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Antitrust Litigation 2023

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Contributing Editor

Elizabeth Morony
Clifford Chance



Chambers

Global Practice Guides

Antitrust Litigation

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2023

Chambers Global Practice Guides

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INTRODUCTION

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Clifford Chance has a global antitrust litigation group that has handled many of the most significant antitrust damages claims over the past 20 years, including leading judgments on issues relating to disclosure, limitation, and quantum, as well as group actions.

Contributing Editor



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C L I F F O R D
C H A N C E

INTRODUCTION

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Global Overview – Antitrust Litigation 2023

Antitrust litigation in the form of follow-on damages claims against cartels is now the norm in most European countries. The volume of claims has increased significantly in recent years since the implementation of the EU Damages Directive. France, Germany, the Netherlands, and Spain in particular have seen a sharp increase in the volume (and value) of antitrust litigation, partly fuelled by a huge volume of individual claims against the trucks cartel. Litigation has been a standard part of the antitrust enforcement process for even longer in the USA, Australia, Canada, and New Zealand. While antitrust litigation continues to grow and embrace new procedures and approaches in those jurisdictions (not least, class actions), the focus in terms of developing jurisdictions is now moving to Asia. As China, Japan, and Korea are seeing a growth in cartel investigations, so antitrust damages claims in those jurisdictions will start to become more common.

To date, England and Wales has been the leading jurisdiction within Europe for EU-wide damages claims, in light of its highly respected commercial courts, specialist competition judges, and a litigation procedure most like the USA's, including extensive disclosure requirements on both claimants and defendants. The first grant by the UK Competition Appeal Tribunal (CAT) of a collective proceedings order (CPO), in the *Merriks v Mastercard* collective action, has seen a huge boost to the development of collective (or class) actions for competition claims in the UK. However, the recent Supreme Court judgment in *R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and Others* is going to require a wholesale review of Litigation Funding Agreements (LFAs) and is likely to put a break on the recent exponential growth in collective actions in the UK.

Class actions

Class actions are increasing in popularity in a variety of jurisdictions in Europe, particularly in England and Wales, and most recently, with the introduction of collective action legislation, in the Netherlands. The significance of antitrust litigation, both as a type of general commercial litigation and as one of the pillars of competition enforcement, is demonstrated by the fact that procedures are being introduced in some jurisdictions exclusively for antitrust litigation, whether it is the introduction of disclosure of documents across Europe for antitrust damages claims or the introduction of opt-out class actions for antitrust damages claims in England and Wales. There will be numerous examples of as yet unidentified procedural issues which will work their way through the courts for some years to come, on issues relating to identifying the relevant class or disclosure of documents, particularly in those jurisdictions in which wide-ranging disclosure is an entirely new approach in any form of litigation.

The first grant by the CAT of a CPO in the *Merriks v Mastercard* collective action, in August 2021, has been a huge boost to the development of collective (or class) actions in the UK. After the CAT refused the application for a CPO on a variety of grounds, the Court of Appeal allowed the appeal by the proposed representative claimant and ordered that the CPO application be remitted to the CAT for re-hearing. In December 2020, the Supreme Court handed down its judgment dismissing Mastercard's appeal against that judgment. The claim has now been certified by the CAT as one of (as of the date of writing) ten collective actions which have been certified. These include opt-in as well as opt-out claims, follow-on claims relying on pre-Brexit European Commission (EC) decisions (which remain binding post-Brexit), as well as standalone abuse of

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dominance claims, including claims against the large tech platforms Meta, Apple, and Google.

Collective actions, including the “trucks” litigation, which were previously stayed pending the outcome of the Merricks appeal, have been certified and are continuing in the CAT. However, in *R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and Others*, the Supreme Court found that LFAs, pursuant to which the funder is entitled to recover a percentage of any damages awarded, do involve the provision of claims management service and, as such, are Damages Based Agreements (DBAs) within the relevant legislation. DBAs are not permitted in the UK for opt-out collective actions in the CAT. Therefore, LFAs – which are used in the majority of opt-out collective actions – will now have to be reviewed and likely amended. This is likely to put a break on the recent exponential growth in class actions in the UK.

The Brexit effect

The UK has now left the European Union and completed its post-exit transition period. This means that statutory changes passed by the UK government have become effective, bringing an end to the direct jurisdiction of EU institutions and treaties in the UK. UK courts are now able to diverge from EU competition law, and EC decisions issued after the UK’s Brexit transition period are no longer binding on UK courts. However, there are a number of grandfathering provisions which will preserve elements of the pre-Brexit framework, and UK courts will be free to have regard to EU jurisprudence in applying competition law in the UK. Importantly, decisions of the EC issued prior to the end of the Brexit transition will still be binding in the UK courts. In addition, if alleged breaches of EU competition law took place before the end of the transition period, the UK courts will be required to apply

EU law as at the end of the transition. The UK’s exit from the EU has also given the UK competition authorities freedom to conduct investigations and market studies in areas of interest to the EU autonomously from the EC. The Competition and Markets Authority (CMA) has taken a renewed interest in digital markets and online platforms (eg, its market study into Apple and Google’s mobile ecosystems) and further decisions can be expected in this area, with litigation to follow, in the coming years. Where the CMA is not investigating, the EC can no longer intervene to stay standalone claims brought in the UK courts, making the jurisdiction increasingly attractive as a forum for antitrust claims with a global reach.

Claims based on an abuse of a dominant position

In Europe and beyond, as competition regulators switch their focus to the big technology companies and increase the number of investigations based on abuse of a dominant position, the number of antitrust litigation claims based on such allegations has increased. Such claims are not limited to follow-on damages claims, but encompass standalone damages claims and/or injunction applications to prevent an alleged abuse of a dominant position, often as a matter of urgency. Such injunction applications are often settled privately, without a court hearing, and never see the light of day. However, most of these claims are unsuccessful and the cost consequences in those jurisdictions that order costs to be paid by the losing party (including in the UK) can be significant. As a result, such claims – particularly on a standalone basis – should be considered very carefully.

Trends in antitrust investigations

In recent years, authorities around the globe have been focused on investigating a number of

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prominent technology companies, including the EC's investigations into Apple's App Store Rules and Apple Pay, the US DOJ and State Attorneys General filing a civil antitrust lawsuit relating to alleged exclusionary practices in the search and search advertising markets, and the UK's CMA opening investigations into both Google and Apple over suspected anti-competitive behaviour. There has also been a particular focus in Europe and the UK in recent years on investigations into pharmaceutical companies, principally focusing on allegations of excessive pricing and/or anti-competitive agreements. These investigations may lead to follow-on damages claims.

Principled assessment

The majority of cartel damages claims are settled prior to the trial hearing. In the more significant claims in terms of value of sales and quantum claimed, it may take many years to arrive at the point where a principled settlement can be achieved, which is a genuine estimate of the claimant's loss, including an assessment of the extent to which such loss has been passed on to third parties. Such a principled assessment will require the parties to go through the steps of disclosure of documents, factual witness statements and expert economic reports to quantify the loss suffered (potentially, in addition to interlocutory applications on issues such as jurisdiction and/or limitation). In lower-value claims, parties may consider it worth trying to achieve a settlement in advance of doing the bulk of such work, particularly where the legal costs of years of trial preparation might exceed the value of the claim itself.

Specialist firms

The presence of specialist (often US) claimant firms in an increasing number of European jurisdictions and the growth in litigation funding (generally, but specifically in the context of antitrust

damages claims) are having a significant impact on the strategy for managing such claims.

Antitrust litigation in other jurisdictions

Other jurisdictions seeing an increasing volume of antitrust litigation include Israel and some jurisdictions in Latin America which have active national competition authorities, including Argentina, Brazil, and Mexico. Israel also has a class action regime and the claimant lawyers are beginning to focus on antitrust claims.

Antitrust litigation post-pandemic

Many of the legal issues arising from the pandemic to date concerned consumer law issues (rather than competition law issues), such as price gouging. Many businesses have considered co-ordinating their activities with others in response to the pandemic. This may have entailed the development of common standards, exchanging sensitive information, and co-ordination to address supply chain issues. However, where businesses are rivals or co-operation could otherwise result in the disclosure or receipt of competitors' competitively sensitive information, such collaboration could amount to competition law infringements. Many competition authorities around the world, including the CMA in the UK, and the EC, have taken a reinvigorated interest in potential competition law breaches affecting consumer prices as the world adjusts to post-pandemic economic conditions. The CMA has stated that it will consider any evidence that companies have broken competition law, for example by charging excessive prices, and take appropriate action. Follow-on damages claims may follow from any such enforcement action. The last financial crisis resulted in the largest global cartels in terms of volume and value at the time: the Libor cartel and the foreign exchange cartel. It remains to be seen whether the next financial crisis will result in

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an increase in cartels and cartel damages litigation. However, the usual motivation for cartels in a financial crisis – falling profit margins – combined with increased working from home and the risk of lighter-touch compliance in the new post-pandemic circumstances is a potentially toxic combination which may well lead to an increase in cartel damages claims in years to come.

ARGENTINA



Law and Practice

Contributed by:

Luis Diego Barry, María Carolina Abdelnabe Vila, María Clara Rodríguez Llanos
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PAGBAM was founded in 1991 and is a full-service law firm specialised in advising local and international companies and entities. With more than 30 years of experience and solidity in the industry, it offers its clients strategic and innovative solutions to their most complex legal and commercial matters and, at the same time, provides co-ordinated legal advice and transactional capability in Argentina and the rest of Latin America through its offices in Buenos Aires,

Santiago de Chile, Uruguay and New York. Its competition practice combines an unmatched mix of international and domestic experience in significant antitrust law matters. The team covers all aspects of applicable regulations, including merger control, cartel investigations, abuse of dominance/monopolisation, industry regulation and market research, public procurement and competitive bidding.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Argentina is still developing and there are not a lot of ongoing cases. Antitrust issues that reach the court mostly consist of sanctions that are being challenged. The claims for damages are usually brought by consumer associations or public bodies or as a *litisconsorcio activo* (multiple parties acting as claimant); individual claims are rare.

1.2 Other Developments

The current Antitrust Law that came into force on 24 May 2018 (Law No 27,442) provides for the possibility of requesting a civil fine (punitive damages) that will be established for the claimant's benefit, hence it may be expected that this civil fine will increase the number of class actions claims, especially those claiming for consumers' rights.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Individuals or legal entities injured as a result of conduct sanctioned by the Antitrust Law can

file a claim for damages, in accordance with Argentine legislation, before the judge having jurisdiction (Section 62, Antitrust Law). In addition, chapter IX of the Antitrust Law regulates private antitrust litigation. The Antitrust Law and Argentina's legal system do not impose a prior finding of an antitrust infringement as a condition for initiating private antitrust litigation. However, damages claims are usually initiated as follow-on actions, based on the prior finding of infringement by the National Competition Authority (NCA).

2.2 Specialist Courts

Pursuant to the Antitrust Law, the actions must be filed with the Civil and Commercial Federal Courts at national level or the Federal Court in provincial jurisdictions.

2.3 Decisions of National Competition Authorities

The decision of the NCA in relation to a violation of the Antitrust Law, once it becomes final and binding, has the force of *res judicata*, so the claimant of a follow-on action only has to demonstrate that the already proved infringement caused them harm. A decision of NCAs in other states is not binding on the court. NCAs

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can intervene in damage actions, though this is not common.

2.4 Burden and Standard of Proof

In principle, the burden of proof is on the claimant. However, if the defendant wants to argue that a claimant is not entitled to claim under the proceeding, as they have passed on the overcharge to indirect purchasers and therefore suffered no loss, they have to provide evidence. The pass-on defence must be invoked when responding to the claim.

2.5 Direct and Indirect Purchasers

Claims can be brought by direct and indirect purchasers. The basis of the claims consists of proving the existence of an antitrust infringement, the actual damage suffered and the relation between the alleged antitrust infringement and the damage.

2.6 Timetable

The typical duration of proceedings from the issuance of a claim through to trial is one year, but it takes three to four years to obtain a final and binding court decision. The resolution of the judicial claim may be suspended if the NCA initiates an investigation in relation to the damages claim. Said suspension will end when a final and binding decision is issued or when the proceedings are closed by any other way. The suspension is based on the fact that the NCA's decision, when final and binding, has res judicata force in relation to the damages claim.

3. Class/Collective Actions

3.1 Availability

Collective actions are available. According to the Consumer Law, a court settlement must take the consumer's opt-out right into account. However,

the Antitrust Law does not provide for the possibility to opt-in or opt-out of collective actions.

In addition, multiple parties can act as claimants (*litisconsorcio activo*). However, in this kind of action, the ruling does not have the same effect as a ruling issued in a collective action. In a multiple claimant action, the ruling only binds the parties that have directly acted in the proceedings as claimant or defendant.

3.2 Procedure

Consumer associations (duly registered) or public bodies have standing to file collective actions if certain requirements are met:

- the claim has to be homogeneous within the members of the class; and
- the claim for each individual member has to be insignificant – ie, individuals shall not have an interest in pursuing the claim themselves due to its insignificance. (See rulings in Halabi, Ernesto c/ PEN ley 25.873 y decreto 1563/04 s/ amparo and Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía. Industrial Argentina S.A. y otros, – CSJ 566/2012 (48-A); CSJ 513/2012 (48-A)/RH1; CSJ 514/2012 (48-A)/RH1 – among others.)

3.3 Settlement

In the settlement of collective actions there is judicial oversight: judicial settlements have to be submitted for the court's approval and the court decides on the case after the Public Prosecutor has issued its opinion.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

The Antitrust Law provides that the summary proceeding governed by the Civil and Commercial National Procedural Code is applicable to claims for damages based on a previous final and binding resolution of the NCA determining whether an anti-competitive conduct occurred.

