decision by the Supreme Court of Appeal (SCA) in the Pioneer bread cartel case, which clarified the requirements for bringing a class action. A number of non-government organisations and five individuals attempted to launch a class action against Tiger Brands, Pioneer Foods and Premier Foods following the successful prosecution of their bread price-fixing cartel by the Competition Commission in 2010. The High Court initially refused to certify the action as a class (a prerequisite for bringing a class action in South African law), which led to an appeal to the SCA. In 2012, the SCA sent the case back to the High Court for reconsideration. The same process was followed in the Mukkadem case, which involved distributors taking action against Tiger Brands, Pioneer Foods and Premier Foods for their participation in the bread cartel. In this case, however, the matter had to go all the way to the Constitutional Court before being sent back to the High Court for reconsideration. The High Court has yet to decide whether these classes should be certified. The cases are still pending, but if successful are likely to be the first class actions arising from a competition law infringement in South Africa.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Private antitrust enforcement

The Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction in respect of the interpretation and application of, inter alia, Chapter 2 of the Competition Act, 1998 (Competition Act), which regulates prohibited practices. However, Section 62(5) of the Competition Act precludes the Competition Tribunal and the Competition Appeal Court from making an assessment of the amount of damages and awarding damages arising from a prohibited practice: only the South African civil courts can award damages for a contravention of the Competition Act (Section 65(2) of the Competition Act).

Sections 62 and 65(2) of the Competition Act thus provide that the competition authorities have exclusive jurisdiction to determine whether a prohibited practice under the Competition Act has occurred, but the civil courts have exclusive jurisdiction to determine whether a claimant is entitled to damages, and if so, how much.

The substantive requirements for instituting civil action are set out in Section 65 of the Competition Act, and a finding by the competition authorities of a prohibited practice is a prerequisite for a civil claim for damages.

If requested by a claimant, the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court must issue a certificate certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Competition Act. A certificate issued in terms of Section 65(6)(b) of the Competition Act is

9 Section 62(1) and (2) of the Competition Act.
10 There is provision in the Competition Act for an amount of damages to be awarded in terms of a consent order settling a complaint; however, this is seldom used in practice.
11 Section 65(6)(b) of the Competition Act.
conclusive proof of its contents and is binding on a civil court. This means that a claimant will not need to prove any prohibited conduct before the civil court, and any action will relate only to whether the other elements of a delictual (tort) claim for damages have been met.

In a 2015 SCA decision, the SCA considered a situation where the leniency applicant had not been cited as a respondent to a complaint referral of the cartel complaint by the Competition Commission to the Competition Tribunal. The SCA found that civil action could not be pursued against the bread manufacturer Premier (although it was granted leniency) because the Competition Commission had failed to cite it as a respondent. In December 2015, the Competition Commission brought an application for leave to appeal this decision to the Constitutional Court in an effort to protect the rights of those that had suffered damage as a result of the prohibited practice. Prior to the application for leave to appeal being heard, a settlement agreement was reached between Premier and civil society organisations including Black Sash, COSATU, the Children’s Resources Centre and the National Consumer Forum. The application for leave to appeal has therefore been withdrawn.

ii Limitation to bringing a claim for damages

Any action for a civil claim for damages must be instituted within three years from the date on which the cause of action arose.

A person’s right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person (i.e., the finding of prohibited practice); or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

III EXTRATERRITORIALITY

The Competition Act applies to ‘all economic activity within, or having an effect within, the Republic’, with limited exceptions for collective bargaining between employees and employers and agreements in terms of the Labour Relations Act, as well as concerted conduct that is designed to achieve a non-commercial socioeconomic objective or similar purpose or any conduct that has been exempted in terms of Section 10 of the Competition Act.

To the extent that a public or private entity is engaged in economic activity with an effect in South Africa, they will be subject to the Competition Act.

In the ANSAC decision, the Competition Appeal Court and then the SCA considered the extraterritorial application of the Competition Act, and in particular the meaning of the word ‘effect’ contained in Section 3 of the Competition Act. The case involved a complaint lodged by Botswana Ash and Chemserve against ANSAC and CHC Global (Pty) Ltd (CHC) that they had contravened Sections 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act. ANSAC

12 Section 65(7) of the Competition Act.
14 Section 11 of the Prescription Act 1969.
15 Section 65(9) of the Competition Act.
16 Section 3 of the Competition Act.
is an association whose members are competing producers of soda ash in the United States. The association is incorporated in accordance with the provisions of the United States Export Trade Act 1918, commonly known as the Webb-Pomerene Act. 18

ANSAC did not dispute that the statutory phrase ‘an effect’ was wide and unqualified, but it argued that Section 3(1), when placed in its proper context and purposively interpreted, had to be read as bringing only anticompetitive activity within its ambit. The Competition Appeal Court and the SCA found that this argument flies in the face of the plain meaning of the statute’s wording. ANSAC’s argument also required that words be read into Section 3(1). The SCA found that there ‘was no discernible justification for doing so’. The SCA ultimately found that the correct approach is that all effects are captured (i.e., both positive and negative). 19 The SCA quoted the Competition Appeal Court, which pointed out that Section 3(1):

do not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences... The question is... one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory “net”, concerns not only anticompetitive conduct but also conduct the import of which still has to be determined. 20

Accordingly, the territorial scope of the application of the Competition Act is wide in the South African context. A number of consent agreements have been concluded with foreign entities whose conduct elsewhere in the world has had an effect in South Africa, and these entities therefore submitted to the jurisdiction of the Competition Act. 21

In 2019, a number of banks took exception to a complaint referral by the Competition Commission against many banks related to allegations of collusive conduct in respect of forex trading, including a challenge to the jurisdiction of the competition authorities in respect
of conduct of foreign entities. In its decision, the Competition Tribunal\textsuperscript{22} found there to be three broad categories of respondent banks: local banks, local peregrini (foreign banks that have a presence in South Africa) and pure peregrini (international banks that have no presence in South Africa. No issue of jurisdiction was raised in relation to the local banks.

The pure peregrini banks were those international banks that had no presence in South Africa. The Competition Tribunal, in line with common law precedent, found that it did not have jurisdiction to issue an order requiring the foreign banks (pure peregrini) to pay any administrative penalty as such an order would not be effective. It therefore constrained the Competition Commission, in relation to these banks, to seek an order declaring the conduct of these pure peregrini to be anticompetitive.

Regarding those foreign banks which have a presence in South Africa, the local peregrini, the Competition Tribunal found that because an order requiring the payment of a penalty against such banks could be enforced, the Competition Commission could seek to extract an administrative penalty, but only to the extent that such a penalty was calculated on the turnover of the representative in South Africa.

The Competition Tribunal found that, in both of these instances, the Competition Commission would still need to allege that the conduct of the respondent banks had an effect in South Africa, that met the internationally recognised threshold of being direct or immediate, and substantial before the Competition Tribunal could assert its jurisdiction in making any order.

IV STANDING

The Competition Act provides an express mandate for private actions both before the competition authorities and the civil courts.

i Standing to bring a complaint about anticompetitive conduct in terms of Section 49B of the Competition Act

Section 49B of the Competition Act recognises the right of any person to submit a complaint to the Competition Commission for investigation. If the Competition Commission issues a notice of non-referral in respect of a complaint submitted by a complainant, the complainant may, in terms of Section 51(1) of the Competition Act, refer the complaint directly to the Competition Tribunal within a limited time frame.

\textsuperscript{22} Macquarie Bank and Competition Commission (CR212Feb17/EXC037May17); HSBC Bank and Competition Commission (CR212Feb17/EXC028Apr17); SNYS (Standard New York) and Competition Commission (CR212Feb17/EXC034May17); BAML1 (Bank of America) and Competition Commission (CR212Feb17/EXC036May17); Standard Bank SA and Competition Commission (CR212Feb17/EXC042May17); HSBC Bank USA and Competition Commission (CR212Feb17/EXC328Mar18); Competition Commission and Bank of America and Others (CR212Feb17/OTH270Jan18); Standard Chartered Bank and Competition Commission (CR212Feb17/OTH121Jul17); ANZ Banking Group and Competition Commission (CR212Feb17/EXC029May17); Commerzbank AG and Competition Commission (CR212Feb17/EXC031May17); JP Morgan Chase and Competition Commission (CR212Feb17/EXC032May17).
ii Standing to bring a claim for damages arising from anticompetitive conduct in terms of Section 65 of the Competition Act

Any party who has suffered loss as a result of a contravention of the Competition Act may commence civil action to recover the loss once the Competition Tribunal has certified that the prohibited conduct has occurred.\(^\text{23}\)

In principle, the Competition Act affords an indirect purchaser the right to institute a claim for damages if the plaintiff can prove he or she suffered a loss or damage as a result of a prohibited practice. In the *Pioneer* bread class action case, the High Court did not make a ruling on whether an indirect purchaser claim is available; however, the High Court did recognise that Section 38 of the Constitution of the Republic of South Africa, 1996 (Constitution) identifies the following persons that may approach a court to institute a class action:

- anyone acting in his or her own interest;
- anyone acting on behalf of another person who cannot act in his or her own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;
- anyone acting in the public interest; and
- an association acting in the interests of its members.\(^\text{24}\)

In the *Comair* case, the High Court confirmed that damages claims for anticompetitive conduct are not limited to rivals;\(^\text{25}\) a person found to have engaged in prohibited anticompetitive conduct is liable for damages to any person harmed by that conduct.

While there is no specific clarity yet in South Africa on the availability of an indirect purchaser claim, the remission of the matter by the SCA to the High Court for certification may suggest that the South African courts may be willing to accept that class actions can be brought on behalf of both direct and indirect purchasers: what will be important is whether a causal link between the anticompetitive conduct and harm caused can be established.

V THE PROCESS OF DISCOVERY

i Discovery procedures before the competition authorities

Pretrial discovery procedures apply to both stages of private antitrust litigation in South Africa (i.e., proceedings before the competition authorities, and damages actions before the civil courts).

Section 27 of the Competition Act, read with Rule 22(1)(c)(v) of the Rules for the conduct of proceedings in the Competition Tribunal (the Tribunal Rules),\(^\text{26}\) states that the Competition Tribunal may give directions in respect of the production and discovery of documents (whether formal or informal) at a pre-hearing conference.

There are no specific provisions in the Competition Act or the Tribunal Rules relating to discovery procedures. The Competition Tribunal has, in terms of Rule 55(1)(b) of the

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23 Section 65 of the Competition Act.
26 Published under GG 22025 of 1 February 2001.
Tribunal Rules, a discretion to apply the High Court Rules. In practice, strict adherence to the formalities of the civil courts does not occur. For example, in *Allens Mescho (Pty) Ltd and others v. the Commission and others,* the Competition Tribunal confirmed that Rule 55 of the Tribunal Rules confers on it a discretion to apply the High Court Rules. The Competition Tribunal found this is something less exacting than importing the entire rule once one has identified a lacuna in the Tribunal Rules. The reason for this is that the proceedings in the two forums are not sui generis. Uncritical borrowing of a High Court Rule, the Competition Tribunal found, may lead to impracticality.

Owing to the more informal nature of proceedings before the competition authorities, orders relating to the ad hoc production of relevant documents are not uncommon at appropriate times during the course of proceedings. For example, prior to the close of pleadings, respondents in proceedings before the competition authorities regularly make use of Rules 35(12) and 35(14) of the High Court Rules to request the production of documents. In addition, decisions have confirmed that litigants are entitled to access the Commission’s investigation record in terms of Rule 15 of the Competition Commission Rules. The interpretation of this rule is still subject to litigation; however, Rule 15 has subsequently been amended effective 25 January 2019, removing these issues in future complaints.

Rule 15 of the Competition Commission’s Rules does not provide a time period within which the Commission must provide the record to a requesting party. In *Group Five Ltd v. Competition Commission,* the Competition Appeal Court found that the Competition Commission must do so within a reasonable time period. The concept of a reasonable time period was tested in *The Standard Bank of South Africa Limited v. The Competition Commission of South Africa.* Standard Bank is one of the 18 respondents in a complaint referral that the Competition Commission has brought against local and international banks concerning alleged collusive conduct with regard to trading in foreign currencies. As part of the proceedings, Standard Bank requested, in terms of Rule 15 of the Competition Commission’s Rules, that the Competition Commission make a copy of its record available to it. After various requests over a two-month period, Standard Bank brought an application to compel delivery of the record. The Competition Tribunal was required to consider what a reasonable time period would be within which to produce a record.

27 Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.
29 ibid. at Paragraph 6.
30 This rule permits the respondent to request access to documents that have been referred to in the applicant’s papers.
31 This rule permits the respondent to request access to a clearly specified document that is necessary for the purpose of pleading.
33 ibid.
34 ibid. at Paragraph 10.
The Competition Tribunal noted that there are two points to consider when determining what constitutes a reasonable time. This includes how soon the requestor needs the record and what challenges confront the Competition Commission in responding to such a request. 36

The Competition Tribunal found that, in complex cases involving a lengthy record that is subject to numerous claims, the documents in the record may constitute restricted information, and where discovery has not yet taken place, may justify delaying production of the record until the record is ready to be discovered in the underlying case. 37 38

In light of the fact that Standard Bank had not advanced any facts as to why the record was required prior to discovery, the complaint referral relates to a period of at least seven years and there are at least five separate accounts of alleged co-operation between the respondents, the record is likely to be voluminous and raise logistical issues. 39 The Competition Tribunal therefore found that it would not be unreasonable for the Competition Commission to provide the record when it makes discovery. However, the Competition Tribunal did go on to state that if Standard Bank had reasons for requiring the record more urgently, there was nothing that prevented it from bringing a further request in terms of Rule 15. 40

Standard Bank took the decision on appeal arguing that there was no rationale on the part of the Competition Tribunal to link the production of the record under Rule 15 of the Competition Commission Rules relating to discovery. 41

The Competition Appeal Court found that the decision in Group Five ‘applies unabatedly in the present matter’. 42 In other words, the fact that Standard Bank was a litigant should not have been a factor in determining a reasonable time. 43 The Competition Appeal Court ordered that the record be produced to Standard Bank within five days. The Competition Commission has taken the decision on appeal to the Constitutional Court. The hearing took place on 5 March 2019; however no decision has been issued by the Constitutional Court as yet. The contentious aspect of Rule 15 has since been amended as discussed below.