4.2 Jurisdiction/Applicable Law

The Federal Courts are competent authorities (ie, Civil and Commercial Court at a national level and local federal courts at a local level). As regards the substantive law, the Antitrust Law applies regardless of whether the conduct has a national or local impact; in relation to procedural law, the Civil and Commercial National Procedural Code applies.

4.3 Limitation Periods

The statute of limitations for anti-competitive conduct is five years, commencing from the date the conduct is committed or ceased. The statute of limitations term to claim for damages is:

- three years commencing from the date that:
 - (a) the infraction was committed or ceased; or
 - (b) the victim becomes aware, or it may be reasonable that they are aware, of the anti-competitive conduct; or
- two years commencing from the date the sanctioning decision of the NCA became final and binding.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In Argentina there is no discovery process; instead, there is a procedural stage for the submission of evidence presented by each party (eg, witness hearings, expert evidence) once the judicial claim has started.

5.2 Legal Professional Privilege

In Argentina, there is no discovery process. However, in accordance with Section 1735 of the Civil and Commercial Code, a judge may ask a party to submit certain evidence if it is in a better position to prove guilt or diligent conduct. If the evidence is confidential, that party can ask for it to not be publicly disclosed.

5.3 Leniency Materials/Settlement Agreements

If a settlement agreement with the NCA is reached, it could be protected from full disclosure if requested by the parties. However, a non-confidential version of the agreement may be published.

As regards the leniency programme, the identity of the party who requests it and the information and documents submitted to the NCA by such party will remain confidential.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witnesses of fact are relied on. In principle, their evidence is given orally and may be subject to cross examination, but they may extend their statements in writing. Witnesses can be compelled to provide evidence.

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6.2 Expert Evidence

It is usual to rely on expert witnesses. Depending on their expertise and what they are providing evidence for, their evidence is given orally (and may be subject to cross examination) or in writing. When arguing their case, the parties do not require, however, the permission of the court to adduce expert evidence. Courts do not usually require experts to produce joint statements indicating the areas in which they agree/disagree in advance of the trial, nor do they adopt alternative methods of hearing expert evidence such as “hot tubs”.

7. Damages

7.1 Assessment of Damages

While in “stand alone” cases the party seeking damages must first establish the breach of the Antitrust Law before showing that the infringement caused them harm, “follow on” cases are easier since the infringement of the Antitrust Law has already been established by the NCA and said ruling is *res judicata* so the damaged party only has to prove that said antitrust infringement caused them harm. That is why in a “follow on” case the rules of the abbreviated procedure apply.

Besides, the party seeking damages can also request punitive damages (civil fine) that will be graduated according to the seriousness of the case.

7.2 “Passing-On” Defences

Neither the Antitrust Law nor any of the NCA’s guidelines refer to the “pass-on defence”, but nothing prevents the defendant from invoking it if applicable. In fact, there is a case that has been decided partially admitting this defence.

7.3 Interest

As a general principle, damages have to be totally repaired hence interest can be claimed either as pre-judgment or post-judgment. The interest rate depends on the judge and the competent court.

8. Liability and Contribution

8.1 Joint and Several Liability

When more than one person is responsible for an infringement, all of them will be jointly and severally liable to the injured party.

Those physical persons or legal entities that have made use of the leniency programme (provided that the antitrust authority has accepted it) may exempt or reduce their liability. However, they will be jointly and severally liable when it is impossible to obtain full compensation from the other companies that have been involved in the infringement.

8.2 Contribution

All those responsible for an infringement are jointly and severally liable to the injured party. However, a defendant who has paid damages disproportionate to the harm they have caused may bring contribution proceedings to obtain a contribution from the other defendants or a third party that also caused the damage. Said third party has to be called to the proceedings, otherwise the ruling (that set the obligation to repair the damage) may not be applicable against them and no action for recovery may be allowed.

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9. Other Remedies

9.1 Injunctions

The Antitrust Law establishes that, at any stage of the antitrust proceedings, in order to prevent harm or reduce its magnitude, continuation or aggravation, the NCA may impose compliance with certain conditions, as well as order the cessation or abstention of presumably anti-competitive acts.

With respect to injunctive relief in *stricto sensu*, the Antitrust Law establishes that the NCA must submit a request to the competent judge, who must rule within one day. Injunctions shall be granted and enforced without notice to the other party.

Both types of measures could be imposed or a requested submitted to the judge, as the case may be, *ex officio* or at the request of a party. However, according to the procedural laws, the injunctive relief in *stricto sensu* may only be granted under the responsibility of the party requesting it, who must provide security for all costs and damages that it may cause (*contra-cautela*), but no counter-guarantee is required if the party requesting the injunction is the State. In addition, the (i) imminent damage to and (ii) verisimilitude of the invoked right must be proven in order to obtain an injunction.

9.2 Alternative Dispute Resolution

The Antitrust Law establishes that until the antitrust proceedings are resolved, the alleged infringer may commit to the immediate or gradual cessation of the investigated facts or to the modification of aspects related thereto.

If such commitment is approved by the NCA, the proceedings will be suspended. After three

years of compliance with the commitment, the proceedings will be archived.

10. Funding and Costs

10.1 Litigation Funding

As yet, there have not been any antitrust litigation funding cases in Argentina, but nothing prevents them from being heard.

10.2 Costs

Costs are awarded once cases escalate to the judicial stage, following the “loser pays” principle. In the event that the petitioner is a consumer or consumer association seeking payment of compensation for damages, it is granted *per se* with the benefit of litigation without expenses. Other claimants may request the benefit of litigation without expenses but they must prove that they are not able to afford litigation.

11. Appeals

11.1 Basis of Appeal

The Antitrust Law establishes that only the following the NCA’s resolutions can be appealed:

- the resolutions that impose sanctions;
- the resolutions that impose the cessation or abstention of a certain conduct;
- the resolutions that reject or impose a condition on a certain economic concentration;
- the resolutions that reject a complaint;
- the resolutions that reject a request to join the leniency programme; and
- the resolutions that establish precautionary measures.

However, considering the supplementary application of the criminal procedural code, other

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resolutions that do not fall within those above-mentioned may be appealed provided that they cause irreparable damage.

The Antitrust Law provides that appeals shall be brought before the Antitrust Specialised Panel of the Federal Civil and Commercial Court of Appeals (which is to be created) or the corresponding Federal Chamber in the provinces.

Since the aforementioned Antitrust Specialised Panel has not yet been constituted, the appeals are processed by a panel of the Federal Civil and Commercial Court of Appeals.

Trends and Developments

Contributed by:

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PAGBAM

PAGBAM was founded in 1991 and is a full-service law firm specialised in advising local and international companies and entities. With more than 30 years of experience and solidity in the industry, it offers its clients strategic and innovative solutions to their most complex legal and commercial matters and, at the same time, provides co-ordinated legal advice and transactional capability in Argentina and the rest of Latin America through its offices in Buenos Aires,

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ARGENTINA TRENDS AND DEVELOPMENTS

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Historic Antitrust Pending Developments

One hundred years ago, Argentine legislators of the first antitrust law would have imagined a different outcome of antitrust practice in Argentina. Moreover, after 100 years of practice, Argentina should have been on the top of the podium of “worldwide champions” of antitrust law with such extensive legal experience in the matter. Unfortunately, reality shows something completely different.

It can be assumed that those who drafted the subsequent Argentine antitrust laws had the same idea. In the same way, one can assume that those who drafted the five-year-old Law No 27,442 imagined a fully functioning system. Despite the fact that many officials have made important efforts to achieve high standards in the field of antitrust, it would appear that those desired outcomes have not been fully achieved.

What are the reasons for this?

Firstly, there is a political misunderstanding about what antitrust law is for. For example, there have been decades of government presidents who invoke the application of antitrust as a mechanism of price control or inflation control, when clearly it is not its immediate goal.

There have also been presidents who “do the impossible” against the monopolies that they often publicly denounce, but who in practice do little to prosecute under the law.

Antitrust law is presented as a tool to fight issues that politicians often do not know or do not want to know how to fight or, what is worse, they do not want to fight.

More seriously, there have been cases where antitrust law was used as a tool for extortion,

persecution or for the benefit of the “friends of those in power”.

On the whole, the problem is a lack of conviction about antitrust law, which is trivialised as a tool and public policy, distracting the authorities in their functions, often showing that the goal is none other than to appear on the front pages of the newspapers disguising a lack of action to supposedly make an expectant electorate happy, while it suffers from inaction disguised through incendiary speeches.

The situation becomes intolerable with the realisation that the Antitrust Law that is not applied, or is feigned to be applied, is constitutionally rooted in its Article 42.

This action, intentional or not, leads to a number of serious shortcomings:

- the enforcement authority has not yet been established;
- the enforcement authority is not independent as mandated by the National Constitution according to the interpretation of the Supreme Court of Justice of the Argentine Nation;
- there is no extensive, conducive, frequent and coherent jurisprudential body responsible for sanctions;
- the jurisprudential body responsible for mergers and acquisitions and advisory opinions is often contradictory, to the point that the National Antitrust Commission (“CNDC” in its Spanish acronym) had to clarify that the request for advisory opinions suspends the deadlines for notifying an economic concentration operation;
- the amounts of the sanctions are, up to now, derisory as in the best of cases the maximum

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limit frozen in time established by Law No 25.156 has been applied;

- the leniency regime has not seen the light of day, and there is no single relevant antecedent;
- there is no prior control system for mergers and acquisitions;
- the deadlines for the resolution of complaints as well as the approval of mergers and acquisitions are extremely long; and
- the recursive regime does not respect the constitutional mandate, treaties of constitutional hierarchy and rulings of the Supreme Court of Justice of the Argentine Nation that impose sufficient judicial control and double instance in criminal matters.

These are a few failings that the authors believe are important, but there may be others that are just as relevant.

Having considered what the main problem is, one can also expect that there is a solution. But, how difficult is that solution? Is there an “almost magical” key that would unlock all these problems?

A Problem That is Not Difficult to Solve

Clearly, as seen above, the problem is the leadership, as in so many issues that afflict the country.

Argentina requires a leadership that stops looking at the polls and assumes the role that the society offers to provide solutions to the great problems of the country.

In brief, Argentina needs a leadership that is convinced that “the authorities will commit... to defend competition against all forms of market distortion, to control natural and legal monopo-

lies...” as mandated by Article 42 of the National Constitution.

But, is that too difficult?

The authors genuinely believe that there is a key that would unlock most of the problems that are analysed in this article. That solution is to establish the enforcement authority imposed by Law No 27,442. All that is needed is a National Antitrust Authority that is especially selected for its suitability and is independent of political power, ie, an independent court.

Perhaps this reasoning appears overly simple, but if the Court is independent of political power, then it can focus on prosecuting monopolies that abuse their dominant position with technical and not political rigour. If it could make pro-competitive recommendations away from the heat of politics, antitrust would not be a tool that is suspected of favouring cronyism, facilitating “extortion” or persecution of circumstantial enemies of power, as so considered by the media in cases such as “Telecom” or “Clarín”.

In this scenario, if a political official or an opposition leader denounces the existence of a monopoly through the media, they must file the corresponding complaint and present the evidence that supports it. The vain denunciation from the lectern will no longer work.

It would also be known that in order to limit inflation, the tool is not antitrust, but other more appropriate public policies that are used successfully around the world.

In this way, there will be a jurisprudential body with technical rigour that grants legal certainty, gives real sanctions, and the merger control regime will finally enter into force after one year.

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Article 84 of Law No 27,442 provided that the prior control of mergers and acquisitions would enter into force one year after of the establishment of the Court, this is in order for the system to be orderly, stripped of all political conditioning and reaching the terms that are glimpsed in other jurisdictions.

Logical deadlines both for the control of mergers and acquisitions and for the investigation of anti-competitive behaviours seem easier to achieve if the authority concentrates on technical issues and moves away from the agenda set by circumstantial politics.

In the same way, the recursive regime will be guided by the legal understanding of those who make up the Court and not by the demands of politicians.

Along these lines, a reliable authority that investigates and sanctions will be eligible for a leniency regime. There is no other explanation for the current clear failure of this regime.

Therefore, a simple political conviction that endows the independence that the constitutional mandate and the legal regime impose creates a virtuous circle that can lead to a rapid development of antitrust. These changes would comply with the constitution achieving the goal set by the legislator 100 years ago.

The Pendulum is Always Moving: The Court is Always in Danger

The authors of this article view the formation of the Court as the key to unlocking Argentina's future in antitrust. The Court must be independent and respect the legal mandate of Law No 27,442. That is, it should not be established by a Decree that is far from the Law or only to meet goals agreed with international organisations.

Indeed, one of the virtues of Law No 25,156 was the creation of the National Antitrust Authority, which never saw the light of day. The aforementioned provision was modified in 2014, eliminating it from the administrative agenda.

A few years later, Law No 27,442 fortunately returns to the idea of having an independent authority.

But, at the point when it started to look like a tangible reality, today the pendulum is swinging again. If history repeats itself, an independent Court may never be established.

The authors hope that if the decision to establish the Court is finally taken, it will be in compliance with the provisions of Law No 27,442 and its establishment will not be vitiated, which would have the potential to invalidate its decisions and enter into an eternal litigious spiral. The concern is that if the Tribunal is not established as the regulations impose, all its decisions will be weakened under the cloak of latent nullity.

At this point, it may be disputed whether an independent authority is really necessary. This doubt is not only reflected in the recent history of Argentina but has also been expressed by well-meaning experts.

Although Law No 27,442 already opted for the constitutional path of an independent authority, it is worth revalidating its need, especially if its formation by Decree may affect its independence.