Owing to the commercially sensitive nature of certain documents likely to be required to be produced during complaint proceedings (e.g., pricing schedules and strategic plans), Section 44 of the Competition Act permits a person who submits information to the Competition Commission or Competition Tribunal to identify information that they claim to be confidential. In practice, legal representatives and expert economists sign confidentiality undertakings, which then allow them to access these confidential documents for the purpose of advising their clients in Competition Tribunal or Competition Appeal Court proceedings. With effect from 25 January 2019, 44 Rule 15 of the Competition Commission Rules was amended to bring it in line with Section 7 of the Promotion of Access to Information Act 2000.

The amended rule provides for an exception to the general rule that the record may be copied or inspected upon request. 45 The amended Rule 15 does not permit the copying or

36 ibid. at Paragraph 60.
37 ibid. at Paragraph 68.
38 The discovery process before the competition authorities will only take place once pleadings have closed.
40 ibid, at Paragraph 73.
42 ibid, at Paragraph 34.
43 ibid, at Paragraph 35.
45 Subject to the information not constituting restricted information.
inspection of a document that is requested for (1) pending criminal, civil or administrative proceedings, (2) after proceedings have commenced and (3) where another law or the rules of any court or administrative body already provide for such production or access to the records.  

Furthermore, a record obtained in contravention of Rule 15(5) of the amended Competition Commission’s Rules will not be admissible as evidence in the proceedings unless the relevant court or administrative body determines that the exclusion of the record would be detrimental to the interests of justice.

ii Discovery procedures before the civil courts

Discovery procedures in all civil actions instituted in the High Court or Magistrates’ Court are determined by Rule 35 and Rule 23 of the High Court Rules and Magistrate Court Rules respectively. Parties to a civil action are obliged to disclose to the other party all documents, tapes or recordings relating to any matter in question in their possession, under their control or that were previously in their possession or under their control that either serve to advance their case or adversely affect their case, or that advance the case of the other party to the proceedings. A party’s failure to discover any document will result in that party not being able to rely upon such document in the action. Furthermore, there are procedures in place that permit an application to compel the discovery of documents that have a bearing on the action. In practice, the courts will not hear a matter if discovery has not been finalised.

A party can also request the other party to make further and better discovery in addition to the documents they have already discovered. Either party can call on the other to provide copies of its discovered documents or to make the same available for inspection. Any documentation that is subject to privilege is not discoverable, but a list of these documents must nonetheless be produced.

In a 2015 case, City of Cape Town v. South African National Roads Authority Limited & Others, the SCA dealt with the issue of confidential information in discovery. In this case, the respondent sought to prevent the appellant from referring to its confidential information in its affidavits. The confidential information was obtained by the appellant through the application of civil procedure discovery rules.

When providing the confidential information, the parties agreed that the appellant would provide a confidentiality undertaking that would prevent the appellant from using or

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48 Footnote 23.
49 Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa.
50 Discovery will only take place once pleadings have closed.
51 There is no discovery procedure for high court litigation instituted by way of application unless this is ordered by the court. Discovery only applies if the litigation is instituted by way of action.
52 Rule 35(1) of the High Court Rules and Rule 23(1) of the Magistrate Court Rules.
53 Rule 35(4) of the High Court Rules and Rule 23(4) of the Magistrate Court Rules.
54 Rule 35(3) of the High Court Rules and Rule 23(3) of the Magistrate Court Rules.
55 Rule 35(3) of the High Court Rules and Rule 23(3) of the Magistrate Court Rules.
56 Rule 35(6) of the High Court Rules and Rule 23(6) of the Magistrate Court Rules.
57 Rule 35(10) of the High Court Rules and Rule 23(11) of the Magistrate Court Rules.
59 Rule 35 of the High Court Rules.
disclosing any information received from the appellant for any purpose other than the matter at hand, and only in a manner agreed between the parties or in accordance with the directions of a court or judge. In breach of the agreement between the parties, the appellant filed an affidavit that contained references to the respondent's confidential information. The SCA held that the High Court prohibited the publication of all information from the Rule 53 record (a record filed in a review application), including the non-confidential record, whereas the respondent's case was that all such information, apart from certain specified portions, could be made public immediately, while other parts of the information must be kept secret only until the respondent filed its answering papers, not until the hearing of the matter. This judgment confirms that, in relation to confidential information and public access to court records, the position is now that:

\[
\text{court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified.}^{60}
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While confidential documents will need to be discovered, in certain circumstances a party can approach the court to order a regime where confidentiality can be specifically dealt with.\(^{61}\) In practice, parties can reach agreement with one another to limit availability of confidential information such as inspection rather than retention of sensitive documents.

VI USE OF EXPERTS

Experts play a key role in prohibited practices cases before the competition authorities and damages actions before the courts in South Africa. In particular, economists are crucial in identifying substantive competition law issues such as market definition and anticompetitive effect.

In England and Wales, the use of expert evidence in competition matters is subject to the guidelines of the court. The courts generally aim to control the manner of production of expert evidence in competition matters by, for example, giving directions on the issues in relation to which expert evidence may be produced, guiding the parties to narrow the issues of the matter or sanctioning discussions between the various experts involved in the matter.\(^{62}\)

In the United States, the courts have narrowed down the instances where expert testimony may be utilised in competition cases to the following cases: when the expert has sufficient specialist knowledge and expertise with respect to the field in question; when the methodology and data used to reach the expert's conclusions are sufficiently reliable; and when the expert's testimony is sufficiently relevant to assist the tester of fact.\(^{63}\)

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60 Footnote 54 at Paragraph 47.
61 Crown Cork + Seal Co Inc + Another v. Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093(W).
The reliability of the expert evidence is a second factor to the inclusion of expert evidence, and is frequently the cause of most expert evidence being excluded from antitrust cases. In contrast to England and Wales as well as the US, however, in South Africa there are no specific rules on the use of expert evidence in antitrust cases heard by the competition authority.

In the absence of specific rules in relation to the calling of expert witnesses, and in particular economists in Competition Tribunal proceedings, the High Court Rules relating to the use of expert evidence will generally apply. In terms of Rule 36(9) of the High Court Rules, no person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he or she shall, not less than 15 days before the hearing, have delivered notice of his or her intention so to do; and not less than 10 days before the trial, have delivered a summary of such expert’s opinions and his or her reasons therefor. Typically in matters before the Competition Tribunal, provision is made in the pretrial timetable for the exchange of expert witness statements with an opportunity for the parties to supplement their expert witness statements in reply.

In a 2015 decision, the SCA dealt with the issue of the use of expert evidence to prove damages. The SCA held that courts in South Africa and other jurisdictions have experienced difficulties dealing with evidence from expert witnesses who are often described as ‘hired guns’. The SCA made reference to a passage from the judgment of Justice Marie St-Pierre in Widdrington (Estate of) v. Wightman, which stated the following in relation to the standard that should be met in the use of expert evidence in civil proceedings:

Legal principles and tools to assess credibility and reliability

[326] Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

[327] As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness’s opinion.

[330] An expert witness’s objectivity and the credibility of his opinions may be called into question, namely, where he or she:
accepts to perform his or her mandate in a restricted manner;
presents a product influenced as to form or content by the exigencies of litigation;

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65 The parties can by agreement set longer time periods for compliance with this rule.
67 ibid.
68 2011 QCCS 1788 (CanLII).
shows a lack of independence or a bias; has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise; advocates the position of the party that retained his or her services; or selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.

The SCA evaluated the expert evidence adduced in this case in terms of these principles, thereby creating a precedent in South Africa for the standards to be met for the use of expert evidence in civil claims.

Following the SCA decision, the Competition Appeal Court stated that the guidelines from the *Ikarian Reefer* case should be followed in future hearings before the Competition Tribunal. The duties and responsibilities of expert witnesses as recorded in *Ikarian Reefer* include:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his or her expertise. An expert witness in the High Court should never assume the role of an advocate.
- An expert witness should state the facts or assumption upon which his or her opinion is based and not omit to consider material facts that could detract from the concluded opinion.
- An expert witness should make it clear when a particular quotation or issue falls outside his or her expertise.
- If an expert’s opinion is not properly researched because insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

In a novel decision in South Africa, the Competition Tribunal introduced the concept of a hot-tub hearing in the *Timrite/Tufbag* merger. The principle of hot-tubbing has been used

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73 Re J sup.
74 ibid.
75 ibid at Paragraph 181.
76 ‘Derby & Co Ltd and Others v. Weldon and Others’, *The Times*, 9 November 1990 per Lord Justice Staughton.
77 Timrite (Pty) Ltd and the Mining Bag Division of Tufbag (Pty) Ltd (IM100Jul17) (19 February 2018),
in recent years in other jurisdictions to allow opposing experts to meet and independently
discuss and identify points of agreement. This process ensures that only issues in contention
are ultimately argued at the hearing before the Competition Tribunal.

Each expert gave a short opening presentation, and the remainder of the experts’
testimony took the form of direct discussion between the experts.\textsuperscript{78}

As mentioned above, the competition authorities have discretion in applying the High
Court rules. In a claim for damages before the civil courts, the High Court rules would apply.

In the \textit{Nationwide} and \textit{Comair} decisions,\textsuperscript{79} extensive expert evidence was used to
demonstrate what the value of damages should be. The High Court did not, in this case,
set out defined parameters for the standards to be applied in the use of expert evidence. It
is, however, clear from the conclusions reached that it is the role of the relevant forum (the
competition authorities or the civil court) at which the expert or economist evidence is being
presented to determine the value that should be attached to the evidence.

\textbf{VII CLASS ACTIONS}

Unlike the legislation of some other jurisdictions, South Africa’s Competition Act does not
provide for class actions in antitrust cases. However, Section 38(c) of the Constitution allows
for class actions for an infringement of any fundamental right in the Bill of Rights. There is
no specific class action legislation in South Africa.

The \textit{Pioneer} bread class action was the first of its kind in South Africa, and confirmed
that class actions for damages are possible in South Africa. In this case, the SCA gave the
following guidance on class action proceedings:\textsuperscript{80}

\begin{itemize}
  \item[a] class action proceedings may be sanctioned by a court where constitutional rights are
        invoked and in other appropriate cases;
  \item[b] it is necessary to apply to court for certification to institute a class action;
  \item[c] there must be a clear and explicit definition of the class to be encompassed, the
        identification of some claim or issue that could be determined by way of a class action,
        and evidence of the existence of a valid cause of action;
  \item[d] the court must be satisfied that the class representative is suitable to represent the
        members of the class;
  \item[e] the court must be satisfied that the class action is the most appropriate procedure to
        adopt for the underlying claims; and
  \item[f] the definition of the class must have sufficient precision so that a particular individual’s
        membership can be objectively determined by examining the situation in the light
        of the class definition. This test and commonality are likely to give rise to the most
difficulties that litigants will experience in getting a class certified.\textsuperscript{81}
\end{itemize}

\textsuperscript{78} https://econex.co.za/the-use-of-concurrent-expert-evidence-before-the-competition-tribunal-is-the-
hot-tub-getting-hotter/.
\textsuperscript{79} ibid Footnote 2 and 4.
\textsuperscript{80} The Court noted that the factors are merely guidelines to be considered on a case-by-case basis. Footnote 4
at Paragraph 15.
\textsuperscript{81} Footnote 4.
Following the Pioneer case, class action case law in South Africa has been developing, as demonstrated in the case of Nkala.\(^82\) On 13 May 2016, judgment was handed down by the High Court in relation to an application by 69 mine workers seeking to bring a class action against 32 mining companies for compensation for contracting silicosis and pulmonary tuberculosis while working in their mines. The Court issued an order for certification of the class after finding that, in this context, a class action was the only realistic option through which the applicants could assert their claims effectively against the mining companies. This action was settled on 26 July 2019 on terms acceptable to the court.\(^83\) The settlement involved the establishment of a trust to administer the settlement terms.

On 3 December 2018, the South Gauteng High Court certified a class action in respect of a listeriosis outbreak early in 2018 that affected over 1,000 people. The defendant, a processed meat manufacturer, has elected not to challenge the certification, however, it has issued extensive subpoenas to meat suppliers and laboratories for various information and these are being challenged across the board. As a result, it is unlikely that this matter will progress quickly.

These developments in advancing the law applicable to class actions for damages claims are already leading to an increase in the prevalence of such private actions in South Africa.

VIII CALCULATING DAMAGES

Section 65(6)(a) excludes a civil claim for damages by persons who have already been compensated for damage in a consent order. In practice, however, damages are seldom agreed to by respondents in consent orders, and accordingly a civil claim may be brought where a finding that a party had contravened the Competition Act has been made.\(^84\)

While the plaintiff will not need to prove the cause of action (that is, that the Competition Act has been contravened), he or she will be required to prove the damage they allege was suffered as a result of the prohibited practice. The general common law principles relating to civil damages claims apply.

In South African common law, to sustain a civil claim for damages, the plaintiff must show that the prohibited practice caused the plaintiff to suffer a loss and the amount of the loss. In other words, the plaintiff must prove, on a balance of probability, that there is a causal nexus between the alleged unlawful conduct and the damages that it claims.

The amount claimed as damages must be capable of being quantified in monetary terms,\(^85\) and should only restore the plaintiff to the financial position he or she was in before the wrongful conduct causing the damage took place. The onus is on the plaintiff to quantify and prove the damages sought, and the court will determine the amount of damages to be awarded, although these will not exceed the actual amount claimed by the plaintiff.\(^86\) In the Comair case, the court was satisfied that SAA’s anticompetitive conduct had caused damage

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\(^{82}\) Nkala and Others v. Harmony Gold Mining Company Limited and Others [2016] ZAGPJHC 97 (13 May 2016).


\(^{84}\) In practice, many claims for damages are agreed to by way of private settlement negotiations.

\(^{85}\) The courts in South Africa are entitled to award nominal damages in the event that damages cannot be quantified.

to Comair and that in that case, damages should be calculated based on lost revenue less avoided costs. SAA argued that the lost market share of Comair was attributable to other factors and not as a result of SAA’s anticompetitive scheme in place with travel agents. The court was not convinced by this argument given that in its 2010 decision, the Competition Tribunal conclusively determined that an exclusionary abuse of dominance could still be effective despite the growth in the market share of rivals. The court quoted the Competition Tribunal as follows: 87

...foreclosure of rivals does not require a showing that rivals are completely foreclosed from entering or accessing a market or segment of a market, it is sufficient to show that they were prevented or impeded from expanding in the market or in a segment of the market which was still distributed through travel agents (TAS). All the evidence of the witnesses in this case thus far suggests that SAA’s rivals were prevented or impeded from expanding in the TAS segment of the market by SAA’s incentive agreements with travel agents.