Having already considered that the formation of the Court could be the key to the development of antitrust, the authors will now look at how this arrangement is consistent with Argentina's constitutional system.

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The Court Must be Independent, as Ordered by the Supreme Court

In order to understand whether there really is a need for the Tribunal to be independent, it is worth taking a quick look at what has happened in recent years.

Law No 22,262 created a dismembered authority. On the one hand, there is the National Antitrust Commission (CNDC), with investigative powers, and on the other, the Secretary of Commerce, with resolving powers; this has been recognised in numerous rulings by the Supreme Court of Justice of the Nation (some of which are cited above in relation to the enormous amount of litigation that the matter of authority has provoked). In brief, the Commission investigates, instructs and advises; and the Secretariat resolves by means of an administrative act.

This concept of the enforcement authority, which is still in force today, clearly keeps the antitrust policy tied to the political power of the moment, given that those who are responsible for investigating and those resolving antitrust issues are officials, appointed by the Government President.

Almost 24 years ago, Law No 25,156 tried to break with this methodology by recognising that the antitrust policy could not be left free or tied to the decisions and inclinations of the current government, which, as already discussed, represents a constitutional mandate. In other words, administrative criminal conduct that foresees important legal consequences, such as pecuniary and criminal, cannot be left to a political decision-maker.

In light of this, the concept of a National Tribunal for Antitrust was created. The Tribunal, which after some timid attempt to be constituted, nev-

er became a reality. Many presidents came and went between 1999 and 2014 and the Court was never constituted.

Then, in 2014, Law No 25,156 was modified and the provision for a National Tribunal for Antitrust was removed through a rule that was far from technically rigorous, without consultation, as confessed by CNDC members, and as a sign of the clear political desire to move antitrust away from the constitutional mandate and a faithful reflection of the whimsical way in which the country was governed at that time.

Finally, when the current antitrust law was drafted, this topic was discussed again. The editors, with good judgement, returned to a similar scheme, as far as independence from political power is concerned, as provided for by Law No 25,156. This was only possible by providing the enforcement authority with sufficient technical capacity and administrative independence that Law No 27,442 finally established.

Strictly speaking, beyond personal criteria or circumstantial political convenience, it is about complying with the National Constitution.

Indeed, Argentina's constitutional regime does not tolerate an administrative jurisdictional authority such as the one that currently governs the country.

It is worth noting that the Carta Magna provides in its Article 109 that the executive power cannot exercise judicial functions and that, for its part, Article 116 of the National Constitution grants jurisdictional power exclusively to the judiciary.

However, in an already distant unconstitutional turn (in the authors' opinion), the jurisdictional

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capacity of the power that was clearly prohibited was judicially recognised.

For this reason, the Court imposed a series of conditions that are worth remembering.

Moreover, the national doctrine peacefully maintains that the attribution of competence to entities in the administration that carry out jurisdictional activities requires that the entity be created by law, that its authorities be independent and impartial, that the objective of its creation by the legislator has been reasonable and that its decisions are subject to broad judicial control.

More recently, there have been the rulings in the Litoral Gas and Ángel Estrada y Cía cases. In the latter, dated 5 April 2005, the Supreme Court also held that: “No dispute can be validly referred to administrative bodies on the mere condition that their decisions are subject to subsequent judicial control. The reasons taken into account by the legislator to remove the matter in question from the jurisdiction of the ordinary judges must be reasonably justified, otherwise the administrative jurisdiction thus created would lack constitutional support, and would represent an undue advance on the provisions that Article 116 of the National Constitution defines as proper and exclusive of the Judicial Power of the Nation”.

Therefore, the independence and impartiality of the entity that exercises jurisdictional functions are essential requirements for the exercise of administrative jurisdictional activity. Clearly, it cannot be maintained that a political official enjoys the independence and impartiality that the Court requires.

Therefore, continuing with the current scheme not only contradicts the mandate of Law No 27,442, but our National Constitution in the inter-

pretation made by the country’s highest court to ignore what is clearly provided in its Articles 109 and 116.

In other words, it is questionable that the Secretary of Commerce of any political persuasion can be the enforcement authority of Law No 27,442 and, therefore, their decisions could be nullified for not complying with the jurisprudence of the Supreme Court, putting into question all judicial actions and the antitrust regime.

In light of this, it is clear that the Tribunal must be independent.

Conclusion: An Independent Tribunal is Necessary for the Evolution of Antitrust

The aim of this article was to give some constructive criticism, while also providing some positive content. That positive content is to try, from the authors’ humble place, to propose solutions so that the defence of competition becomes a full reality in Argentina and is inserted as an unquestionable policy.

With this in mind, the article highlights that it is essential for those who run the country to be convinced of the benefits that this type of regulation grants to the entire community.

This is a conviction that our legislators had 100 years ago and repeated on numerous occasions with the issuance of several of the regulations that followed. But it was also the conviction that Argentina’s constituents had when they introduced Article 42 of the National Constitution imposing a clear mandate of “the authorities commit... to defend competition against all forms of market distortion, to have control over natural and legal monopolies...”.

ARGENTINA TRENDS AND DEVELOPMENTS

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This constitutional duty should lead to a simple government act being taken: establishing the National Antitrust Authority. This idea is as a solution that could gradually solve many of the problems that Argentina faces today.

Clearly, this decision must be in compliance with the Constitution, according to the interpretation of the Court, as set out in Law No 27,442.

Therefore, although it is essential that the Tribunal be made up of those most capable of carrying out a true transformation in the field of antitrust, its independent formation is a condition for a definitive step being taken to overcome the remaining important problems in the field of antitrust.

AUSTRALIA

Law and Practice

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Clayton Utz



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Clayton Utz has been established for more than 180 years, and now has over 169 partners and over 1,500 employees across six offices in Australia. The firm has a reputation for innovative and incisive advice. The Clayton Utz competition group, based in the firm's Sydney office, provides a national service to clients and industries ranging from government to local Australian corporates, through listed ASX organisations to global organisations. The team contains

five dedicated competition partners who work collaboratively with class action litigation colleagues in relation to antitrust follow-on actions as well as with regulatory and corporate colleagues in respect of regulatory matters and transactions. Recent clients include large Australian retailers, telecommunications providers and banks, mining and infrastructure companies, and global entities undertaking transactions in Australia.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Australia is a mature antitrust litigation jurisdiction.

In essence, there are three types of antitrust litigation in Australia:

- enforcement proceedings brought by the Australian competition regulator, the Australian Competition and Consumer Commission (ACCC) or the Commonwealth Director of Public Prosecutions (CDPP);
- private action between commercial parties; and
- class action litigation brought by a lead applicant representing a “class” of private parties (also known as “group members”) that have suffered loss or damage due to alleged anticompetitive conduct.

The latter type of action is less common in Australia, although there are presently a small number of such actions on foot. The more usual form of antitrust litigation is enforcement action

brought by the regulator. Class action litigation is sometimes brought as “follow-on” litigation after a successful prosecution by the regulator (depending on the conduct alleged and the time taken to bring a prosecution to conclusion).

Active Antitrust Litigation Cases

There are currently a number of active antitrust litigation cases before Australian courts for breach of the Australian Competition and Consumer Act 2010 (Cth) (CCA). These include:

- criminal cartel prosecutions brought by the CDPP, including against providers of demolition waste services who entered guilty pleas in relation to criminal cartel conduct relating to allegations of price fixing; and
- civil cartel proceedings brought by the ACCC, including action against a business in the supply of services to the oil and gas service industry alleged to have attempted to enter, or attempted to induce four other suppliers to agree to not supply particular services to large oil and gas companies, to share markets and to rig a tender and action against a technology company for alleged bid rigging and price fixing when tendering to supply

equipment and services to five Pilbara mining village sites;

- class actions, including in relation to the alleged global forex cartel, alleged misuse of market power and access to pastoral land, and two actions (seeking to follow-on from private actions) each alleging that certain conduct relating to app store and in-app purchases had the purpose, effect or likely effect of substantially lessening competition; and
- private actions against a digital platform operator for (amongst other things) alleged anti-competitive conduct, an app store provider and power companies based in Queensland, each in relation to alleged misuse of market power.

Developments in Antitrust Litigation

In relation to regulator-instituted antitrust proceedings, the primary development is that ACCC is pushing hard for higher penalties for contraventions of the CCA. For some time the ACCC has sought to increase penalties both for their deterrent effect, and to be in greater alignment with the EU and USA where significant penalties are the norm. The ACCC has had some success with this strategy in recent years.

In this respect the ACCC also has the support of the newly elected Labor Government which amended the CCA increasing maximum penalties from AUD10 million to AUD50 million with effect from 10 November 2022. The government's rationale for the proposed change is to bring competition penalties under Australian law closer in line with penalties imposed in other jurisdictions. This may have been spurred by an Organisation for Economic Co-operation and Development (OECD) report from 2018 which found that the average and maximum competition penalties in Australia are substantially lower than those in comparable jurisdictions. To be in

line with those jurisdictions (such as Europe, the UK, Germany, Japan, Korea and the USA) the average Australian competition penalty would need to be multiplied by a factor of 12.

A further development has been in the context of investigations leading to proceedings, which is that cartel investigations are now initiated with view to criminal cartel proceedings being commenced. While criminal cartel offences were introduced in 2009, the change in the approach to enforcement activity has been particularly noticeable in the last several years, resulting in the ACCC more commonly referring matters to the CDPP. This strategy has not been entirely successful. In 2021 the CDPP lost the first contested criminal proceedings brought against a supplier of assistive technology products used in rehabilitation and age care. The proceedings, which proceeded by way of a trial before a jury, resulted in an acquittal on eight criminal charges for the accused, being the supplier, its CEO and a former employee.

In early 2022 a significant cartel matter brought against a number of banks in relation to a 2015 institutional share placement collapsed as the CDPP withdrew all charges. This decision was made following extended preliminary challenges to the formulation of the charges by the defendants.

The outcome of the ACCC's antitrust litigation has however assisted the ACCC in arguing for, and achieving, significant legislative and policy changes. Some of the ACCC's losses in the past decade have assisted in driving legislative reforms to the CCA. For example, the introduction of a new prohibition on anticompetitive concerted practices was partly fuelled by the ACCC's failure to win cases alleging cartel conduct given the technical requirements for

demonstrating that such conduct had occurred in Australia.

1.2 Other Developments

The ACCC has significantly increased its investigative capabilities and resources in recent years, with dedicated investigators assigned to its criminal cartel branch, and sector-specific teams such as digital platforms, financial services with a focus on payment services, and construction.

The ACCC's investigation and enforcement activities have also been bolstered by the many wide-ranging market inquiries that it has been directed to conduct in recent years, for example in relation to digital platforms including, most recently, online market places, digital advertising services, financial institutions and foreign currency conversion, and electricity and gas markets. The ACCC has investigated and taken enforcement action (including commencing proceedings) for anti-competitive conduct uncovered during these inquiries. Most notably, the ACCC has commenced a number of actions against a digital platform as a direct result of its Digital Platforms Inquiry. In the context of the ongoing inquiry into the East Coast gas markets, it has indicated that it will take enforcement action for anticompetitive arrangements and has identified its most high-profile targets in a clear signal to those entities that certain behaviour is not sanctioned and may have enforcement consequences.

The ACCC is also increasingly investigating and taking action in industries and sectors that it has not traditionally focused on. The examples mentioned above (involving digital platforms and the financial services sector) are two such areas, but recently there have been others, such as the funeral services industry following review of the sector by the CMA in the United King-

dom. Enforcement priorities are amended on an annual basis.

While the move to remote hearings was prevalent due to the impacts of COVID-19, the courts are largely reversing that trend, with judges tending to request that hearings be in person again. While the use of some technology will probably continue given it provides greater flexibility, it is no longer expected to be the default position.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The legal basis for a claim for damages is based on breach of the CCA, being an Australian Commonwealth law, not a State law. The ACCC, may bring civil proceedings for breaches of the CCA. Criminal prosecutions for certain breaches of the cartel provisions are brought by the CDPP.

A person who has suffered loss or damage as a result of a contravention of the CCA may also bring stand-alone civil proceedings or a follow-on action against any person involved in the breach seeking damages under Section 82 of the CCA, or compensation orders under Section 87(1) of the CCA. A claim for compensation orders under Section 87(1) can also be made by a person who is likely to suffer loss or damage as a result of a breach. Follow-on actions may be brought by a single applicant or by a "class" of people who claim to have suffered loss or damage.

In the case of follow-on actions, applicants can rely on Section 83 of the CCA which provides that findings of fact, including admissions, made in prior proceedings (typically public enforcement actions by the ACCC) is prima facie evidence

of that fact in future proceedings (eg, follow-on actions for damages or compensation orders).

The ACCC in civil cases, or the CDPP in criminal cartel cases, may also make an application for compensation orders under Section 87(1) of the CCA on behalf of such persons.

2.2 Specialist Courts

There are no specialist competition courts in Australia for antitrust litigation.

Subject to a small number of exceptions, the Federal Court of Australia (FCA), a Commonwealth Court of various divisions, has exclusive jurisdiction to hear civil and criminal matters in relation to the competition law provisions of the CCA. There are a number of judges of the FCA who are part of the Economic Regulation, Competition and Access sub-area and specialise in competition law matters. In the usual course, a matter commenced in the FCA that concerns a competition law issue will be allocated to a judge that has specialist expertise.

The Australian Competition Tribunal is a specialist competition tribunal that has jurisdiction to review certain decisions made by the ACCC; however, it does not have jurisdiction to determine litigious proceedings under the CCA.

2.3 Decisions of National Competition Authorities

The decisions of the ACCC are not binding on any Australian court.