The court noted that the Competition Appeal Court had also confirmed that SAA’s conduct substantially foreclosed the relevant market to its rivals and such conduct accordingly had the requisite anticompetitive effect for the purposes of establishing a contravention of Section 8(d)(i) of the Act. The court therefore held that the findings of the competition authorities are binding on the High Court and, therefore, found that Comair suffered damages as a result of SAA’s infringing schemes and was anticompetitively foreclosed from the market for domestic airline travel. 88

The ‘once and for all’ rule has the effect that a complainant may generally only claim damages that flow from a single cause of action once. 89 A distinction must be drawn between a single wrongful act that gives rise to a single cause of action and a continuing wrongful act that causes damage over a period of time, which may give rise to a series of rights of action arising from time to time. 90 In Nkala, for example, the class action sought damages as a result of alleged liability against the mine owners for silicosis and tuberculosis over an extended period of time.

Prospective loss is accepted as part of the concept of damage in South African law. 91 The following forms of prospective damages are recognised in South African law:

\[\begin{align*}
a & \text{ future expenses on account of a damage-causing event;} \\
b & \text{ loss of future income (or loss of earning capacity);} \\
c & \text{ loss of prospective business and professional profit;} \\
d & \text{ loss of prospective support;} \\
e & \text{ loss of a chance; and} \\
f & \text{ future non-patrimonial loss (injury to personality).} \\
\end{align*}\]

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88 See above.
90 John Newmark & Co (Pty) Ltd v. Durban City Council 1959 (1) SA 169 (N); D & D Deliveries (Pty) Ltd v. Pinetown Borough 1991 (3) SA 250 (D); Gijzen v. Verrinder 1965 (1) SA 806 (D). Claims for delictual damages and subsidence are based on different causes of action.
92 ibid.
Non-patrimonial loss is defined as the deterioration of highly personal or personality interests. South African law recognises personality rights (and interests) in regard to physical and mental integrity, bodily freedom, reputation, dignity, privacy, feelings and identity. A deterioration of the quality of any of these interests constitutes non-patrimonial damage.\(^93\) South African law accepts that compensation may be awarded for non-patrimonial damage.\(^94\) Such damages are, however, unlikely to arise as a result of a contravention of the Competition Act.

In Nationwide, the court stated that to determine the damage suffered by Nationwide, it had to compare the performance of Nationwide before and after the abuse period to try and reach some estimation of how it would have performed absent SAA’s unlawful agreements with travel agents.\(^95\)

The primary object of an award for damages is to compensate the person who has suffered harm. Plaintiffs may not profit from defendants’ wrongdoing.\(^96\) No punitive damages for contraventions of the Competition Act can be awarded by the South African courts.

Ordinarily in a civil case, the unsuccessful party will be responsible for the reasonable legal fees incurred by the successful party, which normally include legal fees. The costs of advocates and experts are generally not included in costs orders unless specifically stated or the expert is declared a necessary witness. There is, however, more than one tariff at which the legal fees are taxed, and the court has the discretion of whether to order costs and the tariff at which it is to be taxed.

**IX PASS-ON DEFENCES**

The passing-on defence has not yet been tested in South Africa.

In contrast, the US has rules dealing directly with pass-on defences. In the US, antitrust defendants are barred from using pass-on defences against a direct purchaser with three exceptions to this rule that have been recognised by lower courts in the US: pre-existing, fixed quantity cost-plus contracts;\(^97\) claims where the direct purchaser is owned or controlled by either the defendant or the indirect purchaser;\(^98\) and claims where the intermediary is a direct participant in a conspiracy with the defendant.\(^99\)

**X FOLLOW-ON LITIGATION**

The Competition Act makes provision for follow-on litigation following a finding of prohibited practice, provided damages were not awarded as part of a consent order.

Leniency is available for firms for cartel conduct (the direct or indirect fixing of prices or trading conditions, market allocation or collusive tendering that contravenes

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\(^{94}\) ibid. at 196.

\(^{95}\) Footnote 2 at Paragraph 53.

\(^{96}\) J R Midgley and J C Vand Der Walt, footnote 57.


Section 4(1)(b) of the Competition Act). However, leniency awarded to a firm by the Competition Commission in terms of the Commission’s Corporate Leniency Policy only provides immunity from prosecution by the competition authorities and administrative penalties in terms of the Competition Act, and does not protect the applicant from civil or criminal liability. In practice, the Competition Commission will enter into a consent order or cite the leniency applicant as a party in the main action to ensure that there is an order against that entity to enable civil claimants to obtain a certificate from the Competition Tribunal to proceed against the leniency applicant for damages.

The amendments to the Competition Act that came into effect on 12 July 2019 require the Competition Commission to develop and publish a policy on leniency. Accordingly, there are likely to be amendments to the current corporate leniency policy; however, these are expected primarily to deal with leniency for directors and managers of firms that engage in cartel conduct.

XI PRIVILEGES

Privilege is a fundamental right that protects communication between a legal representative and his or her client from being disclosed. Communication is privileged if it is made to a legal adviser acting within a professional capacity in confidence for the purpose of obtaining professional advice, for the purpose of use in contemplated or pending litigation or prosecution, or for both; and where the client claims the privilege.

i Legal adviser acting within a professional capacity

South African courts have held that there is no distinction drawn between internal legal advisers and attorneys acting within private practice for the purposes of legal privilege. The High Court in Mohamed concluded that in the circumstances, confidential communication made between the government and its internal legal advisers was no different from confidential advice obtained from an independent legal adviser.

ii Communication made in confidence

Confidentiality is a question of fact. Courts tend to infer that communication is confidential where it is proven that the legal adviser was consulted in his or her professional capacity to obtain legal advice. Nevertheless, in Bank of Lisbon, the Court held that ‘the basis of privilege is confidentiality. When confidence ceases, privilege ceases.'
iii  Purpose of obtaining legal advice
Communication made for the purpose of obtaining legal advice is also a question of fact. The communication is not limited to advice connected to actual or pending litigation.\textsuperscript{108}  

It has also been held that legal advice need not be the primary purpose of the communication provided that the purpose is connected with obtaining legal advice.\textsuperscript{109}  Therefore, a statement made that is unconnected with the giving of legal advice will not be privileged merely because it was made in confidence to a legal adviser.

iv  The client must claim the privilege
Privilege attaches to the client, not the legal adviser. The legal representative is obliged to raise the privilege on behalf of his or her client or is bound by the waiver depending on the client’s decision.

v  Waiver
Privilege can be waived either expressly, impliedly or through imputation. The courts may impute waiver where the client discloses privileged information. In \textit{Wagner}, the Court held that an implied waiver involves ‘an element of publication of the document or part of it which can serve as a ground for the inference that the litigant or the prosecutor no longer wishes to keep the contents of the document a secret’.\textsuperscript{110}

vi  Impact of producing documents to the competition authorities
Leniency applications and the documents attached to such applications have not, to date, been disclosed by the Competition Commission to any complainants or third parties. These have only been released during the discovery process or part of a request for the record in terms of Rule 15. The Competition Commission’s view is that both leniency applications and the documents produced in support of them are protected by legal privilege and also constitute restricted information in terms of Rule 14 of the Competition Commission’s Rules.\textsuperscript{111}  To qualify as subject to a claim of legal privilege, the leniency application documents must have been compiled for the dominant purpose of litigation before the Competition Tribunal in contested complaint proceedings and have been placed before legal advisers for advice in respect of such litigation.\textsuperscript{112}

However, in a 2013 judgment,\textsuperscript{113}  the SCA held that although leniency applications are protected from disclosure by a claim of legal privilege (by the Competition Commission), in this particular case the Competition Commission had waived its claim of litigation privilege by referring to the leniency application in the referral document filed with the Competition Tribunal.

\textsuperscript{108}  Savides v. Varsamopolus 1942 WLD 49.
\textsuperscript{109}  Lane and Another NO v. Magistrate, Wynberg 1997 (2) SA 869 (C).
\textsuperscript{110}  Ex parte Minister of Justice: \textit{In re S v. Wagner} 1965 (4) SA 507 (A) 514.
\textsuperscript{111}  Rules for the conduct of proceedings in the Competition Commission published under GG 22025 of 1 February 2001.
\textsuperscript{112}  \textit{ArcelorMittal South Africa Limited and Another v. Competition Commission and Others} (103/CAC/Sep10) [2012] ZACAC 1 (2 April 2012).
\textsuperscript{113}  \textit{Competition Commission of South Africa v. ArcelorMittal South Africa Limited and Others} (680/12) [2013] ZASCA 84 (31 May 2013).
It is, however, possible that information contained in a leniency application will still be protected to some extent if it has been claimed as confidential in a confidentiality claim submitted by the disclosing party, however, as noted above, usually legal advisers will be permitted access to confidential information subject to a suitable confidentiality undertaking.\textsuperscript{114}

This principle was reiterated in a 2016 Competition Appeal Court case in which the Competition Appeal Court found that the Competition Commission’s investigative record ought to be disclosed to any person who requests it in terms of Rule 15 of the Competition Commission’s Rules\textsuperscript{115} provided that those documents are not legally privileged or confidential and do not constitute restricted information.\textsuperscript{116} This position has been amended slightly in respect of litigants by the changes to Rule 15 discussed above.

Commencing 12 July 2019, certain provisions of the Competition Amendment Act, 2018 came into force. These included significant amendments to both Section 44 and Section 45 of the Competition Act. In particular, with regards to information submitted to the Competition Commission, the Competition Commission will determine whether the information is confidential information and, if it determines that the information is confidential, may make any appropriate determination concerning access to that information.\textsuperscript{117} An aggrieved party will be entitled to refer the Competition Commission’s decision to the Competition Tribunal, which may confirm or substitute the decision. The Competition Tribunal will be entitled to make a determination in respect of confidential information submitted to it.

The effect of these amendments is that it is no longer be necessary to approach the Competition Tribunal to make a determination on whether information submitted to the Competition Commission, which has been claimed as confidential, is confidential information. It bears mention that if confidentiality has been claimed over information, it will continue to remain confidential until a determination to the contrary has been made. However, the amendments to Section 45 of the Competition Act will allow for the Minister of Trade, Industry and Competition, or any other relevant minister and any relevant regulatory authority to access confidential information in merger proceedings for the purposes of their participation in merger proceedings (although in practice the Minister is provided with a confidential copy of all merger filings by the Competition Commission).

Confidential information is defined in Section 1 of the Competition Act as ‘trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others’.

\section*{XII Settlement Procedures}

In terms of Rule 34 of the High Court Rules and Rule 18 of the Magistrate Court Rules, provision is made that in an action where a sum of money is claimed, a defendant may at any time, unconditionally and without prejudice, make a written offer to settle the plaintiff’s claim, which must be signed by the defendant him or herself, or by his or her attorney authorised in writing to do so.

\textsuperscript{114} Section 44 of the Competition Act.
\textsuperscript{115} Footnote 28.
\textsuperscript{116} Footnote 28.
\textsuperscript{117} See Section 44 of the Competition Act.
Where a settlement offer is made on a without prejudice basis and the offer is not accepted, then the offer may not be used or referred to in court or in arbitration proceedings except insofar as a cost order is concerned. In the case of an unconditional formal settlement offer, should the offer not be accepted, either party is entitled to refer to the offer in proceedings.  

An example of this in a civil action for damages in an antitrust case is the settlement reached between Premier and civil society organisations including Black Sash, COSATU, the Children’s Resources Centre and the National Consumer Forum for damage suffered as a result of Premier Foods’ participation in the bread cartel. Any party can approach the court to have a settlement agreement made an order of court to enable it to be enforced as an order.

**XIII ARBITRATION**

There is nothing preventing parties from agreeing to arbitration or other alternative dispute resolution mechanisms as a means of addressing a damages claim after a finding of prohibited practice has been made.

**XIV INDEMNIFICATION AND CONTRIBUTION**

The Competition Act does not provide for joint and several civil liability. In terms of Section 2(6) of the Apportionment of Damages Act, 1956, if judgment is given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the joint wrongdoer has, if the judgment has been paid in full, a right of recourse against other joint wrongdoers in the proceedings for a contribution in respect of such an amount. Such a claim will prescribe 12 months from the date of the judgment.  

In the US, the Supreme Court has held that an antitrust defendant is not permitted to seek a contribution from the other participants in an anticompetitive arrangement. This decision was based on the finding by the Supreme Court that Congress in the US had not explicitly or implicitly created any statutory right to contribution for an antitrust defendant, and also had not conferred any authority on the US federal courts to create a common law right to contribution in favour of an antitrust defendant. There are no clear rules in US antitrust law in relation to the right of a defendant to indemnification.

In South Africa, it is possible for defendants in a case to apply to join other parties in certain circumstances.

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120 Section 2(6)(b) of the Apportionment of Damages Act, 1956.
122 ibid.
Criminal liability for individual managers or directors who participate or knowingly acquiesce in price fixing, market allocation or collusive tendering in contravention of Section 4(1)(b) of the Competition Act was introduced in South Africa on 1 May 2016. Individuals face administrative penalties of up to 500,000 rand and prison sentences of up to 10 years if found guilty. No individuals have been prosecuted yet, because of difficulties in reaching agreement between the National Prosecuting Authority and the Competition Commission on how prosecutorial discretion will be applied in these cases in order to allow the Competition Commission to grant leniency to individuals.

The Competition Amendment Act, 2018 was partially enacted on 12 July 2019. The amendments are far-reaching, and are likely to result in increased cartel litigation and private enforcement in respect of abuse of dominance contraventions, this is especially so as many amendments to the abuse of dominance provisions are designed to allow for easier prosecution of these cases.

With continued public enforcement of high-profile cartel cases, and with further clarity arising in respect of civil claims, private enforcement is likely to increase in South Africa, albeit slowly as South Africa is not a particularly litigious society and there is backlog in the court system.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Nearly every year over the past decade, the US Supreme Court has significantly changed the private antitrust litigation landscape. Starting with the establishment of a heightened ‘plausibility’ pleading standard that governs whether a complaint survives a motion to dismiss, subsequent decisions have clarified that:

a conduct must be directly linked to cognisable harm or injury to give rise to an antitrust claim;

b activities inextricably intertwined with US Securities and Exchange Commission regulatory activity are immune from antitrust attack;
c plaintiffs bringing antitrust actions under state law in federal court may pursue class actions or class-action remedies not otherwise available in state court;
d a federal court’s denial of class certification for a proposed class does not preclude a state court from later adjudicating another plaintiff’s proposed class;
e arbitrators may not impose class arbitration on parties unless it is contractually permissible;
f express arbitration clauses trump class-action rights, even in antitrust cases;
g expert testimony does not overcome lack of commonality in class actions;
h class certification requires that plaintiffs establish that damage can be proven with class-wide evidence to satisfy Federal Rule of Civil Procedure (FRCP) 23(b)(3)’s predominance requirement.