The ACCC may, with leave of the court and subject to any conditions imposed by the court, intervene in any proceedings instituted under the CCA, including private proceedings. The ACCC has published guidance on intervention in private proceedings, which state that the ACCC

will consider intervening if the case involves significant public interest, a construction of the Act in untested areas, or to clarify its operation and/or international conduct such as anticompetitive conduct and consumer exploitation on an international scale. The ACCC has sought to intervene in private litigation such as the misuse of market power proceedings commenced against an app store provider.

2.4 Burden and Standard of Proof

The burden of proof is generally on the party seeking to establish a contravention of competition laws (the ACCC, the CDPP or a private party).

The burden may shift to a defendant in some circumstances, such as where they seek to rely on a particular statutory defence (eg, the joint venture defence to cartel conduct under Section 45AO of the CCA).

For civil proceedings brought by the ACCC or private parties, the standard of proof is the “balance of probabilities”. For criminal proceedings brought by the CDPP, the standard of proof is “beyond reasonable doubt”.

There is, as yet, no statutory pass-on defence recognised under Australian competition laws.

2.5 Direct and Indirect Purchasers

Claims may be brought by direct and indirect purchasers provided that they are able to establish on the balance of probabilities that they have suffered, or are likely to suffer, loss or damage as a consequence of conduct contravening the CCA.

2.6 Timetable

The duration of a competition law claim will depend on the nature and complexity of the

case. These may include: the number of issues in contention, the extent and number of any interlocutory issues, the number of witnesses and experts, the extent of any discovery, whether the court orders any stay of the proceedings, and whether the case is subject to any appeals process.

For proceedings brought by ACCC, the typical duration of proceedings (assuming that the case runs to trial and does not settle before then) would be at least two to three years. Matters that settle before trial typically take about two years to conclude. That said, some cases run for considerably longer, for example the civil proceedings initiated by the ACCC in relation to the alleged high voltage cable cartel took nine years to conclude. Such cases should be considered as outliers. The only criminal cartel case to be contested was completed, including a jury trial, within 18 months.

Antitrust class actions have never been run to trial in Australia as they are either ongoing or have settled pretrial, making it hard to determine a typical timeframe. It is common for class action litigation to run for a number of years, with initial hearing usually commencing between two to five years from commencement (depending on the complexity of the case and the scope of document discovery and evidence gathering). The duration of class actions then depend on the appellate process and any resolution (which requires court supervision).

Suspending Proceedings

The concept of suspension pending an investigation is not relevant for Australia. The ACCC would only initiate proceedings once it had concluded its investigations, and private parties typically would not initiate follow-on proceedings until after any proceedings initiated by the ACCC

have concluded (so that they can rely on findings of fact made in those primary proceedings).

While parties can apply for an order to stay proceedings, this is quite unusual and will generally only be granted by the court to allow proceedings to be managed in a different forum or to await the outcome of a proceeding in a different forum.

3. Class/Collective Actions

3.1 Availability

In Australia, there are statutory class action regimes in the FCA and the Supreme Courts of New South Wales, Victoria, Queensland, Tasmania and Western Australia, which are state courts. The courts in the other Australian States and Territories have limited provisions for group actions.

Class Actions Regime

The class actions regime has been in force since 4 March 1992, with the relevant provisions of the regime outlined in Part IVA of the Federal Court of Australia Act 1976 (Cth) (Part IVA). Generally, a class action is commenced by a lead applicant or applicants on behalf of group members. However, there are also federal legislative provisions that allow the ACCC to institute representative proceedings on behalf of a group.

For example, the ACCC may institute proceedings for breaches of federal anticompetitive statutory provisions on behalf of persons who have suffered, or are likely to suffer, loss or damage by reason of the contravening conduct. The ACCC can only pursue a representative proceeding on behalf of persons who have been identified and who have consented in writing to the action. A proceeding could involve claims of direct and

indirect purchasers, but this will depend on the scope of the group member definition.

Opt-Out

Part IVA provides for an “opt-out” system for class actions, which means that each person who is a member of the class (as defined in the originating process) is part of the proceeding unless they notify the court that they wish to opt out. Following commencement of a proceeding, the court will fix a date by which group members are required to opt out. If a group member does not opt out, they will be bound by any judgment of the court or resolution agreed by the parties.

3.2 Procedure

Class actions can be commenced by a single or multiple lead applicants (on behalf of group members) provided the following three requirements are met:

- at least seven persons must have claims against the same person;
- the claims of all of these persons are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims of all these persons must give rise to at least one substantial common issue of law or fact.

Typically a claim is commenced by a single representative of the class who becomes the named applicant.

There is no certification requirement and no other process by which a class action need be approved by the court before it can proceed. There is no imposed limit to the number of group members and group members do not need to be named; the group definition determines the scope of the class. Provided an individual meets

the group member definition and does not opt out, they will be a member of the class.

3.3 Settlement

A class action cannot be settled without the approval of the court. Once an in-principle settlement is reached, group members are notified of the proposed settlement through a court-ordered notification process.

As part of the approval process, the court must assess whether the proposed settlement is a fair and reasonable outcome of the proceeding for the group members as a whole. The court is empowered to reject a proposed settlement if it is not satisfied that the proposed settlement meets that requirement. Evidence (including confidential exhibits) is put before the court as part of the approval process. Group members are entitled to object to the proposed settlement. However, if the court ultimately approves the settlement, all group members will be bound by it.

If a court is not satisfied that the proposed settlement is fair and reasonable, it can withhold approval and the representative action will proceed.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment Strike Out of an Action

Australian courts have the power to strike out the whole or any part of a pleading if:

- the pleading discloses no reasonable cause of action or defence;
- it has a tendency to cause prejudice, embarrassment or delay in the proceedings; or

- is otherwise an abuse of the process of the court.

A pleading may tend to prejudice, embarrass or delay the fair trial of the proceedings if it contains allegations which are vague or imprecise, such that the other party cannot plead to such allegations specifically, or if it contains allegations that are irrelevant, unnecessary or scandalous.

Summary Judgment or Dismissal

Australian courts also have the power to enter summary judgment for the plaintiff and summary dismissal for the defendant. An application may be made in relation to the proceedings as a whole, or particular claims in the proceeding. For a summary judgment to be awarded, the plaintiff must establish that there is:

- evidence on the facts which justifies a claim for summary judgment;
- a belief that the defendant has no defence to the claim; or
- there is no issue to be tried, ie, the defendant is relying on a defence that is so flawed it cannot possibly succeed.

For a summary dismissal to be issued the defendant must demonstrate that:

- the proceedings are frivolous or vexatious;
- the plaintiff has not disclosed a reasonable cause of action; or
- the plaintiff's proceedings are an abuse of process.

Orders for strike-out, summary judgments and summary dismissal are very seldom made in antitrust litigation cases. On very few occasions, pleadings have been struck out for being poorly articulated; however in practice, courts

tend to allow plaintiffs to withdraw and resubmit a revised claim. This can occur multiple times.

4.2 Jurisdiction/Applicable Law

Territorial Jurisdiction

The jurisdiction of the CCA applies to conduct in Australia by Australian corporations, foreign corporations, and individuals.

Extraterritorial Jurisdiction

In addition to this, certain provisions of the CCA have extraterritorial operation, including restrictive trade practices (which include the cartel provisions, anticompetitive contracts, arrangements or understandings, and concerted practices) and Australian Consumer Law (ACL) (Schedule 2 of the CCA, other than the country of origin representations provisions). These parts of the CCA extend to conduct engaged in outside Australia by Australian citizens, Australian residents or corporations that are incorporated in Australia or carrying on business within Australia.

The CCA further extends the prohibitions on exclusive dealing and resale price maintenance to any person engaging in conduct outside Australia in relation to them supplying goods or services to persons within Australia.

The CCA also extends the prohibitions on misuse of market power to conduct in respect of markets in Australia and New Zealand and conduct by New Zealand corporations, residents and corporations carrying on business in New Zealand. These provisions are included because of the close economic ties between Australia and New Zealand.

4.3 Limitation Periods

Damages under the CCA

A damages claim may be commenced within six years of the day on which the cause of action that relates to the conduct accrued.

Civil Pecuniary Penalties

Proceedings in which the ACCC is seeking pecuniary penalties must be brought within six years of the date of contravention.

Criminal Penalties

There is no limitation period for criminal conduct but proceedings may only be brought for conduct occurring after 24 July 2009, which is the date on which the criminal cartel offences included in the CCA came into effect.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In Australia, the requirement to identify and enumerate documents relevant to the proceedings is known as “discovery”, whereas “inspection” refers to the requirement to produce copies of those documents to the other parties.

A document is generally considered to be any record of information, regardless of the method of storage. Therefore a document may be digital or analogue, visual or auditory, or written.

Discovery Generally

There is some variation in the threshold approach to discovery and applicable procedure depending on the jurisdiction within Australia.

The traditional approach, still adopted by some state courts, is that the parties may be required to give “general discovery”; that is, the parties must discover and list all documents within their

possession, custody or power which relate to any matter in question in the proceedings.

The test for relevance is set out in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 52 LJQB 181: a document is discoverable if it is reasonable to suppose that it contains information which may either directly or indirectly enable the party seeking discovery to either advance their case or damage their adversary’s case (which includes documents which may fairly lead to a train of inquiry which may have either of these two consequences).

The obligation to give discovery may be automatic under the rules of the relevant court, or the rules may provide that the obligation to discover is triggered by a notice given by one party to the other, or that a party must apply to the court for an order for discovery.

Where a party is obliged by the rules or an order to give discovery, that obligation is a continuing one and does not come to an end when the party has served a list of documents. If, after the party has served its list, it identifies more documents that meet the relevant criteria (whether that be general or standard discovery or discovery by categories), the party is required to discover those documents by service of a further or supplementary list of documents.

Searching for Documents to Discover

Parties must make a diligent search for relevant documents that are within their possession, custody or power, but it is generally accepted that the search is not required to be exhaustive or oppressive.

“Possession” means the right to physical possession, and also the right to possession of the

document and so encompasses documents held by agents of the party; “custody” means actual physical possession regardless of the right to possession (an agent has custody of the document of their principal); and “power” (or sometimes “control”) means an enforceable right to inspect or obtain possession of the document from the person who ordinarily has possession of it.

The various court rules differ as to the form in which discovery is to occur: in some jurisdictions an informal list is sufficient, whereas in others the list of discovered documents must be verified on affidavit. The list should describe the documents being discovered so that they can each be adequately identified.

Current Approach of Australian Courts to Discovery

Increasingly, however, the courts seek to minimise the burden of discovery on the parties by various means.

For instance, the FCA has amended the Federal Court Rules (FCR) to the effect that no party is required to give discovery except when an order has been made to that effect. Further, the FCR require that a party may not apply for an order for discovery unless that party can show that such an order will facilitate the just resolution of the proceedings as quickly, inexpensively and efficiently as possible.

The court expects that the parties will consider and confer with one another in relation to specific categories of documents that are sought. If agreement cannot be reached, parties may apply to the court for a ruling on relevant categories.

Electronic Discovery

If the parties intend to give electronic discovery, it is expected that they confer and reach agreement on a suitable protocol setting out the format of digital files that are to be provided, including metadata.

Availability of Pre-action Discovery

Pre-action discovery is generally available on application, subject always to the court’s discretion. A party against whom pre-action disclosure is sought is generally entitled to their costs of the application and of the search and production required to be undertaken to respond to any order made.

However, because the question of relevance is tested against the pleaded cases of the parties, it is more usual for discovery and inspection to take place after the close of pleadings. While it is possible to apply for early discovery, this is reserved for exceptional cases where a particular need is shown. It is also likely that an application for early discovery will only be successful if the application is confined to a well-defined category of documents.

5.2 Legal Professional Privilege

In all courts in Australia, a document that is the subject of a privilege is discoverable and must be listed. However, a privileged document may be withheld from inspection.

In practical terms, this requires that the list of discovered documents contains two parts:

- those documents in respect of which the party does not object to inspection by its opponents; and
- those documents that the party claims are privileged from production.

Forms of Privilege

There are a number of relevant privileges:

- legal professional privilege applies to documents recording confidential communications between solicitor and client that were made for the dominant purpose;
- of giving or receiving of legal advice (“advice privilege”); or
- for use in, or for carrying on, actual or contemplated legal proceedings (“litigation privilege”). Whether litigation is anticipated or contemplated is a question of fact determined on objective criteria, not subjective belief;
- common interest privilege, where two or more parties have a common interest in the advice or litigation;
- public interest privilege, which applies where a document contains information that it would be injurious to the public interest to disclose—it would not be typical for a party other than the ACCC or CDPP, or perhaps a government body, to attempt to rely on this form of privilege; and
- “without prejudice” communications, which arise where the parties have engaged in communications in an effort to settle a dispute between them—this is said to give rise to a joint privilege so that neither one can produce or refer to the communications without the consent of the other.

Waiver of Privilege

Legal professional privilege may be waived if a document is produced to an opponent (unless that occurs accidentally) or the substance of the advice is revealed. Common interest privilege or without prejudice privilege cannot generally be waived except with the consent of all parties sharing in the privilege.

Where the client is a corporation, it is necessary to determine who within the corporation is authorised to obtain legal advice for the corporation, as a very wide dissemination of the advice within the organisation may amount to a waiver of the privilege.

Legal professional privilege (and common interest privilege) does not apply to communications to facilitate crime or fraud, even if a party’s lawyer is ignorant of that purpose.