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individual corporate entities that are part of a joint venture may be subject to antitrust ‘rule-of-reason’ scrutiny;\textsuperscript{11}

an order disposing of one discrete case consolidated in a multi-district litigation under 28 USC Section 1407 is an appealable final decision under 28 USC Section 1291;\textsuperscript{12}

stare decisis may have less than ‘usual force in cases involving the Sherman Act’\textsuperscript{13}

courts must include both sides of a two-sided credit-card market (merchants and cardholders) in defining a relevant market and evaluating anticompetitive effects;\textsuperscript{14}

that US federal courts are not bound to defer to a foreign governments’ official interpretation of its own laws, but owe the foreign government’s interpretation ‘respectful consideration’;\textsuperscript{15} and

that the Supreme Court’s ruling in Illinois Brick Co v. Illinois, which bars antitrust suits by indirect purchasers, did not apply to consumers who purchased apps from Apple’s App Store, even though Apple only collected a commission on the apps and did not set their prices.\textsuperscript{16}

The lower federal courts apply these Supreme Court cases, deciding issues related to antitrust injury, standing requirements, the statute of limitations, class actions, discovery and pleading standards.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private plaintiffs may bring suit in federal court for violations of federal antitrust law under two provisions of the Clayton Act of 1914. Section 4 allows private plaintiffs to sue for money damages, including reasonable attorneys’ fees as well as prejudgment interest on actual damages at a court’s discretion if such an award is ‘just’ under the circumstances.\textsuperscript{17} Section 16 allows private plaintiffs to sue for injunctive relief.\textsuperscript{18}

A four-year statute of limitations applies to Section 4 claims.\textsuperscript{19} The limitations period commences when the cause of action accrues, which generally occurs when the plaintiff suffers injury and damages become ascertainable.\textsuperscript{20} Section 16 claims may also be subject to a four-year statute of limitations. Some courts have held that the four-year limitation period

\textsuperscript{12} Gelboim v. Bank of America, 135 S Ct 897 (2015).
\textsuperscript{13} Kimble v. Marvel Entertainment, 135 S Ct 2401 (2015).
\textsuperscript{16} Apple v. Pepper, 139 S. Ct. 1514 (2019).
\textsuperscript{17} 15 USC Section 15(a).
\textsuperscript{18} id. Section 26.
\textsuperscript{19} id. Section 15(b).
also applies to Section 16 claims, while others have held that it does not.\textsuperscript{21} The defence of laches nevertheless bars Section 16 claims four years after accrual of the cause of action, unless the court finds equitable reasons to allow the claim.\textsuperscript{22}

The statute of limitations may be tolled by government antitrust actions,\textsuperscript{23} the filing of a class action,\textsuperscript{24} fraudulent concealment,\textsuperscript{25} duress\textsuperscript{26} or equitable estoppel.\textsuperscript{27} Where a series of overt acts rather than one definitive act causes new injury to plaintiffs, the ‘continuing violation’ doctrine restarts the statute of limitations period.\textsuperscript{28} Some courts allow the tacking of tolling periods.\textsuperscript{29}

\section*{ii State antitrust claims}

Most US states and territories have adopted antitrust statutes. They generally mirror the federal scheme, and prohibit monopolies and unreasonable agreements (like the Sherman and Clayton Acts) and unfair and deceptive trade practices (like the Federal Trade Commission (FTC) Act). The vast majority provide for private rights of action. Statute of limitations periods vary by state.

The statutes and courts’ interpretations of them differ on various points, such as the availability of treble damages,\textsuperscript{30} restitution, class actions and availability of recovery for indirect purchasers.

\section*{III EXTRATERRITORIALITY}

\subsection*{i General jurisdictional rule}

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the extraterritorial reach of the Sherman Act to foreign anticompetitive conduct that either involves US import commerce or has a ‘direct, substantial, and reasonably foreseeable effect’ on US import or domestic commerce.\textsuperscript{31} Courts have construed this to require a ‘reasonably proximate causal

\begin{thebibliography}{99}
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\item\textsuperscript{21} \textit{e.g.,} Weinberger \textit{v.} Retail Credit Co, 498 F2d 552, 556 (4th Cir 1974).
\item\textsuperscript{22} \textit{e.g.,} \textit{ITT} \textit{v.} GTE, 518 F2d 913, 929 (9th Cir 1975), overruled on other grounds by \textit{California v. American Stores Co}, 495 US 271 (1990).
\item\textsuperscript{23} 15 USC Section 16(i).
\item\textsuperscript{24} \textit{Crowen, Cork & Seal Co v. Parker}, 462 US 345 (1983).
\item\textsuperscript{25} \textit{e.g.,} \textit{In re Scrap Metal Antitrust Litigation}, 527 F3d 517, 536–38 (6th Cir 2008); \textit{In re Linerboard Antitrust Litigation}, 305 F3d 145, 160 (3d Cir 2002).
\item\textsuperscript{26} \textit{e.g.,} \textit{Willmar Poultry Co v. Morton-Norwich Products}, 1974-2 Trade Cas (CCH) Paragraph 75, 292, at 97, 896 (D Minn 1 October 1974), aff’d 520 F2d 289 (8th Cir 1975); \textit{PhilCo Corp v. RCA}, 186 F Supp 155, 161–62 (ED Pa 1960).
\item\textsuperscript{27} \textit{e.g.,} \textit{American Pipe & Construction Co v. Utah}, 414 US 538, 559 (1974).
\item\textsuperscript{29} \textit{e.g.,} \textit{City of Detroit v. Grinnell Corp}, 495 F2d 448, 460–61 (2d Cir 1974), abrogated on other grounds by \textit{Goldberger v. Integrated Resources Inc}, 209 F3d 43 (2d Cir 2000).
\item\textsuperscript{31} 15 USC 6a. Where conduct involves import trade or commerce, the FTAIA does not apply and courts instead apply the common law ‘intended effects’ test, requiring that the foreign anticompetitive conduct was intended to and actually affected US trade or commerce. \textit{Hartford Fire Insurance Co v.}
‘nexus’ between the conduct and the effect on US commerce or import commerce, a standard similar to a proximate causation standard.\textsuperscript{32} Additionally, a plaintiff’s injury must occur in the US rather than a foreign market to ‘give rise to’ a claim under the Sherman Act.\textsuperscript{33} Although the US effects requirement is sometimes characterised as a jurisdictional issue, it has been treated as a substantive element of the Sherman Act.\textsuperscript{34}

When a plaintiff alleges other antitrust claims, such as under the Clayton Act, the extraterritoriality test applies,\textsuperscript{35} subject to territorial limitations found in the substantive provision asserted. For example, Section 3 of the Clayton Act only reaches transactions in which the products are sold for use, consumption or resale in the US.\textsuperscript{36} Additionally, the FTAIA extends the Sherman Act’s extraterritoriality test to apply to the FTC Act.\textsuperscript{37}

A circuit split has arisen as to whether the FTAIA bars Sherman Act claims arising out of foreign conduct of a cartel. While the Seventh Circuit interpreted the FTAIA as barring the Sherman Act claims,\textsuperscript{38} the Ninth Circuit held that the conduct of the same cartel was within the reach of the Sherman Act.\textsuperscript{39} The US Supreme Court recently denied a petition for certiorari to resolve this issue, so lower courts will continue to develop the law to clarify how these decisions apply.

\textbf{ii Comity considerations}

A court may employ comity considerations to decline jurisdiction, even when the FTAIA’s requirements have been satisfied.\textsuperscript{40} Comity considerations generally come into play when domestic and foreign law are in conflict, such as where one law requires a defendant to engage in acts prohibited by other laws.\textsuperscript{41}

\textsuperscript{32} Lotes Co, Ltd v. Hon Hai Precision Industry Co, 753 F3d 395, 398 (2d Cir 2014); Motorola Mobility LLC v. AU Optronics Corp, 683 F3d 845, 857 (7th Cir 2014) (en banc); Minn-Chem, Inc v. Agrim, Inc, 683 F3d 845, 857 (7th Cir 2012) (en banc); In re Dynamic Random Access Memory (DRAM), 546 F3d 981 (9th Cir 2008); In re Monosodium Glutamate Antitrust Litigation, 477 F3d 535 (8th Cir 2007); Empagran SA v. F Hoffmann-La Roche Ltd, 417 F3d 1267, 1271 (DC Cir 2005).

\textsuperscript{33} F Hoffmann-La Roche Ltd v. Empagran SA, 542 US 155 (2004); Empagran SA, 417 F3d at 1271.


\textsuperscript{36} 15 USC Section 14.

\textsuperscript{37} id. Section 45(a)(3).

\textsuperscript{38} Motorola Mobility v. AU Optronics Corp, 775 F3d 816 (7th Cir 2014).

\textsuperscript{39} United States v. Hui Hsiung, 778 F3d 738 (9th Cir 2015).

\textsuperscript{40} HR Rep No. 97-686, at 13 (1982), reprinted in 1982 USCCAN 2487, 2498.

Exemptions

Foreign sovereigns are presumptively immune from US courts’ jurisdiction under the Foreign Sovereign Immunities Act (FSIA). To rebut the presumption, a plaintiff must show that one of the FSIA’s seven exceptions applies. The most common exemption in antitrust cases is the commercial activity exception, which precludes FSIA immunity where a foreign sovereign state’s commercial activity has a ‘nexus’ with the US. The scope of ‘commercial’ activity, ‘foreign state’ and the specific nexus required to meet this exception has been extensively litigated.

The act-of-state doctrine requires US courts to recognise the validity of public acts performed by authorised agents of foreign sovereign states within their jurisdictions. Thus, where a plaintiff’s claim depends on the invalidity of a foreign sovereign state’s domestic act, the act-of-state doctrine may absolve the defendant of liability. Various exceptions apply, such as where an extant treaty provides applicable legal standards, where the act involves a commercial function or where US foreign policy interests would not be advanced by application of the doctrine.

A private party whose conduct was compelled (and not merely sanctioned or assisted) by a foreign sovereign state will generally be immune from antitrust liability under the assumption that the defendant’s activity was effectively foreign sovereign state activity. US federal courts must give ‘respectful consideration’ to a foreign government’s official statement on the correct interpretation of its own laws, but are not bound to defer to the foreign government’s interpretation.

IV STANDING

Standing under Section 4 of the Clayton Act

To maintain a lawsuit under Section 4 of the Clayton Act, an antitrust plaintiff must allege: that the plaintiff is a ‘person’ under Section 1 of the Clayton Act.
that the defendant violated the ‘antitrust laws’;\footnote{e.g., 15 USC Sections 12(a) and 15.}
\c
that antitrust injury (‘impact’ or ‘fact of damage’),\footnote{Story Parchment Co v. Paterson Parchment Paper Co, 282 US 555, 563 (1931).} that is, harm to competition\footnote{Zenith Radio Corp v. Hazeltine Research, 395 US 100, 126 (1969).} to a plaintiff’s ‘business or property’ proven by direct or circumstantial evidence or inference\footnote{Duty Free Americas, Inc v. Estee Lauder Companies, 797 F3d 1248, 1272–73 (11th Cir 2015); Mostly Media v. US W Communications, 186 F3d 864, 865–66 (8th Cir 1999); OK Sand & Gravel v. Martin Marietta Technologies, 36 F3d 565, 573 (7th Cir 1994).} with a reasonable degree of certainty;\footnote{e.g., Tal v. Hogan, 453 F3d 1244, 1258 (10th Cir 2006).}
\d
that the antitrust violation was a material and substantial cause of the injury.\footnote{Associated General Contractors v. California State Council of Carpenters, 459 US 519, 537-44 (1983). In 2018, the Third Circuit Court of Appeals addressed a novel standing issue and found that purchasers of products that include inputs made more expensive by the defendants’ conspiracy - but not produced by the conspirators - had standing under the Clayton Act. In re Processed Egg Prods. Antitrust Litig., 881 F.3d 262 (3d Cir 2018).}

Finally, the plaintiff must satisfy the remoteness doctrine, which requires that a plaintiff’s injury is not too remote from the defendant’s conduct, by addressing five factors: \footnote{Campos v. Ticketmaster Corp, 140 F3d 1166, 1169 (8th Cir 1998).}  
\a causal connection between the violation and the harm to the plaintiff, and whether defendants intended to cause the harm;  
\b nature of the injury, including whether the plaintiff is a consumer or competitor;  
\c directness of the injury, and how speculative or tenuous the damages are;  
\d potential for duplication of recovery or complex apportionment of damages; and  
\e whether more direct victims exist.

The doctrine generally limits the plaintiff class to consumers and competitors, and denies standing to creditors, employees, officers, shareholders and suppliers of antitrust victims. The remoteness doctrine may bar an indirect purchaser\footnote{Illinois Brick Co v. Illinois, 431 US 720, 735 (1977).} from bringing a Section 4 claim unless it is a competitor.\footnote{Sanger Insurance Agency v. Hub International Ltd, 802 F3d 732 (9th Cir 2015); Sunbeam Television Corp v. Nielsen Media Research, Inc, 711 F3d 1264 (11th Cir 2013).} Some courts require that the plaintiff is an ‘efficient enforcer’ or a potential competitor sufficiently prepared to enter the market.\footnote{Sanger Insurance Agency v. Hub International Ltd, 802 F3d 732 (9th Cir 2015); Sunbeam Television Corp v. Nielsen Media Research, Inc, 711 F3d 1264 (11th Cir 2013).}
Standing under Section 16 of the Clayton Act

A plaintiff who has standing to bring an antitrust action under Section 4 will also have standing under the more lenient requirements of Section 16, which are as follows:  

a. the plaintiff is a ‘person, firm, corporation, or association’;  
b. the defendant violated the ‘antitrust laws’;  
c. the threatened loss or damage proximately results from the alleged antitrust violation;  
and  
d. the ‘antitrust injury’, that is threatened loss or injury, is due to harm to competition.