Claiming Privilege in the Context of Discovery

A party that claims privilege from production in respect of a document must give a sufficient description of the document and the grounds of the privilege claimed in order that the other party can reach a view whether the claim of privilege is properly made or, if not, to challenge it. If the other party disputes that a sufficient description has been given or that the privilege has not been made out, it may be necessary to put on affidavit evidence to further substantiate the claim. From time to time, depending on the extent to which privilege may be challenged by opposing parties, it may be necessary to put forward multiple affidavits setting out the privilege claims.

5.3 Leniency Materials/Settlement Agreements

Immunity Applications

Where the ACCC grants immunity or leniency to a party under its Immunity and Co-operation Policy for Cartel Conduct (Immunity Policy), the ACCC will use its best endeavours to protect any confidential information provided by the party, including their identity, while the investigation is ongoing.

The ACCC is obliged by Section 155AAA of the CCA to not disclose any protected information except in certain circumstances. “Protected

information” includes information that was given in confidence to the ACCC or obtained pursuant to its powers to compel production of documents and information. The ACCC may, however, disclose protected information where disclosure is required by law to do so, where it is required in the exercise of the ACCC’s functions, and where it would assist or enable another agency, including a foreign government body.

The party granted immunity and its legal representatives is required to keep confidential the fact of their application, as well as any information provided to the ACCC in support of their application while the ACCC’s investigation is ongoing.

However, once proceedings are commenced it would be usual for the fact of the application to become public knowledge and for information provided in the course of the investigation to form part of the evidence brought in support of the proceedings.

Similarly, the provision of information to the ACCC does not make the party immune, in follow-on proceedings, from production to the applicant of information provided to the ACCC. Nor is the ACCC immune from the production of that information under subpoena if a subpoena is issued by the court.

Following an amendment to the Immunity Policy in late 2019, the ACCC now seeks a party’s agreement to written terms concerning that party’s co-operation in the course of any immunity application. It seems likely that any such agreement could be the target of discovery where it is held by the immunity applicant, or subpoena where it is held by the ACCC.

Settlement Agreements on Penalty

The ACCC does not have the power to enter into a settlement agreement for breach of the CCA with a party in the enforcement context where a penalty is sought. That is because the ACCC is unable to issue a penalty in its own right and must initiate proceedings in court for a civil pecuniary penalty. For criminal breaches of the CCA, the CDPP must seek a criminal penalty from the court.

In civil matters, the court will consider whether any penalty proposed jointly by the ACCC and the party is within the applicable range and, if so, issue a penalty in the agreed amount. If the court does not believe any agreed penalty is appropriate it will substitute its own judgment when issuing the penalty. This has occurred in Australia in circumstances where the court doubled a jointly proposed penalty.

In criminal proceedings the CDPP may not make a recommendation to the court on penalty, although a defendant party may do so. To the extent that the CDPP does not dispute the level of penalty put forward by a defendant, it may make submissions to the effect that the court will not fall into appealable error if a criminal penalty is awarded in the range proposed by the defendant. The prohibition on submissions by the CDPP on penalty is imposed because criminal penalties are matters entirely for the court.

In either of the above scenarios, the proceedings and penalties imposed are public and are not the subject of a confidential settlement agreement between the regulator and the party.

Settlement Agreements by Way of Enforceable Undertaking

Where the ACCC does not seek a penalty but seeks to have the party undertake to change its

conduct or practices, it may request the party to enter into a court enforceable undertaking. This step does not require the ACCC to first serve proceedings on the relevant party. Undertakings are publicly available and are posted to the ACCC's website. They set out both the particular practice the party undertakes to cease, as well as any remedial steps to be taken. In the event that the parties do not comply with the terms of the undertaking, or continue to engage in the impugned conduct, they are at risk of proceedings being brought against them for breach of the undertaking or, alternatively, for continued contravention of the CCA.

6. Witness and Expert Evidence

6.1 Witnesses of Fact Evidence in Chief

A party has discretion in regard to which witnesses it chooses to call, but should call all witnesses necessary to establish the facts it pleads. The unexplained failure of a party to give evidence, call witnesses or tender documents/evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted the party's case (but not that it would have damaged their case).

The form of evidence in chief is ultimately at the discretion of the court and will usually depend upon the nature of the evidence.

In most antitrust proceedings, affidavits are used in place of a witness giving oral evidence in chief in court.

Trials are not usually run on the basis of oral evidence, other than cross-examination as discussed further below, because it is often more time-consuming. The use of affidavits accords

with case management principles encouraging more time and cost-effective litigation. The form of an affidavit is highly prescribed.

In some courts there has been a more recent trend towards oral testimony, particularly where witness testimony is likely to be particularly contentious and there are issues of credibility. Where oral testimony is to be given, there will be a requirement for an outline of evidence to be served on the other side in advance of trial. This outline is not treated as evidence.

Providing an affidavit does not make the information contained in it part of the evidence, the affidavit must be read to the court before it forms part of the evidence (subject to any objections for admissibility). Evidence in chief, whether oral or by affidavit, must be admissible; that is, it must be relevant and must not fall within an exclusion. The common exclusions for lay witnesses are hearsay, relevance and opinion. For interlocutory matters the hearsay rule may be relaxed in some jurisdictions.

Cross-Examination

Generally, any witness who is called to give evidence by one party may be cross-examined by the party against whom the witness has testified.

Cross-examination is always oral and usually in person, although it may in some circumstances be undertaken virtually. Prior to the COVID-19 pandemic, a virtual examination was the exception rather than the rule, and usually only occurred when a witness could not reasonably travel to the relevant court and where the cross-examining party did not insist that they do so.

A witness may be cross-examined both on facts and credibility. As with evidence in chief, a wit-

ness in cross-examination must be confined to matters of fact which are admissible.

A party is not required to cross-examine witnesses. Where witness testimony is required to adduce documents that are not controversial, it is common for there to be no cross-examination. Where a party's case is unlikely to be assisted by cross-examination or an opponent's case may be improved by a witness giving oral testimony, a party may choose not to cross-examine.

A key factor in deciding whether or not to cross-examine a witness is whether a party wishes to lead evidence which is contrary to the witness' evidence or suggest that the witness' testimony is not accurate. A party may not lead evidence contrary to a witness' testimony without first putting the contrary evidence to the witness.

Compulsion

Where a witness is unwilling to testify, a party may apply for a subpoena to compel the witness to give evidence. Subpoenas can compel a witness to provide oral testimony or provide documents, or both. For strategic reasons, it is more common for a party to apply for subpoenas for the production of documents rather than the giving of evidence.

A party cannot compel a witness to speak with lawyers or otherwise engage with the litigation process outside of the bounds of a subpoena. When a subpoena is issued by the court it must then be served on the recipient. Subpoena recipients should be aware that as subpoenas are court orders, failure to comply with them is punishable as contempt of court. Failure to comply with a subpoena can result in a warrant being issued for the arrest of the recipient.

A subpoena requires payment for reasonable expenses. As a subpoena compels a recipient to the proceeding to do something, whether give evidence or produce documents, the recipient is entitled to payment of its reasonable costs of compliance.

A person served with a subpoena to give evidence may subsequently choose to give evidence in chief by affidavit to avoid the need for that evidence to be given orally. Where a witness is compelled it may also be the case that an application is made to the court for the party calling the witness to be permitted to cross-examine the witness as a hostile witness.

6.2 Expert Evidence

General Principles of Expert Evidence

Expert evidence is a common part of litigation, particularly in antitrust matters which often involve complex economic modelling, as the fundamental principle is that "the purpose of expert evidence is to provide the court with information which is outside the experience and knowledge of a judge and jury". Expert evidence is permitted as an exception to the general rule against opinion evidence. The facts upon which the expert bases their opinion must be separately established. While a common occurrence, parties do require the leave of the court to adduce expert evidence.

Parties may choose to engage "consulting" or "armchair" experts as well as testifying experts. Some jurisdictions require parties to identify such experts, so care should be exercised in selecting and communicating with experts.

The FCA requires that a party gives an expert it intends to retain a copy of the relevant court practice note dealing with guidelines for expert witnesses in proceedings in the court.

Form of Expert Evidence

The evidence in chief of an expert witness is given in the form of a report which is usually filed and served well in advance of trial. Generally, expert evidence is only called at trial after the completion of witnesses of fact. The expert will then be called upon to swear an affidavit as to whether they hold the opinion expressed in the report or if the expert now holds a different opinion, the nature of that opinion and the factual basis for that opinion.

The form of the expert report can vary considerably but must adhere to the rules of the relevant jurisdiction. There are several common elements required across all jurisdictions:

- the expert's qualifications on the subject of the report;
- the facts, and assumptions of fact, on which the opinions in the report are based and the question(s) answered by the report (a letter of instruction may be annexed);
- the expert's reasons for each opinion expressed—if the expert considers that their opinion is not a concluded opinion because of insufficient research or data, this must be stated;
- any literature or materials utilised in support of the opinions;
- any examinations, tests or investigations on which the expert has relied; and
- the qualifications of persons who conducted such examinations/tests/investigations.

Other elements may also be prescribed by each jurisdiction, including costs arrangements.

Joint Reports, Conferral and Other Methods of Hearing Expert Evidence

It is common for the court to order some form of conferral between experts of the same or similar

expertise following the filing of expert reports. The purpose of conferral is to identify where the experts might find agreement and areas in which they differ. These areas of agreement and difference and the reasons for the difference are then the subject of a joint report by the experts.

The form of the conferral is subject to the court's discretion. The court may direct that conferral occur with or without the parties' legal representatives and/or in the presence of a registrar of the court or other independent facilitator.

It is expected that the conferral would take place in person or by telephone or video conference when meetings in person are not practical. A conferral may occur over several meetings.

An expert directed to confer or prepare a joint report must:

- exercise their independent, professional judgement;
- endeavour to reach agreement with the other expert; and
- not act on any instruction or request to withhold or avoid agreement with the other expert.

The report should be composed by the experts and not the representatives of the parties. The joint report should be signed by all participating experts and then provided to the court.

The other, increasingly common, approach in class action litigation involves the court appointment of referees on specific questions of fact. If this is ordered, a referee (who may be a senior barrister or an expert, depending on the matter and the questions for determination) may be given wide scope to make inquiries and review

materials and then produce a report for adoption by the court.

Concurrent Evidence and Cross-Examination of Experts

Experts may be called for cross-examination in any order the court sees fit. Traditionally, experts would be called to give evidence one after the other in the usual order of evidence in chief, cross-examination and re-examination before the next expert is called.

However, each expert on the same subject matter or issue may be called for cross-examination and re-examination concurrently, known colloquially in Australia as a “hot tub”, allowing parties to put the same question to each expert in turn and for the judge to also ask questions. In some instances, subject to the court’s orders, in the concurrent process experts are also able to ask questions and comment on the evidence given by other experts.

7. Damages

7.1 Assessment of Damages

Generally, damages are calculated on a compensatory basis; that is, to compensate an applicant for loss suffered as a result of a respondent’s wrongdoing.

Whilst the courts are empowered to award exemplary, punitive or aggravated damages, in practice exemplary damages are extremely rare. There are also extensive statutory restrictions on their application.

With respect to class actions brought in the FCA, under Section 33ZB of the Federal Court of Australia Act 1976 (Cth) a judgment given in a representative proceeding must describe or

otherwise identify the group members who will be affected by it. The Court has powers to make an award of damages (in specified amounts) for group members, sub-group members or individual members (Section 33Z(1)(e)) or to award damages in an aggregated amount without specifying amounts awarded to individual group members (Section 33Z(1)(f)). An aggregate damages award must not be made unless the court can make a reasonably accurate assessment of the total amount to which group members will be entitled under the judgment (Section 33Z(2)).

7.2 “Passing-On” Defences

The Australian courts have not yet directly considered the “passing-on” defence and, as a result, it is presently unclear whether it would be available in an action concerning a breach of competition law.

7.3 Interest

Australian courts are empowered to order interest on awards of damages. This can include pre-judgment and/or post-judgment interest.

The rate of interest will vary from court to court and is prescribed by the legislation and rules of the relevant court. For example, in New South Wales, Sections 100 and 101 of the Civil Procedure Act 2005 (NSW) indicate the rate at which pre-judgment (Section 100) and post-judgment (Section 101) interest is to be calculated for proceedings commenced in the local (civil claims), district and Supreme Courts.

8. Liability and Contribution

8.1 Joint and Several Liability

Under Section 82 of the CCA a person who suffers loss or damage by conduct of another person that was done in contravention of the

restrictive trade practices provisions of the CCA can commence proceedings against that other person, or against any person involved in the contravention, to recover the amount of the loss or damage.

Australian case law in Australia has not yet considered whether the liability of cartel participants under the CCA is several, or joint and several. However, it has been observed that the policy considerations which underlie the CCA, and the similarity with conspiracy to commit the tort of deceit which gives rise to joint and several liability, mean liability under the price-fixing cartel provisions may be joint and several.

Limitations on Liability to Direct Purchasers

Australia does not have any analogous provision to that contained in Article 11 of the European Directive that an immunity recipient's liability, as well as its contribution owed to co-infringers under joint and several liability, is limited to the harm caused to its direct or indirect purchasers.

8.2 Contribution

Bringing Contribution Proceedings Against a Third Party

The CCA does not contain any provision which enables a contravener to bring a claim for contribution against another person and there is no broadly applicable contribution regime under any other federal statute. Similarly, the CCA does not provide for proportionate liability (in contrast to actions for damages under Section 236 of the ACL for which apportionment is available).

Claims for contribution in equity are unlikely to succeed, given a contravenor of the CCA is unlikely to be able to seek equitable relief with "clean hands".

However, rights of contribution in respect of liabilities under the CCA may be determined according to the statutory contribution regimes of the various Australian states. For example, Section 23B of the Wrongs Act 1958 (Vic) provides that a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise). This provision has been used to permit claims to be made between respondents in antitrust follow-on class action proceedings.