However, there are differences. Section 16 requires ‘threatened loss or damage’ that is a ‘significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur’ rather than actual loss. Unlike Section 4 claims, the threatened loss or injury in a Section 16 claim is not limited to injury to business or property. Finally, courts do not impose the remoteness doctrine on Section 16 claims, so indirect purchasers may sue for injunctive relief, even though they may not sue for monetary damages.

Indirect purchaser standing

Generally, indirect purchasers who purchase from a defendant indirectly through a downstream distributor cannot recover under federal antitrust laws unless the direct purchaser had a pre-existing ‘cost-plus’ contract, shifting the entire overcharge to the indirect purchaser; there is also an ownership-control exception, where the direct purchaser is owned or controlled by the defendant or the indirect purchaser; indirect purchasers may also sue where the direct purchaser was a co-conspirator. The Supreme Court clarified the scope of the bar on indirect purchaser suits in 2019, ruling that plaintiffs who purchase directly from an alleged antitrust violator have standing to sue even if the defendant only collects a commission and does not set the price of the product sold.

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60 Palmyra Park Hospital v. Phoebe Putney Memorial Hospital, 604 F3d 1291 (11th Cir 2010).  
61 15 USC Section 26.  
62 id.  
65 1675 USC Section 26.  
67 15 USC Section 15.  
68 Cargill, 479 US at 111.  
69 e.g., In re Relafen Antitrust Litigation, 221 FR D 260, 273–74 (D Mass 12 May 2004).  
70 Illinois Brick, 431 US at 735.  
72 Illinois Brick, 431 US at 736 n16.  
74 Apple v. Pepper, 139 S. Ct. 1514, 1525 (2019).
Indirect purchasers may recover under the Illinois Brick repealer statutes of 26 states as well as state consumer protection statutes.\(^{75}\)

V THE PROCESS OF DISCOVERY

The scope of discovery in antitrust cases is broad. FRCP 26 allows discovery of a reasonable time period, geographical scope, and subject matter if the requested information is relevant to any claim or defence, proportional to the needs of the case, and the burden of the proposed discovery on the responding party does not outweigh its benefit. What is relevant for discovery is broader than what is admissible as evidence at trial.

Courts may restrict ‘unduly burdensome’ discovery requests where the burden and expense outweigh the prospective benefit of the requests.\(^ {76}\) FRCP 26(c) allows courts to restrict discovery of confidential business information or trade secrets and privileged attorney–client communications or attorney work product. Grand jury materials are only discoverable if the party has strongly demonstrated a ‘particularized need’ for the materials.\(^ {77}\)

In deciding whether to allow discovery from non-party market participants, courts consider the relevance of and need for the information, whether the information is protected as trade secret or confidential commercial information, and whether the request will cause the non-party undue hardship.\(^ {78}\) A party that refuses to comply with a court order may face sanctions.\(^ {79}\)

Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case.\(^ {80}\) Generally, a foreign party subject to personal jurisdiction in the US is subject to discovery.\(^ {81}\) Foreign blocking statutes do not allow a corporation present in the US to resist producing documents located abroad.\(^ {82}\)

VI USE OF EXPERTS

Plaintiffs may use expert testimony to establish various elements of a private antitrust claim. Expert testimony is often key in certifying a class\(^ {83}\) on substantive antitrust issues like market or monopoly power, anticompetitive harm, antitrust injury and damages.

\(^{75}\) e.g., Ciardi v. F Hoffmann-La Roche, 436 Mass 53 (Mass 2002).

\(^ {76}\) FRCP 26(b)(1); e.g., In re ATM Fee Antitrust Litigation, No. C 04-02676 CRB, 2007-1 Trade Cas (CCH) Paragraph 75, 760 (ND Cal 25 June 2007).

\(^ {77}\) e.g., United States v. Sells Engineering, 463 US 418, 443 (1983).

\(^ {78}\) e.g., ACT Inc v. Sylvan Learning Sys, No. CIV A 99-63, 1999-1 Trade Cas (CCH) Paragraph 72, 527 (ED Pa 14 May 1999).

\(^ {79}\) FRCP 37.

\(^ {80}\) e.g., In re ATM Fee Antitrust Litigation, 233 FR D 542, 544–45 (ND Cal 5 December 2005).


\(^ {82}\) e.g., Arthur Andersen & Co v. Finesilver, 546 F2d 338, 342 (10th Cir 1976).

\(^ {83}\) See Section VII.
Expert testimony is only admissible if the expert has sufficient specialised knowledge and expertise with respect to the field in question; the methodology and data used to reach the expert’s conclusions are sufficiently reliable; and the expert’s testimony is sufficiently relevant to assist the trier of fact.

Reliability is the most common basis on which expert testimony is excluded. Several factors are considered to determine whether the proffered testimony is reliable, such as whether the expert’s methodology has been tested, is subject to peer review or is widely accepted by the relevant scientific community.

VII CLASS ACTIONS

i Requirements
FRCP 23 governs class actions, where one representative sues on behalf of all other similarly situated plaintiffs. To proceed, a class must be certified under FRCP 23(a) and 23(b).

Rule 23(a) requires that the plaintiff establish that:

- the class is so numerous that joinder of all members would be impracticable;
- common questions of law and fact apply to the class;
- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

Additionally, Rule 23(b) requires that the plaintiff establish one of the following:

- separate actions would create a risk of ‘inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class’;
- separate actions would create a risk of adjudications that ‘would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests’;
- ‘the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole’; or
- ‘questions of law or fact common to class members predominate over any questions affecting only individual members’, and ‘a class action is superior to other available methods for fairly and efficiently adjudicating the controversy’.

Most antitrust class action suits are certified under the fourth provision. Only ‘common’ questions under 23(b)(2) are relevant to the 23(b)(3) predominance analysis.

Plaintiffs must establish that damages can be proven with class-wide evidence, that is, the case is susceptible to resolution by common proof, to satisfy 23(b)(3)’s requirement that common issues predominate. In some cases, plaintiffs may have recourse to representative
samples to establish class-wide liability.\textsuperscript{90} Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof.\textsuperscript{91} Courts have recently required more rigorous qualitative and quantitative assessments of plaintiffs’ proposed common methodology for analysing class-wide impact and merits-related issues related to class certification.\textsuperscript{92} While the depth and breadth of expert testimony and the scope of pre-certification discovery necessary is decided on a case-by-case basis,\textsuperscript{93} a ‘rigorous analysis’ of expert opinions is required.\textsuperscript{94}

Plaintiffs’ ability to meet, rather than an intention to meet, the FRCP 23 requirements must be demonstrated by a preponderance of the evidence at the class certification stage. A plaintiff may meet FRCP 23 requirements even if the putative class includes a \textit{de minimis} number of potentially uninjured parties.\textsuperscript{95} Thus, courts generally resolve all factual and legal disputes, including expert disputes, relevant to their certification decision at the time of class certification.

Class representatives may have to establish other threshold requirements, including that the class is in existence, ascertainable and definable with reasonable specificity,\textsuperscript{96} and that at least one class plaintiff is able to demonstrate standing.\textsuperscript{97}

When a district court issues an order ruling on class certification, the parties have 15 days to request permission to appeal the decision from a court of appeals, or 45 days if the United States government is one of the parties.\textsuperscript{98} Courts are not permitted to grant discretionary extensions of the deadline to request permission to appeal a class certification decision.\textsuperscript{99}

\textbf{ii Appointment of class counsel}

After certification, the court must appoint class counsel to adequately and fairly represent the interests of the entire class.\textsuperscript{100}

\textsuperscript{90} Tyson Foods, Inc v. Bouaphakeo, 136 S Ct 1036 (2016).
\textsuperscript{91} 2A, P Areeda and H Hovenkamp, Antitrust Law, 398a, at 438–39 (3d ed 2007).
\textsuperscript{92} See In re Rail Freight Fuel Surcharge Antitrust Litig, 934 F.3d 619, 625 (DC Cir 2019) (upholding a lower court’s denial of class certification where plaintiffs’ proposed damages model indicated that 12.7 per cent of the class suffered negative overcharges, i.e., no injury at all, and finding that under the circumstances, plaintiffs had failed to provide the common proof of impact required by Rule 23).
\textsuperscript{93} In re Hydrogen Peroxide Antitrust Litigation, 552 F3d 305, 310 (3d Cir 2009).
\textsuperscript{94} Comcast, 569 US at 33–38; Wal-Mart, 564 US at 352–55.
\textsuperscript{95} In re Nexium Antitrust Litigation, 777 F3d 3, 25 (1st Cir 2015). But see In re Asacol Antitrust Litig, 907 F. 3d 42 (1st Cir 2018) (overturning a lower court’s grant of class certification where roughly 10 per cent of the class consisted of uninjured plaintiffs, and the plaintiffs proposed that uninjured class members could be removed after class certification); see also In re Rail Freight Fuel Surcharge Antitrust Litig.,934 F.3d, supra note 92.
\textsuperscript{96} Some courts have held that a class is ascertainable when defined by objective criteria that are administratively feasible for the court to identify. Brecher v. Republic of Argentina, 802 F3d 303 (2d Cir 2015); Marcus v. BMW of North America, 687 F3d 583 (3d Cir 2012).
\textsuperscript{97} See, e.g., Prado-Steinman v. Bush, 221 F3d 1266, 1279 (11th Cir 2000).
\textsuperscript{98} FRCP 23(f).
\textsuperscript{99} Nutraceutical Corp. v. Lambert, 139 S Ct 710, 713 (2019).
\textsuperscript{100} FRCP 23(g).
iii Limitations on class-action settlements

Pre-certification settlements

Rule 23 also allows a settlement class to be certified prior to a ruling on class certification for trial purposes. To certify a settlement class, plaintiffs must satisfy the requirements of 23(a) and meet one requirement of 23(b). However, a district court need not inquire whether the case, if tried, would present intractable management problems, allowing settlement classes to be certified where potential conflicts would defeat class certification for trial. ¹⁰¹

Court approval of class settlements required

To prevent abuse by class representatives, Rule 23(e) requires court approval of class action settlements and voluntary dismissals. Proposed class-action settlements, voluntary dismissals or compromise proposals are generally approved if the class meets the 23(a) and 23(b) requirements, and the settlement is 'fair, reasonable, and adequate'. ¹⁰² Under the latter inquiry, relief under the settlement will be evaluated against the class’s expected relief at trial and its likelihood of success. ¹⁰³ The settlement may be rejected if the court has concerns that the damages are inadequate or concerns regarding the class standing of the plaintiffs. ¹⁰⁴

Notice

Upon certification, 23(b)(3) requires notice to be provided ¹⁰⁵ ‘in a reasonable manner’ to all class members who would be bound by the proposal. ¹⁰⁶ Typically, plaintiffs bear the cost of notice.

VIII CALCULATING DAMAGES

i Types of damages cognisable

A fact finder may assess damages where the plaintiff can provide ‘probable and inferential’ proof of a ‘just and reasonable estimate’ of damages. ¹⁰⁷ Damages cannot be proven through ‘speculation or guesswork’. ¹⁰⁸ The court will award the plaintiff triple the amount of damages claimed (‘treble damages’). Courts do not allow punitive damage awards because antitrust plaintiffs already receive treble damages. ¹⁰⁹

¹⁰¹ FRCP 23(b)(3)(d); Amchem Products, Inc v. Windsor, 521 US 591, 620 (1997); e.g., Sullivan v. DB Investments, Inc, 667 F3d 273, 301 (3d Cir 2011).
¹⁰² FRCP 23(e)(2); Amchem, 521 US at 621.
¹⁰³ e.g., Wal-Mart Stores Inc v. Visa USA Inc, 396 F3d 96, 118–19 (2d Cir 2005).
¹⁰⁴ e.g., In re Refrigerant Compressors Antitrust Litigation, 795 F Supp 2d 647 (ED Mich 2011).
¹⁰⁵ FRCP 23(c)(2).
¹⁰⁶ FRCP 23(e)(1).
¹⁰⁸ Bigelow v. RKO Radio Pictures, 327 US 251, 264 (1946); Dopp v. Pritzker, 38 F3d 1239, 1249 (1st Cir 1994).
ii Calculation of damages

The appropriate measure of damages depends on the type of antitrust violation alleged.

Common approaches to damages are as follows:

a  The difference between the plaintiff’s purchase price and the price the purchaser would have paid if not for the violation is a common approach where the alleged effect of the violation is an overcharge, such as cartel claims (e.g., price fixing, bid-rigging, market allocations or output limitation agreements) or monopolisation.110

b  The difference between the plaintiff’s purchase price and the price the purchaser would have paid on the open competitive market is a common measure of damages in tying cases.111 A plaintiff may be entitled to recovery only when the fair market value of the tying and tied products exceeds their combined purchase price.112

c  The plaintiff’s lost profits is a common measure of damages in cases where the plaintiff is a competitor excluded from the market or is a disfavoured purchaser in a price discrimination case.113 Damages are usually limited to lost net profits, although some courts may award lost gross profits if lost net profits are negligible.114 When the plaintiff’s business has been almost or completely destroyed, courts may measure damages by lost goodwill or going concern value (i.e., the current value of lost future profits).115

iii Mitigation

A plaintiff must mitigate damages and cannot recover losses that could have been avoided.116

iv Disaggregation

A plaintiff may only collect damages for losses caused by the defendant’s antitrust violation. Therefore, the plaintiff must provide the fact finder a basis to disaggregate the losses caused by other factors.117 If it does not, a damages award may be overturned on the grounds it is based on speculation and guesswork.118

v Other costs

Section 4 also awards successful plaintiffs’ court costs, reasonable attorneys’ fees, prejudgment interest on actual damages (awarded at the court’s discretion if the court finds it ‘just in the circumstances’) and mandatory post-judgment interest.119

110 e.g., Howard Hess Dental Labs Inc v. Dentsply International Inc, 424 F3d 363, 374 (3d Cir 2005).
111 e.g., Crossland v. Canteen Corp, 711 F2d 714, 722 (5th Cir 1983).
112 e.g., Will v. Comprehensive Accounting Corp, 776 F2d 665, 672–73 (7th Cir 1985).
113 e.g., Trabert & Hoeffer, Inc v. Piaget Watch Corp, 633 F2d 477, 484 (7th Cir 1980).
114 id.
116 e.g., Pierce v. Ramsey Winch Co, 753 F2d 416, 436 (5th Cir 1985); Litton Sys Inc v. AT&T Corp, 700 F2d 785, 820 n47 (2d Cir 1983).
117 e.g., Blue Cross & Blue Shield United v. Marshfield Clinic, 152 F3d 588, 592–93 (7th Cir 1998).
118 e.g., US Football League v. NFL, 842 F2d 1355, 1377–79 (2d Cir 1988).
119 15 USC Section 15(a); 28 USC Section 1961 (2000).
IX PASS-ON DEFENCES