9. Other Remedies

9.1 Injunctions

General Power of the Court to Grant an Injunction

The FCA has the power to grant injunctions (including interlocutory injunctions) to restrain conduct that may be in breach of the restrictive trade practices provisions of the CCA.

Anyone may make an application to the court for an injunction, other than in relation to proposed mergers, although it would be more usual for the ACCC to seek to do so in antitrust enforcement proceedings than for a private party. The CCPP can also seek an injunction for alleged cartel offences.

Although the court may grant an injunction on the basis of consent by all relevant parties, the more usual application is for:

- an urgent injunction (together with an undertaking that the party seeking the injunction will commence a proceeding within 14 days) without notice to the respondent (ie, ex parte); or

- interlocutory relief at the time of commencing a proceeding (pleadings must be served to the respondent at least five days before the “return date”, which is the date fixed by a registrar for the hearing of the application).

Any urgent injunction will ultimately need to be supported by a claim substantiated in pleadings. The court will usually list hearings for applications for injunctions at the earliest appropriate time.

Circumstances in Which an Injunction Will Be Granted

The CCA confers relatively wide powers on the court to grant an injunction. The court will ultimately need to be satisfied on the civil standard of proof, being the balance of probabilities, that:

- there is a serious issue to be tried; and
- the balance of convenience favours the grant of an injunction.

The latter part of the test is sometimes articulated as whether the applicant would suffer more damage if the injunction were not granted than the defendant would if the injunction was granted, thus requiring preservation of the status quo.

This means that a court may restrain a person from engaging in relevant conduct (and similarly, order a person to engage in relevant conduct) whether or not:

- it appears to the court that the person alleged to contravene intends to engage again, or to continue to engage, in the relevant conduct;
- the person has previously engaged in such relevant conduct; and
- there is immediate danger of substantial damage to any person if the person engages in the relevant conduct.

Damages

In the usual course, an application for an injunction needs to be accompanied by an undertaking as to damages. This is an undertaking:

- to submit to such order (if any) as the court may consider to be just for the payment of compensation, to any person, affected by the operation of the injunction or any continuation of the order or undertaking; and
- to pay the compensation referred to, to the person affected by the operation of the injunction.

In the context of injunction applications made by the ACCC for alleged breaches of the relevant CCA provisions, the court will not require such an undertaking to be given (the same applies for applications made by the CDPP for alleged cartel offences).

Costs Orders

The court will make cost orders after the parties are given the opportunity to be heard in relation to the injunction application. For interlocutory injunction applications, the court orders are likely to be to the effect that costs be costs of the parties in the cause, to be determined as part of the subsequent substantive hearing. The ACCC is as liable to a costs order for applications that it loses as any other party.

9.2 Alternative Dispute Resolution

Mediation is available as an alternate dispute resolution process.

As part of the court’s framework for case management, a court will usually consider, and may order, that the parties are to engage in mediation with a view to settling the matter without the need for a trial. Mediation can also be sought by the parties prior to trial.

Further, the parties (and their lawyers) are expected to co-operate with each other and the court to achieve the court's overarching purpose of reducing costs and delays by:

- contesting only the most relevant issues;
- reducing the need for unnecessary factual investigation; and
- requiring as few interlocutory applications as necessary for an efficient disposition of matters.

10. Funding and Costs

10.1 Litigation Funding

Litigation funding for class actions is permitted in Australia and is an arrangement under which a third party (the funder) contributes some or all of a party's costs, or provides security or indemnities for costs. If the action is successful the funder then receives part of the settlement or judgment sum.

Litigation funding has been the subject of both recent legislative reform efforts and remains the subject of dispute in Australian Courts. These issues have arisen in part because group members do not need to be named or to sign up to the class action before the matter can proceed and they can take part (although a registration process will take place upon resolution or judgment). This means that sometimes only the lead applicant, or a comparatively smaller number of group members may have signed up to the funding arrangements. It is, however, generally accepted that all group members should contribute to the costs of running the litigation if the action is successful.

The most common ways in which these issues have been addressed are by funding equalisa-

tion orders (by which "unfunded" group members will be required to contribute equally to the commission payable to the litigation funder) and common fund orders (by which the court makes an order that a percentage of the settlement or judgment is payable to the litigation funder).

There have continued to be a range of class actions in state and federal courts considering these issues; in particular, when, whether and under what powers of the court common fund orders can be made.

Where an application is funded by a litigation funder in a class action, the fact of the funding and the identity of the funder must be disclosed to the respondents. The Class Actions Practice Note requires that the applicants' lawyers notify group members (whether or not they are clients) of any applicable legal costs or litigation funding charges as soon as practicable. This is an ongoing obligation and material changes should also be notified to group members. Details about funding should also be considered and included in opt-out notices and any application for settlement approval, where relevant. It is part of the court's supervisory role to consider any legal costs or litigation funding charges to be paid from any settlement sum.

The defendants in the class action may also consider seeking security for costs against a funder (or, if relevant, self-funded plaintiff firm) early on in the proceedings, to mitigate the risk of the applicant holding insufficient funds to pay costs.

In 2009, a Federal Court decision found that litigation funding schemes are subject to the managed investment scheme regime, and third party funders were regulated as such under the ASIC Act 2001 (Cth) and Corporations Act 2001 (Cth). To reduce the risk that a funder may have insuffi-

cient funds to pay adverse costs, an amendment to the Corporations Act in August 2020 required funders to register class actions as managed investment schemes and to hold an Australian Financial Services Licence (AFSL). A further decision of a Full Court of the Federal Court in 2022 found that the earlier Federal Court decision was fundamentally wrong. Since December 2022, an explicit exemption for litigation funding schemes from meeting the definition of a managed investment scheme has been included in the Corporations Regulations 2001 (Cth).

Specialist class action law firms may also self-fund litigation. Traditionally, Australian lawyers were not permitted to charge “contingency fees”; that is, a fee based on a percentage of the amount recovered. However, in late 2020 the State of Victoria passed legislation permitting contingency fees in class actions in its courts. In 2021 the first case allowing a contingency fee to be charged by a law firm was approved by the court at 27.5%. In that case it was successfully argued that although the firm had commenced the case on a “no win, no fee” basis, that was an interim measure, and were such an order not made, the firm would seek out a litigation funder. That meant that the commission charged by a funder was the appropriate counterfactual in deciding whether to grant the application for a contingency fee.

10.2 Costs

Costs at the Close of a Proceeding

Costs are awarded in antitrust litigation under the court rules and are granted in favour of the successful party. The usual form of costs is “party and party” costs, which means costs incurred in the conduct of the litigation that are fair and reasonable.

Costs are awarded by reference to a court scale, which sets the rates for particular work undertaken by reference to the seniority of the person who performed the work. The application of a court scale means that a successful party cannot expect full recovery of costs expended.

The usual practice for costs in interlocutory proceedings heard during the life of the matter is for costs expended in those proceedings to be costs in the cause, although specific orders may also be made by the court (for example, where the judge takes the view that the specific interlocutory proceeding should not have been brought).

Security for Costs

Security for costs may be sought under the FCRs. The court must consider the following factors:

- whether there is reason to believe that the applicant will be unable to pay the respondent’s costs if so ordered;
- whether the applicant is ordinarily resident outside Australia;
- whether the applicant is suing for someone else’s benefit;
- whether the applicant is impecunious; and
- any other relevant matter.

The authorities have provided guidance for the making of an application for security for costs to the following effect:

- that such an application should be brought promptly;
- that the strength and bona fides of the applicant’s case should be considered;
- whether the applicant’s impecuniosity was caused by the respondent’s conduct, which is the subject of the claim;

- whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate;
- in the case of a company, whether any person is standing behind the company who is likely to benefit from the litigation, and who is willing to provide the necessary security—if so, whether that person has offered any personal undertaking to be liable for the costs and, if so, the form of any such undertaking; and
- that security will only ordinarily be ordered against a party that is in substance the plaintiff, and an order ought not to be made against parties that are defending themselves and thus forced to litigate.

In practice, an order that security be paid requires the payment of a sum into court, or into a solicitors' trust account, pending the outcome of the dispute. Applications for additional security for costs may also be made.

11. Appeals

11.1 Basis of Appeal

Judgments of a single judge of the FCA, whether interlocutory or final, may be appealed to the Full Court of the Federal Court (three or more judges sitting together) on questions of law.

Judgments of state or territory courts may be appealed, including to state or territory Supreme Courts or Courts of Appeal, on questions of law. An appeal from a state or territory Supreme Court to a Court of Appeal is possible, provided the relevant Court of Appeal grants permission to appeal.

Judgments of the FCA or a state or territory Court of Appeal may be appealed to the High Court of Australia (HCA), provided the HCA grants special leave to appeal.

The HCA must have regard to the following criteria when deciding whether to grant special leave to appeal:

- the matter involves a question of law of public importance; or
- the matter involves a question of law requiring final resolution; and
- the interests of the administration of justice require consideration of the matter by the High Court.

If special leave is refused, there is no further avenue of appeal available in Australia. If special leave is granted, any decision from the HCA on the matter is final.

As a matter of process, and where there is material public interest or the potential for a miscarriage of justice, the HCA may hear both the special leave application and the appeal simultaneously, before issuing a final decision.

CANADA

Law and Practice

Contributed by:

Antonio Di Domenico, Vera Toppings, Carolyn Flanagan and Timothy Law
Fasken



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Fasken is a leading international law firm with more than 925 lawyers and nine offices across Canada, the UK and South Africa. Its lawyers consistently receive accolades worldwide and earn hundreds of rankings each year from prestigious business and legal publications, including Chambers and Partners. Leading companies around the world look to the firm for competition law advice on their daily operations and their most significant commercial transactions. Its lawyers have vast experience in all aspects of competition, marketing and foreign

investment law. The firm is regularly retained to advise on and represent multinational corporations (MNCs) in the Canadian aspects of global M&A. It also defends clients in domestic and cross-border competition investigations and prosecutions, as well as in private actions, including class actions. The firm's clients operate in various sectors, including information technology, telecommunications, transportation, pharmaceutical, financial services, agricultural, food, consumer electronics, automotive, mining, energy, manufacturing and retail.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Canada's Competition Act (the "Act") provides for public and private enforcement.

Public enforcement arises primarily from Canada's Commissioner of Competition (the "Commissioner"). The Commissioner heads Canada's Competition Bureau (the "Bureau"), an independent law enforcement agency responsible for the administration and enforcement of the Act. For most reviewable practices, the Commissioner has the dual role of investigator of potential anti-competitive conduct and prosecutor before Canada's Competition Tribunal and the courts.

Private enforcement encompasses private rights of action for damages. The private right of action permits victims of criminal anti-competitive conduct to seek recovery for loss or damage suffered. As a practical matter, the vast majority of private enforcement arises in the context of class actions.

Recently, public enforcement has focused on merger review, with the Commissioner contesting (with mixed success) three mergers before the Competition Tribunal.

In Rogers/Shaw, the Commissioner sought to block Rogers' proposed acquisition of Shaw. Both are large telecommunications companies and provided wireless services in Canada. Rogers proposed divesting most of Shaw's wireless assets to a third party in response to competition concerns. Unsatisfied with this proposed remedy, the Commissioner challenged the transaction and the proposed "fix". Following an expedited hearing, the Competition Tribunal dismissed the

Commissioner's application, allowing the mergers and proposed fix to proceed.

P&H involved Parrish & Heimbeck's acquisition of multiple primary grain elevators in western Canada. The parties closed the transaction despite expressed competition concerns. Subsequently, the Commissioner challenged only the acquisition of the primary grain elevator in the local area. Following a contested hearing, the Competition Tribunal dismissed the Commissioner's application, finding that the Commissioner failed to demonstrate sufficient anti-competitive effects and failed to present relevant markets grounded in commercial reality.

In Secure, the Commissioner challenged Secure Energy Services' acquisition of Tervita Corporation, alleging a substantial lessening of competition for the supply of oil and gas waste services in 143 markets. The Competition Tribunal agreed that there was a substantial lessening of competition in 136 of these 143 markets, and also concluded that Secure did not meet the requirements of the efficiencies defence, which Secure argued would outweigh any alleged anti-competitive harm.

Overall, the Commissioner has expressed a greater willingness to contest mergers to trial, whether seeking to block transactions outright or contesting portions of merger before or after closing.

Most development in recent years has been in competition class actions. Since the Supreme Court of Canada's 2013 trilogy of decisions in Pro-Sys, Sun-Rype and Infineon, and its 2019 decision in Godfrey, plaintiffs have had considerable success certifying private antitrust/competition class actions in Canada. It is thus noteworthy that a number of recent decisions

suggest a growing judicial willingness to limit or dismiss proposed competition class actions at the certification stage or before certification through preliminary motions.

David v Loblaw involved allegations of a conspiracy among competitors in the packaged bread market. While the action concerning a conspiracy to fix the price of packaged bread was certified, the proposed common issues pertaining to umbrella purchasers (being individuals who purchased products from a non-conspirator who was able to and did raise the price of its non-packaged bread products as a result of the conspiracy) were not certified. In their decision, the certification judge made clear that the scope of potential umbrella claims does not extend beyond actual or potential suppliers in the same packaged bread market.