Antitrust defendants are barred from asserting pass-on defences against direct purchasers. Therefore, defendants may not introduce evidence that indirect purchasers, rather than the direct purchasers,\textsuperscript{120} were in fact harmed by the defendants’ antitrust violations. This bar against pass-on defences is analogous to the earlier-noted bar against claims by indirect purchasers, preventing the defensive and offensive use of the pass-on theory to prevent duplicate recovery against defendants.\textsuperscript{121}

Lower courts, however, have recognised three narrow exceptions to this general ban against pass-on defences and indirect purchaser claims:

\begin{enumerate}[a]
\item for pre-existing, fixed-quantity, cost-plus contracts, because the plaintiff may show that the indirect purchaser, not the direct purchaser, was harmed by any anticompetitive overcharge;\textsuperscript{122}
\item where the direct purchaser (i.e., the intermediary) is owned or controlled by either the defendant or the indirect purchaser such that the relationship involved ‘such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale’;\textsuperscript{123} and
\item where the intermediary is a direct participant in a conspiracy with the defendant, such that the intermediary and defendant are then viewed as a single entity from which the plaintiff is a direct purchaser.\textsuperscript{124}
\end{enumerate}

X FOLLOW-ON LITIGATION

i Prima facie evidence

A government judgment or decree may be prima facie evidence in a private antitrust suit if the government judgment or decree is:

\begin{enumerate}[a]
\item final;
\item rendered in a civil or criminal proceeding brought by or on behalf of the United States;
\item under the antitrust laws to the effect that a defendant has violated said laws; and
\item is not a consent judgment or decree entered before any testimony has been taken.\textsuperscript{125}
\end{enumerate}

\textsuperscript{120} Hanover Shoe Inc v. United Machinery Corp, 392 US 481, 491–94 (1968).
\textsuperscript{121} See Section IV; Illinois Brick, 431 US at 730–31.
\textsuperscript{123} Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc, 628 F2d 971, 974–75 (6th Cir 1980).
\textsuperscript{124} e.g., In re Brand Name Prescription Drugs Antitrust Litigation, 123 F3d 599, 604 (7th Cir 1997).
\textsuperscript{125} 15 USC Section 16(a); Emich Motors Corp v. General Motors Corp, 340 US 558, 569 (1951).
Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action. Guilty pleas to a Department of Justice (DOJ) indictment generally are admissible as evidence in subsequent private litigation. Since DOJ and FTC consent decrees are typically for settlement purposes, they do not constitute an admission by the defendant that the law has been violated.

The prima facie effect is given to all matters ‘distinctly put in issue and directly determined’ and ‘necessarily decided’ against the defendant in the government proceeding, but is limited to the period, products and geographical scope adjudicated in the prior government action.

ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits. Generally, the doctrine bars the retrying of issues that have already been determined by a court, and gives them conclusive effect in subsequent suits that involve a party to the prior litigation. A defendant can use collateral estoppel doctrine defensively to prevent a plaintiff from re-litigating issues previously decided and lost by the government, while a plaintiff can use collateral estoppel offensively to bar a defendant from re-litigating issues lost in prior government actions. Collateral estoppel applies to prior DOJ actions, but not to findings made by the FTC.

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) offers criminal defendants who participate in the DOJ’s corporate leniency programme the opportunity to limit civil liability to single rather than treble damages if they provide ‘satisfactory cooperation’ to civil claimants. To qualify, defendants must provide a full account of relevant facts, furnish all relevant documents, and participate in interviews and depositions reasonably requested by the plaintiff. ACERPA does not affect the plaintiff’s right to recover costs, attorneys’ fees and prejudgment interest provided under the Clayton Act.

XI PRIVILEGES

i Attorney–client privilege

Attorney–client privilege protects confidential communications between an attorney and client made for the purpose of rendering or receiving legal advice, and applies in the antitrust context to the same extent as in other contexts. The privilege extends to confidential communications between corporate employees and the corporation’s lawyer when those

126 e.g., Theatre Enterprises Inc v. Paramount Film Distribution Corp, 346 US 537, 543 (1954).
127 FRE 410. A guilty plea is not admissible if a plea is later withdrawn or is a nolo contendere (‘no contest’) plea.
129 15 USC Section 16(a).
130 e.g., Dart Drug Corp v. Parke, Davis & Co, 344 F2d 173, 184 (DC Cir 1965); Michigan v. Morton Salt Co, 259 F Supp 35, 68, 74 (D Minn 1966).
131 15 USC Section 16(a) (‘Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel’).
134 15 USC Section 16(a).
135 Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Section 213, 15 USC Section 1 note.
communications are necessary to facilitate the provision of legal advice to the corporation, and covers communications with current and former employees, subsidiaries and affiliates. It does not extend to communications with a lawyer acting in a business capacity.

ii Waiver of attorney–client privilege
Privilege is waived if a communication is voluntarily disclosed to a third party, unless disclosure is necessary to provide legal advice (e.g., a secretary or an interpreter) or is part of the community-of-interest (or joint defence) privilege. Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.

iii The crime-fraud exception
Communications made between clients and their attorneys for the purpose of furthering a current or future crime or fraud, such as an antitrust law violation, are not privileged. To invoke the exception, the moving party must make a prima facie showing that the allegation of a crime or fraud is founded in fact and was intended to further that crime or fraud.

iv Foreign communications and documents
Attorney–client communications that occur in a foreign country or involve foreign attorneys or proceedings and attorney work for foreign proceedings is governed by common law principles. Principles of international comity dictate that the law of the country with the most ‘predominant’ or ‘direct and compelling’ interest in whether those communications should remain confidential applies, unless it would be contrary to public policy. The ‘predominant’ jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where the relationship was centred at the time the privileged communication was sent.

The Hague Evidence Convention allows discovery of foreign evidence; however, Article 11 safeguards privileged and protected evidence under the law of the ‘state of execution’ or ‘state of origin’.

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137 e.g., In re Allen, 106 F3d 582, 605–06 (4th Cir 1997).
138 e.g., United States v. AT&T Co, 86 FR D 603, 616–18 (D DC 18 April 1979).
139 e.g., In re Allen, 106 F3d at 600–05.
140 e.g., In re Qwest Communications International Inc, 450 F3d 1179, 1185 (10th Cir 2006).
141 e.g., In re Copper Market Antitrust Litigation, 200 FR D 213, 217 (SDNY 30 April 2001).
142 In re Qwest, 450 F3d at 1187–88.
143 e.g., Clark v. United States, 289 US 1, 15 (1933); In re Antitrust Grand Jury, 805 F2d 155, 164–68 (6th Cir 1986).
144 e.g., Clark v. United States, 289 US at 15.
145 FRE 501.
146 e.g., Wultz v. Bank of China, 979 F Supp 2d 479, 486 (SDNY 2013) (quoting Golden Trade SrL v. Lee Apparel Co, 143 FR.D. 514, 522 (SDNY 17 August 1992)).
147 id.
v Attorney work product doctrine

The work product doctrine protects all documents and tangible materials prepared by or for an attorney in anticipation of litigation.148 Ordinary fact work product includes materials in which the attorney merely records or summarises information, while opinion work product includes materials that reflect the attorney’s mental impressions, opinions, judgments or legal conclusions.149 While opinion work product is virtually immune from discovery,150 a discovering party may obtain fact work product if it shows substantial need for the work product and undue hardship in obtaining the information from another source.151 The crime-fraud exception applies to ordinary attorney fact work product, but courts will maintain the immunity given the more sacrosanct opinion work product if the lawyer had no knowledge of the client’s crime or fraud.152

XII SETTLEMENT PROCEDURES

Federal policy generally favours settlement over continued litigation. FRCP 16 allows federal judges to mandate pretrial conferences among the parties to, inter alia, facilitate settlement, and allows them to impose sanctions on parties for failing to appear or for failing to participate in good faith at such conferences.153 With the exception of class action settlements, courts typically accept a party’s stipulation to settle without review. However, FRCP 23 requires that proposed class-action settlements be reviewed and approved by the court only if they are ‘fair, reasonable, and adequate’ as class section settlements affect the rights of all class members.154 A defendant’s unaccepted offer of settlement to a class representative does not moot the plaintiff’s claim.155 Due process requirements – giving notice to the absent class members and holding a hearing in which any such absent class member who wishes to may object to the proposed settlement – must be met prior to settlement approval.156

XIII ARBITRATION

Federal policy favours arbitration, and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.157 Arbitration clauses are construed broadly,158 and courts refuse to recognise attempts by parties to limit the statutory remedies and procedures available to arbitrators, invalidating, for example, portions of arbitration agreements where the parties attempted to waive rights to treble damages or class or consolidated actions.159 Courts may not decline to enforce arbitration agreements

149 e.g., 805 F2d at 163.
150 e.g., 329 US at 513.
151 FRCP 26(b)(3)(A).
152 e.g., 805 F2d at 163-64.
153 FRCP 16(a)(5), (f)(1).
154 FRCP 23(e).
156 FRCP 23(e).
158 e.g., JLM Industries, Inc v. Stolt-Nielsen SA, 387 F3d 163 (2d Cir 2004).
that delegate to an arbitrator the question of whether a dispute should be arbitrated. In the context of class actions, however, the defendant’s arbitration rights may be deemed waived if it seeks to compel arbitration only after the class is certified and extensive discovery has occurred. In addition, arbitrators may not impose class arbitration on parties unless it is contractually permissible. The Supreme Court has held that express arbitration clauses trump class-action rights, even in antitrust cases.

XIV INDEMNIFICATION AND CONTRIBUTION

i Joint and several liability
Under the doctrine of joint and several liability, each guilty defendant is liable for all the damages caused by the conduct of the entire conspiracy, not just those attributable to its own conduct. Antitrust co-conspirators can be held jointly and severally liable for damage predicated on sales by members of the conspiracy and damage caused by entities outside the conspiracy caused by the conspiracy.

ii No right to contribution
An antitrust defendant may not seek contribution from other participants in the anticompetitive scheme. Combined with joint and several liability for antitrust damages among defendants, the absence of the right to seek contribution from others has important practical consequences for defendants in their settlement strategies.

iii Indemnification
Most courts prohibit a defendant from seeking indemnification from other participants of an anticompetitive conspiracy, treating contribution and indemnification analogously. However, indemnification may be available to ‘an innocent actor whose liability stems from some legal relationship with the truly culpable party’.

161 Healy v. Cox Communications, Inc, 790 F3d 1112, 1118–21 (10th Cir 2015).
165 id. at 639–46.
XV ENFORCEMENT OF MONETARY JUDGMENTS AGAINST FOREIGN COMPANIES

Monetary judgments issued by US courts generally become enforceable promptly after entry, and taking an appeal from the judgment does not ordinarily stay enforcement. 168 To stay enforcement pending appeal, the losing defendant (or ‘judgment debtor’) must ordinarily post a bond for the full amount of the monetary judgments.169 Enforcement of monetary judgments in US federal courts is governed by FRCP 69.170

The principal device contemplated by that rule is the ‘writ of execution’ (i.e., an order authorising US marshals to seize and sell property of the judgment debtor within the territory of the district court).171 The holder of a monetary judgment (or ‘judgment creditor’) may register the judgment in other district courts, in which case the judgment is treated as though it had issued from the court in which it has been registered.172 Rule 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor’s assets.173 The US Supreme Court recently held that such discovery may extend to assets held abroad because the judgment creditor may be able to secure execution in the countries where the assets are held.174

US courts generally do not have authority to execute against assets outside the United States.175 However, the enforcement law of the state of New York authorises orders requiring any judgment debtor or third party over which it has personal jurisdiction to bring money or personal property belonging to the judgment debtor into the state for execution.176 The constitutionality of this approach remains an open question.177

XVI FUTURE DEVELOPMENTS AND OUTLOOK

Private antitrust litigation continues to be active in the United States, both in class action litigation for consumers against companies that have engaged in anticompetitive conduct and for private companies challenging the practices of other companies as anticompetitive. Additionally, follow-on litigation to government enforcement action, particularly in cartel matters, continues to be a large part of US antitrust litigation.

US courts continuously evaluate the scope of the antitrust laws and the legal framework in which plaintiffs may bring private litigation. Likewise, the appellate courts continue to

168 FRCP 62(a).
169 FRCP 62(d).
170 Judgments awarding injunctions are enforced by the issuing court through its power to hold a party that violates its orders in contempt. See 18 USC Section 401.
172 See 28 USC Section 1963.
173 See Fed R Civ P 69(a)(2).
175 id.
177 Koehler, 12 NY3d at 544–45 (Smith, J, dissenting) (noting potential constitutional objections).
interpret *Bell Atlantic v. Twombly*\(^{178}\) and clarify what allegations are sufficient to create a ‘reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement’ to survive dismissal.\(^{179}\)

While the Supreme Court currently has no pending antitrust cases, appellate courts are active in interpreting and applying US antitrust law. Two appellate courts are currently considering the scope of antitrust liability for refusals to deal.\(^{180}\) In both cases, the DOJ has stepped in to advocate for the courts to adopt a standard that would require plaintiffs alleging anticompetitive refusals to deal to show that there was no rational reason for the refusal to deal, that is, that the refusal made sense only as a means of reducing or eliminating competition (by contrast, plaintiffs in these cases advocate for more lenient standards).\(^{181}\)

The active debate around the appropriate standard may signal that a case dealing with the scope of refusal to deal liability will soon be appealed to the Supreme Court. Over the past three years, the US Supreme Court has rendered several decisions concerning general litigation issues of potential relevance to antitrust disputes. In particular, in May the Court ruled that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters authorises service of process by mail.\(^{182}\) In another case, the Supreme Court further clarified the boundaries of personal jurisdiction: building upon its 2014 *Daimler*\(^{183}\) decision, the Court explained that a state court cannot establish general jurisdiction over an out-of-state defendant that is not incorporated nor maintains its principal place of business in that state.\(^{184}\)

Further developments in class action litigation and substantive antitrust law have come from the federal appellate courts in recent years. For example, in the context of settling patent infringement disputes between generic and brand-name drug manufacturers, there is still substantial disagreement between the circuits as to whether plaintiffs are required to prove that the pharmaceutical company who sought generic entry would have won the patent litigation had defendants not settled.\(^{185}\) The Third Circuit in *In re Lipitor Antitrust Litigation* rejected the heightened pleading standard the District Court applied in a recent reverse payments case.\(^{186}\) The panel explained that defendants – not plaintiffs – have the burden to justify the rather large reverse payment.\(^{187}\) In *DeHoog v. Anheuser-Busch InBev SA/NV*, the


\(^{179}\) *Evergreen Partnering Group, Inc v. Forrest*, 720 F3d 33 (1st Cir 2013); *Starr v. Sony BMG Music Entm’t*, 592 F3d 314 (2d Cir 2010).