In Jensen, the Federal Court of Canada denied certification of a class action alleging a conspiracy in respect of specific computer chips. The Federal Court concluded that the criteria for certification was not met due to the claim's vague, imprecise and general allegations and the absence of evidence establishing the existence of the alleged unlawful agreement. The Federal Court also discussed in detail the distinction between unlawful agreements between competitors under Section 45 of the Act, which represents a per se violation of the Act, and "conscious parallelism", which refers to situations where competitors unilaterally adopt similar or identical business practices or pricing, due to rational and profit-maximising strategies based on observations of market trends and activities of competitors. The Federal Court was explicit in its reminder that "Canadian law has long recognized that 'conscious parallelism' (even if involving parallel conduct in oligopoly markets)

falls short of conduct prohibited by Section 45 of the Act."

In Lilleyman, the Federal Court of Canada denied certification of a class action alleging a conspiracy in respect of the price of canned tuna products in Canada. The Federal Court specifically noted that while the plaintiffs had established some basis in fact that certain defendants had perpetrated anti-competitive behaviour in the USA (especially as they had entered into plea bargain agreements with the US Department of Justice), there were notable differences between the canned tuna market in the USA and in Canada. Accordingly, the fact that anti-competitive behaviour had occurred in the USA did not provide some basis in fact for the existence of the alleged conspiracy in Canada.

For more information, see the [Canada Trends and Developments](#) article in this guide.

1.2 Other Developments

In 2023, the Act underwent significant changes and amendments. On 23 June 2022, Bill C-19, also known as the Budget Implementation Act, 2022, No 1 (BIA), included significant amendments to the Act which are all currently in effect.

The amendments expand and delineate the scope of prohibited conduct and increase financial penalties pertaining to abuse of dominance, criminal cartel and competitor collaborations, mergers, and deceptive marketing. The amendments also expand the evidence-gathering powers of the Bureau, and clarify the Bureau's ability to obtain all the information the Bureau considers necessary to support its enforcement investigations, including information held by foreign affiliates.

Of note, no poach and wage fixing agreements between companies are now explicitly prohibited under the Act. These new provisions prohibit agreements between unaffiliated employers “to not solicit or hire each other’s employees” (ie, no poach agreements) and “to fix, maintain, decrease or control salaries, wages or terms and conditions of employment” (ie, wage-fixing agreements).

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The Competition Act

The Act is the federal statute that prescribes and governs competition litigation in Canada. The key provisions include criminal offences in Part VI (Offences in Relation to Competition) and civil, reviewable matters in Parts VII.1 (Deceptive Marketing Practices) and VIII (Matters Reviewable by the Competition Tribunal).

The Act recognises dual public and private enforcement. The Competition Tribunal, the provincial Superior Courts and the Canadian Federal Court (the latter two being trial-level courts) may all hear matters arising from the Act.

Public Enforcement

The Act permits the Canadian Competition Bureau, an independent law enforcement agency responsible for the administration and enforcement of the Act, to review and investigate anti-competitive conduct. The Commissioner of the Bureau has the jurisdiction to commence proceedings for certain civil matters before the Tribunal or the Canadian Federal Court.

For criminal matters, the Commissioner, through the Bureau, investigates potential criminal anti-competitive conduct. However, the Attorney

General of Canada, through the Public Prosecution Service of Canada, has the ultimate autonomy to decide whether to lay charges for such conduct.

Private Enforcement

Private right of enforcement

The private right of enforcement permits victims of criminal anti-competitive conduct to seek recovery for loss or damage suffered. In particular, Section 36(1) of the Act provides a statutory right of action for damages to any person who has suffered loss or damage as a result of conduct contrary to Part VI of the Act.

Pursuant to Section 36(1) of the Act, there are two types of conduct for which a plaintiff may recover:

- breaches of the criminal offences in the Act (Part VI of the Act); or
- a failure to comply with a tribunal order or order under the Act.

Criminal Offences

Plaintiffs may seek damages for “conduct that is contrary to Part VI of the Act”, which consists of 16 criminal offences. Most litigation under Section 36(1) has involved the following offences:

- conspiracy;
- foreign directions;
- bid-rigging;
- misleading advertising;
- deceptive telemarketing; and
- double ticketing.

Breaching an Order of a Tribunal

A plaintiff can also bring a claim against a defendant who has breached an order of a tribunal or other court under the Act. Tribunal orders are civil and arise from reviewable practices under

Parts VIII and VII of the Act, while court orders may stem from reviewable practices or criminal offences. To date, there are no reported Section 36(1) proceedings arising from a breach of an order. Given that most matters investigated by the Bureau are settled and reflected in consent agreements that are binding (like court orders), it is possible that breaches of these agreements may give rise to future claims.

Private rights of action to Canada's Competition Tribunal

Under Section 103.1 of the Act, a private person may also seek to bring a private right of action before the Tribunal against another private person. This private right of action is limited to five reviewable matters:

- refusal to deal (Section 75);
- price maintenance (Section 76);
- exclusive dealing (Section 77);
- tied selling (Section 77); and
- market restriction (Section 77).

The test for leave that the Tribunal will apply is twofold.

- For reviewable practices under Section 75 (refusal to deal) and Section 77 (exclusive dealing, tied selling and market restriction), the test is whether:
 - (a) the application for leave is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant is directly and substantially affected in its business by the relevant reviewable practice; and
 - (b) the practice in question could be subject to an order under the section of the Act at issue (ie, under Section 75 or 77 of the Act).

- For reviewable conduct under Section 76 (price maintenance), the test is whether:
 - (a) the application for leave is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant is directly affected by the price maintenance; and
 - (b) the practice in question could be subject to an order under Section 76 of the Act.

2.2 Specialist Courts

The Competition Tribunal is the specialised adjudicative tribunal for competition-related matters. Pursuant to Section 8(1) of the Competition Tribunal Act, the Tribunal only hears proceedings and orders remedies arising from the Act's civil provisions in Part VIII of the Act (encompassing unilateral conduct, non-criminal agreements between competitors, and mergers) and Part VII.1 of the Act (encompassing deceptive marketing practices).

An application to the Tribunal will be heard by a panel consisting of between three to five judges, and one lay member, who are typically economists or have expertise in industrial organisation. Questions of law may only be determined by the judicial members sitting in those proceedings, whereas questions of fact or of mixed law and fact may be determined by all the members of the panel.

2.3 Decisions of National Competition Authorities

The Bureau, as a law enforcement agency, lacks the authority to adjudicate its own disputes and instead must pursue enforcement actions in either the Competition Tribunal or the courts. For civil matters, the Commissioner, through the Bureau, has the dual role of investigator of potential anti-competitive conduct and prosecutor before the Tribunal and the courts.

Decisions by another state's national competition authority (NCA) are not binding on Canadian courts or the Tribunal, but may be considered.

The Bureau does not have any special standing to intervene in private competition litigation before a provincial Superior Court or Canadian Federal Court. Similar to any other private person or entity, the Bureau must seek leave (ie, permission) from the respective court in order to intervene. The rules and procedures pertaining to seeking leave and intervening in such proceedings are specific to each court and outlined in the applicable provincial or federal rules of civil procedure.

Section 103.2 of the Act does provide the right for the Bureau to intervene in any application commenced by a private litigant before the Tribunal.

2.4 Burden and Standard of Proof

In Canada, all civil proceedings operate on a balance-of-probabilities standard of proof, meaning where an act is more likely to have happened than not. In other words, a plaintiff must prove that the facts and evidence tip the scale in their favour, even if there is only a 51% probability that they are correct.

The plaintiff has the burden of proof and must prove, on a balance of probabilities, all the elements of the alleged offence, including the *actus reus* and *mens rea*, and the damage that was caused by the offence.

Section 36: Evidentiary Presumption

Section 36 of the Act contains an evidentiary presumption that helps parties who have suffered loss due to anti-competitive conduct and attempts to avoid the duplication of evidence between criminal and civil proceedings. Spe-

cifically, Section 36(2) creates a rebuttable presumption that the Act was breached if the defendant was convicted in a criminal proceeding for that breach. Section 36(2) permits a litigant to use the record of proceedings in any court in which the defendant was convicted as proof that the defendant breached the Act, and any evidence about the effect of those acts on the plaintiff may be introduced as evidence.

Typically, this evidence would be a statement of admissions and certificate of conviction, or the decision and reasons for the criminal conviction (or both). For confidentiality reasons, it would not typically include the Bureau's investigative file. Where the defendant has not previously been convicted, the plaintiff must prove the offence alleged on the civil standard of a balance of probabilities.

2.5 Direct and Indirect Purchasers

In the 2013 trilogy of decisions in *Pro-Sys*, *Sun-Rype* and *Infineon*, the Supreme Court of Canada ruled that "indirect purchasers" (that is, customers who did not purchase products directly from the alleged price-fixer but indirectly from a party further down the chain of distribution) have a cause of action and are not foreclosed from claiming losses that have been passed on to them.

2.6 Timetable

The duration of competition litigation in Canada, whether before the Competition Tribunal or the courts, will vary widely. Most private competition litigation, especially class proceedings, will settle before trial. However, if they do not, litigation will typically go on for years, as parties exchange evidence, retain experts, dispute certification, and bring motions (such as summary judgment) before trial.

Private competition litigation is not automatically suspended (or “stayed”) during a parallel investigation by the Bureau or an application before the Tribunal. Private litigants may seek stays of competition litigation for reasons common to most civil litigation, such as the commencement of parallel civil or criminal proceedings.

3. Class/Collective Actions

3.1 Availability

Class actions are predominantly statute-based in Canada and all ten Canadian provinces have enacted class action legislation. Some jurisdictions in Canada have “opt-in” regimes (the vast majority), while others have “opt-out” regimes. Class actions may be brought on behalf of indirect purchasers as well as direct purchasers. For more detail, see **2.5 Direct and Indirect Purchasers**.

3.2 Procedure

In Canada, the court plays a gatekeeper role in class action lawsuits. Every class action must be certified (or “authorised” in Quebec) before it can proceed on the merits. The plaintiff must bring a motion for certification (or authorisation), and the court then decides whether to permit the plaintiff to bring the action on behalf of the proposed class. Certification is a screening device that evaluates whether the procedure is appropriate for the claim, rather than evaluating the merits of the claim itself. The evidentiary standard is low, and courts apply a flexible and generous approach that strikes a balance between efficiency and fairness.

In Ontario (and other common law provinces), the plaintiff must establish five elements on a certification motion. The plaintiff must demonstrate “some basis in fact” for each element oth-

er than the first requirement: the existence of a cause of action. “Some basis in fact” is a lower standard than the civil balance-of-probabilities standard.

In Quebec, the relevant test is called “authorisation” and differs slightly from the certification test.

3.3 Settlement

Unlike in other civil proceedings, the court must approve all class action settlements. To grant approval of a class action settlement, the court must find that the settlement is fair, reasonable and in the best interests of all class members. In determining whether to approve a class action settlement, the court will consider factors such as:

- the likelihood of recovery or success if the case were litigated;
- the amount and nature of discovery or investigation;
- the terms and conditions of the settlement;
- the recommendations and experience of counsel;
- the future expense and likely duration of litigation;
- the recommendations of neutral parties or experts;
- the number and nature of objections from class members;
- the presence of good-faith bargaining; and
- the absence of collusion.

Settlement distribution is the responsibility of the plaintiff’s counsel, who must decide how to distribute between direct and indirect purchasers and obtain the court’s approval on the protocol. The same protocol exists for awards and settlements in that the court may order direct payment or that it be paid into court.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment The Competition Tribunal

Pursuant to Section 9(4) and 9(5) of the Competition Tribunal Act, a party may seek to dispose of an application by way of a motion for summary disposition (also known as summary judgment).

A judicial member of the Competition Tribunal may:

- dismiss the application in whole or in part if the judicial member concludes that there is no genuine basis for the application; or
- allow the application in whole or in part if the judicial member is satisfied that there is no genuine basis for the response to the application.

Provincial Superior and Federal Courts

With the exception of Quebec, summary judgment motions are available to parties in provincial Superior Courts or the Canadian Federal Court. The procedure and rules pertaining to summary judgment motions are subject to the respective provincial or federal rules of civil procedure.

In Ontario and other common law provinces, the courts may dismiss an action where the court is satisfied that there is no “genuine issue requiring a trial” with respect to a claim or defence. This is the case where the evidence presented by the parties:

- allows the court to make the necessary findings of fact;
- allows the court to apply the law to the facts; and

- is a proportionate, more expeditious, and less expensive means of achieving a just result.

If the court is satisfied that these three elements are satisfied, summary judgment will be appropriate.

For class actions, unless a party is contesting jurisdiction, Canadian courts will rarely permit motions prior to certification, such as a motion to dismiss or a motion to strike.

4.2 Jurisdiction/Applicable Law The Competition Tribunal

For more information, see 2.1 Legal Basis for a Claim and 2.2 Specialist Courts.

Section 36 Claims

A plaintiff must bring its claim before a court of competent jurisdiction. In private competition litigation, plaintiffs often assert common law or equitable claims (or both) in conjunction with statutory claims under the Act. Therefore, the provincial Superior Court (or its equivalent) is often the preferred court as these courts have inherent jurisdiction to hear any matter unassigned to another court, including common law and equitable claims. The Canadian Federal Court has jurisdiction to hear statutory claims but does not have jurisdiction to award damages for common law or equitable claims.

A Canadian court will apply a three-part test to determine whether it can assume jurisdiction over a foreign defendant, as follows.

- Does the court have presumptive jurisdiction over the foreign defendant?
- Can the court’s presumptive jurisdiction be rebutted?
- If the court has presumptive jurisdiction that has not been rebutted, should the court

decline to exercise its jurisdiction in favour of a clearly more appropriate forum?