\(^{181}\) *Viamedia Inc v. Comcast Corp*, No. 18-2852, 7th Cir. Court of Appeals, Brief for the United States as Amicus Curiae, Dkt. 30, at 1; *FTC v. Qualcomm, Inc*, No. 19-16122, 9th Cir. Court of Appeals, United States’ Statement of Interest, Dkt. 25-1.


\(^{183}\) *Daimler AG v. Bauman*, 134 S Ct 746 (2014).

\(^{184}\) *BNSF Ry. v. Tyrrell*, 137 S Ct 1549 (2017).

\(^{185}\) Compare *In re Lidoderm Antitrust Litigation*, 2017 US Dist LEXIS 182940, at *50 (ND Cal 3 November 2017) (holding that plaintiffs must only show ‘some evidence’ that the pharmaceutical entrant could have won at trial) with *In re Wellbutrin XL Antitrust Litig*, 868 F3d 132, 167 n58 (3d Cir 2017) (explaining that the panel cannot solve the antitrust issue without considering the underlying parent dispute).


\(^{187}\) Id. at 256.
Ninth Circuit ruled that private plaintiffs could not challenge a merger as anticompetitive where the government had required the target to divest its business interest in the US beer market, reducing the likelihood of anticompetitive effects. The Court of Appeals for the DC Circuit recently upheld a district court decision rejecting the DOJ’s effort to block the merger of AT&T and Time Warner, issuing a fact-specific decision focused on evidence about the market in question that declined to adopt general standards for the review of vertical mergers. The court’s focus on market realities and reluctance to develop new law may be seen by future courts as a tacit approval of existing merger law, and suggests that – for now – challenges to mergers will depend on concrete evidence that the merger in question will have anticompetitive effects.

The development of the law on the procedures for bringing antitrust actions, including the evolution of pleading and class certification standards as well as the continued enforcement by the federal antitrust agencies and state authorities against cartel activities and monopolisation across industries, virtually assures that private litigation will remain a robust and complex area of activity in the United States.

188 DeHoog v. Anheuser-Busch InBev SA/NV, 899 F. 3d 758 (9th Cir 2018).
189 United States v. AT&T, Inc., 916 F.3d 1029, 1037-1047 (DC Cir 2019).
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JUAN CARLOS CASTILLO CHACÓN

*Aguilar Castillo Love, SRL*

Juan Carlos Castillo Chacón is a managing partner at Aguilar Castillo Love. Mr Castillo Chacón graduated with honours (*magna cum laude*) as an attorney and notary from Universidad Francisco Marroquín and has a master’s degree in law from Harvard Law School, Cambridge, Massachusetts.

He has considerable experience in energy, financial and acquisition matters, and has participated in some of the biggest acquisitions in the history of Guatemala, such as, among many other projects, the process of disincorporation of generation assets from Empresa Eléctrica de Guatemala, SA from 1996 to 1998; the social capitalisation and sale of shares (80 per cent) from the same company in 2009; the acquisition of all the assets of Shell in Central America in 2009; and a percentage of the entity Royal Forest Holding (RFH) and its subsidiaries in Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica in 2010.

In 2000, he was part of the group that presented an analysis of the bill of the Banking and Financial Groups Law as an adviser to the Guatemalan Bank Association.

In 2006, he founded the law firm Aguilar Castillo Love through a merger between two well-known firms in Costa Rica and Guatemala.

RICK CORNELISSEN

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Rick Cornelissen is a partner at Houthoff. He specialises in competition litigation and commercial litigation, with a particular focus on cartel damages claims, claims for access to distribution networks and disputes regarding contract terminations. Rick also has extensive experience in advising, negotiating and litigating on a wide variety of other matters regarding distribution, agency and e-commerce (with a focus on automotive and other high-end consumer goods). He is a lecturer on several courses and the author of several publications on the subject of competition litigation. Rick is a member of the Dutch Associations for Competition Law, European Law and Distribution Franchise and Agency Law.

MIGUEL DEL PINO

*Marval, O’Farrell & Mairal*

Miguel del Pino joined Marval, O’Farrell & Mairal in 1998 and has been a partner since 2008. His area of specialisation is centred on competition and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anticompetitive investigations and general market investigations. Mr del Pino has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations.

He has published several works related to his area of expertise, and has participated as a panellist and moderator in different conferences related to his area of expertise. He is an assistant professor of competition law on the postgraduate courses in business and economics law at the Universidad Católica. He graduated as a lawyer from the Universidad de Buenos Aires in 1994, and in 1997 obtained a master’s degree in law from the University of Pennsylvania (Philadelphia).
SANTIAGO DEL RIO

Marval, O’Farrell & Mairal

Santiago del Rio is a partner at Marval, O’Farrell & Mairal. He joined the firm in 2006 and has been involved in competition issues ever since. He regularly provides advice to companies regarding merger control regulations in Argentina over a wide range of markets, and also provides counsel to companies that either undergo antitrust investigations or decide to initiate them during Antitrust Commission investigations, and regarding the challenge of decisions before the appellate courts and the Supreme Court of Justice.

Between 2010 and 2011 he was seconded to the Spanish firm Uría Menéndez, where he dealt with both European Union and Spanish competition matters in the firm’s Brussels and Madrid offices. He participated in Phase I and II merger control proceedings, anticompetitive investigations under Sections 101 and 102 of the TFEU, as well as appeals before the European Court of Justice.

He graduated with honours in 2005 from the Universidad del Salvador, and holds a postgraduate diploma in economics for competition law from King’s College London.

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Ken Edelson is an associate in the New York office of Wilson Sonsini Goodrich & Rosati and a member of the firm’s antitrust practice. His work encompasses civil litigation and government investigations. During law school, he interned in the Antitrust Bureau of the New York State Attorney General’s office and worked as a teaching assistant in Fordham Law School’s legal writing programme.

BERNT ELSNER

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Bernt Elsner leads the Austrian team for EU competition law, public procurement and regulatory. He is head of the global CMS practice group for public procurement, and a member of the managing team of the global CMS practice group for competition and EU. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 20 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience of cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage and antitrust compliance.

EYTAN EPSTEIN

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Eytan Epstein is a senior partner at M Firon & Co. Mr Epstein has repeatedly been listed in Who’s Who Legal: Competition, and has also been elected by leading research organisations, such as Chambers and Partners and The Legal 500, as one of the leading competition law practitioners in Israel.

Mr Epstein received his law degree from the faculty of law at Tel Aviv University (1984) and, after being admitted to the Israel Bar in 1985, he worked in DG IV (competition) in
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He served as a member of the government committee for the preparation of Israel towards the European Union (1992) and the foreign trade committees of the Israel Industrialists’ Association, the Israel CPA Association and the Israel Chambers of Commerce. Mr Epstein is a member of the International Bar Association (IBA) and served until recently as co-chair of the international sales committee. In 2008, he was a member of a special taskforce formed by the IBA to comment on the draft Non-Horizontal Merger Guidelines issued by the European Commission. He is the representative of the Israeli Bar to the IBA, serves as acting chair of the Israeli Bar’s antitrust committee and chairs the Israel Bar Annual Conference. Mr Epstein is also the Israeli Bar’s representative to the Knesset (the Israeli parliament) with respect to all economic and antitrust issues.

Mr Epstein practises corporate, commercial and trade law, and specialises in antitrust law. He has extensive experience dealing with competition issues before the Israeli Antitrust Authority, and represents Israeli and foreign clients engaged in the airline, telecommunications, energy, credit card, insurance, computer, pharmaceuticals, retail and other industries. He advises frequently on international M&A filings in Israel and collaborates with the leading antitrust international law firms.

Mr Epstein has published numerous articles on antitrust and the legal environment of Israel’s foreign trade. Inter alia, he is the author of the chapters on Israel in the Oceana Digest of Commercial Laws of the World (Kluwer Law, 2000) and Warranties and Disclaimers (Kluwer Law and the IBA, 2002).

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Karolien Francken is a senior associate at Contrast. She specialises in EU and Belgian competition law and distribution law. She assists companies in proceedings before the European Union and national authorities and courts. Karolien has a particular focus on private damages in competition law and has gained practical experience in this field. She closely follows the developments in private damages both on an EU and a domestic level.

Karolien obtained a master’s degree in European and international law at the University of Antwerp and a master’s degree in competition law at the University of Toulouse Capitole I. In addition to her law degrees, Karolien holds a master’s degree in applied economic sciences, with a specialism in business administration, international management and diplomacy. During her studies, Karolien participated in summer schools and exchange programmes with the University of Paris-Sorbonne (France), the University of Oxford (UK), the University of Oujda (Morocco) and the University of Toulouse (France).

Karolien is the driving force behind behind the Contrast law seminars, which see four to six legal seminars organised each year together with a leading Belgian publisher (Larcier). These seminars have welcomed international top speakers from the European Commission and national competition authorities.

Karolien speaks regularly at seminars on EU and Belgian competition law (including on private damages) and gives hands-on training sessions on compliance with competition law to sales teams throughout Europe.

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Marcos Pajolla Garrido graduated in law at the Faculdade de Direito da Universidade de São Paulo, Brazil in 2007. He specialised in competition law at the São Paulo Law School of Fundação Getúlio Vargas, Brazil in 2009.

He has an LLM in corporate and commercial law from the London School of Economics and Political Science (2015). He was a foreign associate at Bredin Prat, Brussels, in 2016.

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ILENE KNABLE GOTTS

Ilene Knable Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters. Mrs Gotts is regularly recognised as one of the world’s top antitrust lawyers, including being recognised for over the past decade in *The International Who’s Who of Business Lawyers* as one of the top 15 global competition lawyers, in the first-tier ranking of *Chambers USA* and in the ‘leading individuals’ ranking of *PLC Which Lawyer? Yearbook*, being named an ‘All Star’ by BTI Consulting Group due to her level of dedication and commitment to exceptional client service, and having been selected as the ‘Antitrust Lawyer of the Year’ for 2016 by the *Wall Street Journal*’s ‘Best Lawyer’ survey.

Mrs Gotts was a member of the American Bar Association’s Board of Governors from 2015 to 2018, having previously served as chair of the ABA’s Section of Antitrust Law as well as in a variety of leadership positions in the Section for over two decades, including as the International Officer. From 2006 to 2007, Mrs Gotts was chair of the New York State Bar Association’s Antitrust Section. She is currently a member of the American Law Institute.

Mrs Gotts is a frequent guest speaker, has had over 200 articles published on antitrust-related topics and has been the editor of the ABA’s *Merger Review Process* handbook editions published over the past 20 years.

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Elselique Hoogervorst is a professional support lawyer in Houthoff’s litigation and arbitration practice group, and a member of the class actions and competition litigation team.

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Mihaela Ion is a partner at Popovici Nitu Stoica & Asociatii and head of the competition practice group. Her area of expertise covers in particular antitrust litigation, unfair trade practices, consumer law, merger control proceedings and state aid. She also assists clients in structuring and implementing compliance programmes, providing regular training as external legal counsel on all relevant aspects of competition law. *Chambers Europe* reported Ms Ion as having ‘great expertise in antitrust investigations and wider competition law’. Ms Ion holds a degree from the Lucian Blaga University of Sibiu and is a member of the Romanian Bar Association. She also holds a master’s degree in European and international business, competition and regulatory law from Freie Universität Berlin, a master’s degree in competition from the Bucharest Academy for Economic Studies, and a master’s degree in international relations and European integration from the Romanian Diplomatic Institute.
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Sushma Jobanputra is based in Jones Day’s Singapore office and is permitted to practise Singapore law (commercial, finance, and corporate). She has over 30 years’ experience advising clients in London, Toronto, Paris and Singapore. She regularly represents clients before the Competition and Consumer Commission of Singapore including in relation to significant and complex merger clearances and joint ventures, including many cross-jurisdictional transactions.

ARUTO KAGAMI

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Aruto Kagami has considerable experience in multi-jurisdictional merger filings and cartel investigations, and has acted as global lead counsel coordinating filings and investigations involving Japanese, US, Canadian, EU, Chinese, Korean, Indian and other enforcement authorities in the ASEAN region. Having lived and worked abroad for more than 10 years, he has a good command of communication and takes a collaborative approach in order to bring about the best solution in the most efficient manner. He has extensive experience of dealing with overseas competition authorities under the amnesty and leniency programme and handling overseas civil litigations, including US class actions. Based on his experience working at the overseas subsidiary of a Japanese manufacturer, he also provides advice on compliance issues on a global basis.

AVAANTIKA KAKKAR

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Avaantika Kakkar heads the competition law practice at Cyril Amarchand Mangaldas. She advises on complex merger filings with the Competition Commission of India (CCI). She was the lead lawyer in the first Phase II merger control case in India (*Sun Pharma/Ranbaxy*) and also on the first few cases involving remedies and modifications (*Hospira/Orchid, ZF Friedrichshafen AG/TRW Automotive*). She represented Titan International, Inc in its plea for mitigation of damages for a late merger filing. Her experience in corporate and securities laws, mergers and acquisitions, private equity and structured finance equips her uniquely for strategic advice on merger control.

Besides advising on joint ventures, Avaantika represents select clients on the enforcement side before the CCI and the Office of the Director General. She provides strategic support on commercial arrangements and compliance issues and was involved with filing the first few leniency applications before the CCI.

She regularly writes on the subject of competition law, speaks at domestic and international seminars, and also delivers guest lectures to training institutes for company secretaries, chartered accountants and law schools. Avaantika spoke at the ABA Spring Meeting 2016 on Global Damages Litigation. She presented developments on anti-corruption laws in India at the United States–India Business Council (USIBC) Legal Services West Coast Conference in San Francisco in (2012) and was a panellist for the USIBC forum entitled ‘One Year Later: A Look at the Investment Attitudes in India Post-Elections’, Washington
About the Authors


According to *Who’s Who Legal: Competition*, Avaantika is among the world’s leading competition lawyers. She is a ranked lawyer in *Chambers and Partners*, was recognised by *GCR* in its list of top 100 women in antitrust in 2016, and is a leading lawyer according to *Asialaw Leading Lawyers*.

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Ms Kim is a foreign attorney and associate at EJE Law with licences to practise both in Korea and in the United States. Ms Kim’s practice primarily focuses on cross-border transactions, intellectual property and M&A. She worked at Kim & Chang as foreign legal counsel for nine years and thereafter she went to a Korean law school to obtain a licence to practise in Korea. Since joining EJE Law, Ms Kim has taken the dual roles of a Korean and US attorney advising foreign clients on Korean law issues and domestic clients on foreign law issues.

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Albert Knigge has comprehensive experience in complex, multiparty cross-border disputes. He acts as a defence counsel for corporate and financial institutions with a particular focus on class action litigation and mass claim settlements and in follow-on civil litigation. He heads a team of experienced competition litigation lawyers at Houthoff. He is admitted to the Dutch Bar as a Supreme Court litigator. He is the author of several publications, primarily on the subject of procedural law and tort law, and a board member of the Dutch Association for Procedural Law. He is recommended in *Chambers Global*, *Chambers Europe* and *The Legal 500*: ‘Knigge is “always a source of good, clear advice and common-sense practicality”, (*Chambers Global* and *Chambers Europe* on dispute resolution (2019)) and: “The “experienced” Albert Knigge “provides superb client care”, (*The Legal 500*, for dispute resolution: commercial litigation (2019)).

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Mr Kwon is a founding partner of EJE Law. Prior to establishing EJE Law, Mr Kwon worked at Kim & Chang’s antitrust and competition practice group for 14 years. During his 20 years of practice, Mr Kwon has advised and represented multinational companies in litigation and transactions involving international and local cartel, abuse of market dominance and superior business position, and merger control in various industries. In addition to antitrust and competition, Mr Kwon has significant experience in a wide range of practice areas including M&A, real estate and intellectual property.
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Olga Ladrowska is an associate in the dispute resolution group. She has experience advising clients on a wide range of contentious commercial matters, with a particular focus on competition litigation. Olga has acted on complex multi-jurisdictional follow-on cases, including before the Court of Appeal. Prior to joining Slaughter and May, Olga completed a PhD in private international law at the University of Cambridge.

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Rosalind is the director at Norton Rose Fulbright South Africa, specialising in competition, consumer and data privacy law.

Rosalind has extensive experience in regulatory investigations and compliance audits. She is highly skilled in developing and implementing customised compliance programmes and training employees on how to comply with the law.

Rosalind has substantial experience in cartel investigations, leniency applications, merger notifications and competition law opinions across all sectors. She advises clients on merger filings and consumer protection issues across a number of African jurisdictions, including COMESA.

Rosalind is listed as a recommended competition lawyer by top international research publication _The Legal 500_ in 2019 and the same publication has described her as ‘very efficient, thorough and knowledgeable’ and having a ‘tremendous reputation’. _Chambers Global 2017_ describes Rosalind as ‘a pleasure to work with’.

Rosalind co-authored the book _Understanding the Consumer Protection Act_, published by Juta Law in 2012. Rosalind also co-authored the LexisNexis Practical Law series on South African competition law, along with other similar publications. Rosalind also authored a number of chapters in the Thomson Reuters sales and marketing guide for South Africa. Rosalind is a regular conference and guest speaker and is often interviewed on television and radio as a specialist in competition and consumer protection-related topics. She also frequently contributes articles to mainstream, academic and specialist publications on these subjects.

Rosalind joined the practice in 2006 and holds a BA, LLB and LLM (with distinction) from Rhodes University.

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Mazor Matzkevich is a partner at M Firon & Co, heading the competition, antitrust and regulatory affairs department.

Ms Matzkevich’s practice focuses on all aspects of antitrust including litigation in administrative and criminal cases, merger notifications and the Concentration Law and Food Law.

Ms Matzkevich joined the Israel Antitrust Authority in 1998, and between 1999 and 2002 led the Authority’s Criminal Division. Ms Matzkevich supervised the Authority’s
prosecutors and represented the Authority at the district courts and the Supreme Court, leading the key criminal cases of the Authority, including the first case in which prison sentences were imposed on cartel members.

In addition, Ms Matzkevich was responsible for the Authority’s regulatory activity in sectors such as professional organisations, water and the environment.

In 2003, after being admitted to the New York State Bar, Ms Matzkevich joined the Federal Trade Commission (FTC) as a staff attorney. During her six-year tenure, Ms Matzkevich practised both antitrust and consumer protection law, and was the lead counsel or co-counsel of merger and non-merger cases involving various industries, including high-tech, retail, pharmaceuticals, agro-chemistry, energy, hospitals and food.

Ms Matzkevich was part of the FTC’s litigation team in the North Texas Specialty Physicians and Whole Foods/Wild Oats cases. She also took part in the Intel investigation.

In 2010, Ms Matzkevich joined the law firm of Epstein Chomsky, Osnat and Co as a partner, until its merger with M Firon in 2016.

Ms Matzkevich has authored several professional publications, including the Israeli chapter in Merger Control (2011, 2014 and 2017; JF Francois Bellis and P Elliot, Van Bael & Bellis).

Ms Matzkevich was elected one of the 100 leading women worldwide in competition law by Global Competition Review in 2016, and was recognised as a ‘competition future leader partner’ by Who’s Who Legal 2017 and 2018.

NATALIA MIKOŁAJCZYK

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Natalia Mikołajczyk is a senior associate at Linklaters specialising in infrastructure and energy projects, as well as international dispute resolution. Prior to joining Linklaters, she practised in a renowned claimants’ antitrust boutique law firm in London. Natalia graduated from the faculty of law and administration at the University of Warsaw and obtained her LLM degree from the University of California, Berkeley, School of Law.

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Mr Ocampo obtained his Juris Doctor from the University of the Philippines in 2012 where he received the Dean’s Medal for Academic Excellence. In 2018, he obtained his
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MITCHELL J O’CONNELL

*Jones Day*

Mitchell J O’Connell has experience in a range of commercial matters across a broad spectrum of competition law issues, including in merger clearance and regulator investigations in different industries. He also has worked on matters involving regulatory issues with other regulators, including foreign investment regulators and has experience in disputes in both the Federal Court of Australia and the Supreme Court of Queensland.

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Thomas is a partner in Bird & Bird’s competition and EU practice, based in Paris. His practice covers both contentious and non-contentious national and European competition law.

Thomas has substantial experience of advising on cartel investigations and assisting companies in preparing leniency applications before the European Commission and the French Competition Authority. He helps to develop and implement competition compliance programmes, and provides assistance in notifications of transactions to the European Commission under the EC Merger Regulation and to the French Competition Authority. He also assists clients in relation to antitrust damages actions.

Thomas’ experience of competition law covers different angles, having worked in practice and in house, and having done an internship at the French Competition Authority. Prior to joining Bird & Bird, he worked for 14 years in the Paris office of a major global law firm.

Thomas regularly participates in seminars and conferences, and is the author of several articles on competition law. He is a member of the Association of Competition Law Practitioners (APDC) and of the French Association for the Study of Competition Law (AFEC).

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Chul Pak is a partner in Wilson Sonsini Goodrich & Rosati’s antitrust practice, where he focuses on antitrust litigation, mergers and counselling. Chul defends clients in class actions, individual lawsuits, and complex multi-district antitrust litigations across the United States. His litigation matters include representing manufacturers, services companies and technology firms in monopolisation, tying, exclusive dealing, price fixing, patent misuse and conspiracy claims. Chul also counsels companies in mergers and non-merger investigations before the FTC, the DOJ and numerous state attorneys general. Prior to joining Wilson Sonsini, Chul served as the assistant director of the Mergers IV Division at the FTC. In that role, Chul supervised a 25-attorney team responsible for investigating mergers and acquisitions across a wide spectrum of industries, including consumer goods (food and beverages), retail
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Wojciech Podlasin is a senior associate in Linklaters’ Warsaw competition practice. He specialises in antitrust, merger control and state aid cases and gained extensive practical experience as a member of Linklaters’ Warsaw and Beijing competition teams. Wojciech has a broad sector expertise, including IT, energy, financial services and chemicals. He is the co-author of a leading commentary on the part of the Polish Competition Act concerning merger control. Wojciech read law at the University of Warsaw and the London School of Economics, and finance at the Warsaw School of Economics.

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Ms Prodigalidad obtained her Bachelor of Laws degree from the University of the Philippines, *cum laude*, graduating class salutatorian. She then ranked first in the 1996 Philippine Bar examinations. In 2004, she obtained her master’s degree in law from Harvard Law School.

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Ms Rosenblum-Brand received her law degree (LLB) from the Interdisciplinary Center Hertzliya (IDC) in 2016.

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Anshuman advises on all issues related to market practice as well as market structure, including merger control, abuse of dominance and cartel enforcement. He advises on compliance aspects related to the enforcement provisions of Indian competition law and has conducted mock ‘dawn raids’ and competition audits. Further, Anshuman has been involved in advising clients in relation to the leniency programme of the Competition Commission of India (CCI).
Anshuman has advised clients across various sectors such as pharmaceuticals, automotive components, media and entertainment, financial services, heavy machinery, civil aviation, chemicals and information technology. He has assisted in obtaining merger control approvals for several marquee transactions including *Sun Pharma/Ranbaxy* (the first Phase II investigation in India that led to structural modifications), *Orchid/Hospira* (the first matter in which parties made modifications to the terms of their agreement to secure the approval of the CCI), *Grasim/Aditya Birla Chemicals*, *ZF Friedrichshafen/TRW Automotive*, *Adani Transmission/Reliance Infrastructure*, *Warburg Pincus/ICICI Lombard* and *Reliance Jio/Reliance Communications*, among others.

Anshuman’s articles are routinely published in various national and international journals and magazines. He has also co-authored the module on abuse of dominance in LexisNexis Practical Guidance. Anshuman has been called upon to speak on the subject at conferences and universities and has been assisting the Indian Institute of Corporate Affairs with the merger control and abuse of dominance modules in their courses. He has recently been invited to join the board of advisors for the NLIU Media Law e-Journal published by the National Law Institute University, Bhopal, India.

Anshuman’s experience has been recognised in publications such as *Chambers and Partners*, *Who’s Who Legal* and *Asialaw*.

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Camilla Sanger is a partner in the dispute resolution group. Camilla’s practice includes handling complex commercial disputes of a varied nature, often involving multiple jurisdictions, with particular expertise in competition litigation and regulatory investigations. Camilla has acted on a large number of high profile follow-on and standalone damages cases, including before the Court of Appeal. Camilla is recognised in *Who's Who Legal Future Leaders: Competition* and has been named a ‘next generation lawyer’ in both commercial litigation and competition litigation in *The Legal 500 UK*. She is frequently asked to speak at panel events on private enforcement issues.

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Mr Schwartz’s practice includes corporate, commercial, and securities litigation at both the trial and appellate levels, as well as a variety of regulatory and corporate governance matters. He has worked on a number of the firm’s high-profile matters, including M&A litigation in the courts of Delaware and other complex litigation in courts around the country. He also represented several of the nation’s leading financial institutions in the resolution of federal regulatory investigations arising out of the financial crisis of 2008. In addition, Mr Schwartz has worked on a number of pro bono matters important to New York State.

Mr Schwartz received his BA from Harvard College and was awarded the Sophia Freund Prize as the top ranked *summa cum laude* graduate. He earned his MBA and PhD from Oxford University as a Marshall Scholar, received his JD from Yale Law School, and
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Monique Sengeløv is a junior associate at Contrast. She graduated from the University of Ghent and obtained an LLM in European Union law at the University of Ghent.

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**MATTHEW J SKINNER**

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Matthew J Skinner is a leading practitioner based in Singapore and has also practised in London and Sydney. He has extensive experience representing clients in legally complex and sensitive disputes. These include joint venture, licensing, construction and post-M&A disputes. Matt understands the business dynamics and strategic issues impacting the dispute resolution process, enabling him to provide solution-driven, commercially focused advice and effectively guide his clients through the litigation or arbitration process. Matt also advises and assists clients in investigations and prosecutions, including conducting internal investigations for clients. He also has experience in various forms of alternative dispute resolution, including adjudication and mediation. Matt is a Fellow of the Chartered Institute of Arbitrators and a panel arbitrator at SIAC (Singapore International Arbitration Centre).

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Paul Sluijter is counsel in Houthoff’s litigation and arbitration practice group. His particular field of expertise is private international law. Paul focuses on complex cross-border disputes, including cartel damages proceedings, class actions and shareholder liability litigation. Paul obtained his PhD in civil procedure law from Tilburg University before joining Houthoff in 2012.

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Prudence J Smith’s practice is focused on competition and regulatory law. Drawing on her many years as an officer within the Australian competition regulator, she advises and represents clients in Australia, New Zealand, Singapore (with locally registered Jones Day lawyers), and throughout the Association of Southeast Asian Nations (ASEAN). Prudence advises clients on a broad range of competition law issues, including cartel and anticompetitive conduct investigations, authorisations, and notifications. She also regularly advises on significant and complex merger clearances and joint ventures, including many cross-jurisdictional transactions. She has in-depth experience in complex competition and consumer litigation and is regularly sought out by clients that are facing significant and complex private litigation.
issues involving competition law (such as private actions for anticompetitive conduct, including refusal to deal or misuse of market power) or misleading and deceptive conduct representations.

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Jonathan Speed is a partner in Bird & Bird’s international dispute resolution group, based in London. He has extensive experience of domestic and international commercial litigation acting for multinational companies, public sector clients and individuals. He has particular expertise in disputes in the technology and communications and automotive sectors, and is regularly involved in disputes relating to the private enforcement of competition law.

WILLIAM TURTLE
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William Turtle is a partner in the competition group. He has extensive experience in a wide range of competition and regulatory matters, including global investigations, merger control and antitrust. On the contentious side, he has advised on a range of multi-jurisdictional standalone and follow-on damages actions as well as on appeals before the European courts. William is recognised as a leading competition lawyer by Who’s Who Legal: Competition.

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