The party asserting jurisdiction (typically the plaintiff) has the burden of establishing presumptive jurisdiction. Courts will find presumptive jurisdiction over a foreign defendant if there is a “real and substantial connection” between the foreign defendant and the jurisdiction in which the action is commenced. The Supreme Court of Canada has, to date, confirmed four presumptive connecting factors for establishing a “real and substantial connection”:

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

Class Actions

Canadian courts are willing to certify national classes. However, Canada does not have any formal, national system for controlling multi-jurisdictional class actions. Consequently, competition class actions involving the same allegations and the same defendants are often commenced in multiple provinces – frequently in Ontario, British Columbia and Quebec.

Notwithstanding the prospect of a multiplicity of proceedings across provinces, plaintiff firms often reach agreements or form consortiums to prosecute these claims. Where multiple proceedings are being prosecuted by different firms across provinces, defendants may seek to stay duplicative proceedings.

Some provinces also have codified an approach to dealing with multi-jurisdictional class actions

in recent years, including Alberta, British Columbia and Saskatchewan.

In Ontario, the Class Proceedings Act was amended to introduce new provisions enabling judges to more effectively manage parallel and overlapping multi-jurisdictional class proceedings. These have harmonised Ontario’s class actions regime with those provinces. The amended legislation includes a requirement that judges consider whether to refuse certification on the basis that it would be preferable for all, or some, class members’ claims to be resolved in a multi-jurisdictional class proceeding commenced outside Ontario. The court will be able to stay an Ontario proceeding, based on this factor, prior to the certification hearing on a motion by either a party or a class member.

Where multiple plaintiff firms commence duplicative class proceedings in the same province and cannot reach agreement, carriage of the action is decided on a contested carriage motion. The test for such motion is what resolution is in the best interests of all putative class members while at the same time being fair to the defendants.

4.3 Limitation Periods

Section 36 Claims

A litigant has two years to bring a Section 36 claim. The Act prescribes a two-year limitation period of the later of:

- a date on which the anti-competitive conduct was carried out or the order was breached; or
- the final disposition of any criminal proceedings relating thereto.

The commencement of criminal proceedings and class proceedings related to the alleged breach suspend the limitation period, as does

the defendant's fraudulent concealment of the breach where it would be unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action.

The Supreme Court of Canada has determined that the principle of "discoverability" applies to Section 36 claims. Accordingly, the limitation period for Section 36 claims does not begin to run until the plaintiff discovers the material facts giving rise to the cause of action, or ought to have discovered them by the exercise of reasonable diligence.

Private Rights of Action to the Competition Tribunal

Pursuant to Section 103.1(8) of the Act, a private person seeking leave of the Competition Tribunal must commence litigation no more than one year after the practice or conduct that is the subject of the application has ceased.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure The Competition Tribunal

The discovery process before the Competition Tribunal is similar but not akin to the discovery process in civil proceedings before the courts. Discovery in proceedings before the Tribunal is a two-step process, beginning with documentary discovery and followed by examinations for discovery.

Documentary discovery

The *Competition Tribunal Rules* impose two mutual documentary discovery obligations:

- first, each party is required to disclose (by way of service of a sworn affidavit of docu-

ments) the existence of all documents relevant to any matter in issue that are or were in the possession, power or control of the party or intervenor; and

- second, each party is required to produce non-privileged documents listed in the affidavit of documents.

Examination for discovery

The *Competition Tribunal Rules* provide that examinations for discovery occur in an application as of right. Unlike civil rules of procedure before the courts, the *Competition Tribunal Rules* do not prescribe any ancillary rules regarding the conducting of the examination for discovery. The *Competition Tribunal Rules* afford the tribunal the discretion to determine the conducting of the examination for discovery for each application before it, including with respect to the timing, duration, scope and form of the examination for discovery as well as the appropriate person(s) to be examined for discovery.

Provincial Superior and Federal Courts

The exchange of evidence between parties in provincial Superior and Federal Courts is governed by their respective rules of civil procedure.

Typically, documentary discovery occurs first, whereby parties are required to disclose to the opposing side every document in their power, possession or control that is relevant to the lawsuit. This is then followed by examination for discovery. Rules pertaining to the conducting of the examination for discovery are set out by each province's rules and the federal rules of civil procedure.

5.2 Legal Professional Privilege

Documents may be withheld on the basis that they are protected by legal professional privilege, which falls into two broad categories:

- solicitor-client privilege; and
- litigation privilege.

Solicitor-Client Privilege

Solicitor-client privilege protects the advisory relationship between the lawyer and the client and protects such communications from disclosure. Solicitor-client privilege applies to communications between a solicitor and client, involving the seeking or giving of legal advice, and where the communication is intended to be confidential by the parties.

Litigation Privilege

Litigation privilege is focused directly on the process of litigation. It seeks to provide a “zone of privacy” to facilitate investigation and preparation of a case for trial in an adversarial process. Accordingly, unlike solicitor-client privilege, which seeks to protect the confidential relationship between lawyer and client, litigation privilege seeks to facilitate the adversarial process. For litigation privilege to apply, the communication must have been created for the dominant or sole purpose of litigation, either actual or contemplated. Litigation privilege may not apply to communication where litigation is ancillary or is not more than a suspicion.

5.3 Leniency Materials/Settlement Agreements

The Bureau has immunity and leniency programmes. An immunity applicant is eligible for full immunity from prosecution; whereas a leniency applicant that is not eligible for a grant of immunity is eligible for lenient treatment in sentencing.

Leniency Agreements

Immunity and leniency agreements with the Bureau are kept confidential.

The Bureau treats the identities of immunity and leniency applicants or any information provided by the applicants as confidential, except where:

- disclosure is required by law;
- disclosure is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- the party has agreed to disclosure;
- there has been public disclosure by the party;
- disclosure is necessary to prevent the commission of a serious criminal offence; or
- in the case of information other than the immunity or leniency applicant’s identity, where disclosure of such information is for the purpose of the administration or enforcement of the Act.

Further, the Bureau will disclose the information provided by the leniency applicant (but not the applicant’s identity) for the purposes of the administration or enforcement of the Act.

Settlement Agreements

Settlement agreements with the Bureau will generally be kept confidential, though the degree to which this would occur is determined on agreement between the Bureau and applicable parties.

Any information or communication that is submitted to the Bureau for the purposes of settlement discussions is confidential and is also protected by “settlement privilege”. Settlement privilege protects from disclosure documents or communications created for the intended purpose of settlement or settlement negotiations.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

The Competition Tribunal

Any party may rely on, and compel testimony from, a fact witness at a hearing. Fact witnesses are examined in chief in the form of written witness statements served before the commencement of the hearing. At the hearing, fact witnesses may only be examined in chief for the purpose of summarising or highlighting the evidence contained in the witness statement.

Fact witnesses may be cross-examined and, thereafter, re-examined to respond to issues raised during the cross-examination. Furthermore, the Tribunal can and frequently does question the witness.

Provincial Superior and Federal Courts

Parties in the provincial Superior Court or the Canadian Federal Court may rely on, and compel testimony from, fact witnesses both before and during trial. The rules pertaining to the calling of a fact witness are subject to the applicable provincial or federal rules of civil procedure.

The general rule is that fact witnesses provide evidence through an examination in chief at trial. In some limited circumstances, fact witnesses may be examined in chief prior to trial and with the transcript used as evidence at trial, or may provide evidence via a sworn affidavit. In any case, fact witnesses may be subsequently cross-examined and, thereafter, re-examined to respond to issues raised during the cross-examination.

6.2 Expert Evidence

Expert witnesses are commonly used in any type of competition litigation in Canada. Owing to the technical complexity of competition-related mat-

ters, expert witnesses play a significant role in applications before the Competition Tribunal or proceedings before the courts.

The Competition Tribunal

Parties may call one or more experts to provide opinion evidence at a hearing. A party that seeks to introduce the evidence of an expert witness at the hearing must serve the expert witness's expert report on each other party and on any intervenors in advance of the hearing. The *Competition Tribunal Rules* also provide that the Tribunal may appoint one or more experts.

At the hearing, the expert witness may be examined in chief for the purpose of summarising or highlighting the evidence contained in the report. Accordingly, unlike litigation before civil courts, the expert witness's report is effectively the expert witness's evidence in chief at the hearing. The expert witness must be available for cross-examination at the hearing in order for their report to be received in evidence.

The Tribunal may require that some or all of the expert witnesses in an application before it testify as a panel at any time that the Tribunal may determine. The Tribunal may direct the manner in which the panel will testify, and the parties may cross-examine or re-examine the panel witnesses.

Provincial Superior and Federal Courts

The rules pertaining to the calling of an expert witness are subject to the applicable provincial or federal rules of civil procedure. Generally speaking, parties may call one or more experts to provide opinion evidence at a hearing. Expert evidence will generally take the form of a written report prepared and signed by the expert (which must be provided to the opposing party prior to trial) as well as subsequent in-person testimony

at trial. The expert witness may be cross-examined and, thereafter, re-examined to respond to issues raised during the cross-examination.

7. Damages

7.1 Assessment of Damages

The Competition Tribunal

The Competition Tribunal only has jurisdiction to order a defendant to cease the relevant anti-competitive conduct. It cannot order monetary awards or damages.

Section 36 Action

The Act provides that a private litigant can recover an “amount equal to the loss or damage”, which is full and fair compensation calculated to place the plaintiff in the same position it would have been in had the conduct not occurred.

Plaintiffs cannot recover equitable remedies or punitive, general or aggravated damages under Section 36 of the Competition Act.

Class Proceeding

For calculating damages in a class proceeding, the traditional approach is to assess the difference between the alleged cartel prices and what the prices would have been but for the overcharge. Once all other issues of fact and law have been decided (other than the assessment of damages), class action legislation provides that the court may determine the amount of monetary damage caused by the wrongdoing on an aggregate (global) basis, without proof of the specific amount of loss by each class member.

The defendant would pay the aggregate amount and the award would subsequently be divided among class members. However, in order for individual class members to participate in an

award of damages for a harm-based cause of action, each class member has to prove that they actually suffered some loss.

Plaintiffs may recover equitable remedies or punitive, general or aggravated damages in a class proceeding.

7.2 “Passing-On” Defences

In the 2013 trilogy of decisions in *Pro-Sys*, *Sun-Rype* and *Infineon*, the Supreme Court ruled that the pass-on defence is not available in Canada.

7.3 Interest

In Canada, pre- and post-judgment interest is generally payable on damages. The rate for pre- and post-judgment interest is either determined on agreement between the parties, or subject to the rates set out in the respective rules of civil procedure applicable to the provincial Superior Court or the Canadian Federal Court.

8. Liability and Contribution

8.1 Joint and Several Liability

The general rule in Canada is that joint defendants are held jointly and severally liable for each other's conduct in tort, in proportionate share to their liability level as determined by the court. However, proportionate liability in a price-fixing context has not been fully litigated in Canada, in particular regarding the basis for allocating liability between colluding defendants.

8.2 Contribution

The Competition Tribunal

There is no procedure for bringing contribution proceedings against a third party as regards applications before the Competition Tribunal.

Provincial Superior and Federal Courts

The specific procedure for bringing contribution proceedings, otherwise known as third-party claims, is subject to the applicable provincial and federal rules of civil procedure.

Generally, the defendants to a claim must commence a third-party claim against a third party shortly after issuing their defence, or at a later date with leave of the court. The general two-year limitation period applies to third-party claims, but commences on the date the defendant was served with the statement of claim.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available to parties on similar bases as in other forms of civil litigation. The specific procedure and rules pertaining to injunctive relief are subject to the applicable provincial and federal rules of civil procedure.

The test for obtaining injunctive relief differs depending on the type of relief sought. Generally, an applicant must meet the following three criteria.

- There is a serious question to be tried.
- The applicant must demonstrate that irreparable harm will result if the relief is not granted. Specifically, the damages must be of the type that cannot be quantified in monetary terms or cured because the party seeking an injunction would not be able to collect damages from the respondent at the time of a decision on the merits (ie, trial).
- The applicant must show that the balance of convenience favours granting the injunction.

For certain types of injunctions, a more difficult merits standard, whereby the applicant must show a strong prima facie case that it will succeed at trial, is applied in place of the first “serious question to be tried” criterion. These exceptions are:

- where the pre-trial injunction is, in effect, a final determination of the merits;
- mandatory injunctions, being orders that require the respondent to perform a certain act;
- where the issue to be decided is purely a question of law;
- where there are no material facts in dispute;
- Mareva injunctions, being orders that restrain a party in current or pending litigation from removing or dissipating assets; and
- Anton Piller injunctions, which require the respondent to give the applicant’s representatives access to the respondent’s premises to inspect and remove documents and items specified in the order.

In all cases, the applicant must give an undertaking as to damages, as the party seeking the injunction must promise to abide by any damages award to an enjoined party that suffers a loss because of an injunction ultimately found to have been wrongly granted.

Ex Parte Motions

Parties may bring motions for injunctive relief without providing notice to the other parties. These are referred to as ex parte motions. Interlocutory injunctions or mandatory orders obtained on ex parte motions are sometimes referred to as interim injunctions as the duration of the injunction is limited (eg, up to ten days in Ontario).

Courts may grant *ex parte* motions in two circumstances, whereby the applicant can demonstrate the requisite “extraordinary urgency”:

- where there is good reason to believe that the defendants, if given notice, will act to frustrate the process of justice before the motion can be decided; and
- where there is simply not the time and/or means to provide notice.

Parties seeking an *ex parte* motion must make full and fair disclosure of all matters in their knowledge which are reasonably material for the judge to know about. Failure to comply is sufficient grounds for setting aside any injunctive order obtained on the motion.

Special Injunctions for the Commissioner

The Commissioner also has special injunctive powers. For merger review and other reviewable matters, the Commissioner can seek an interim order to prevent irreparable harm pending the disposition of the Commissioner’s contested application. In exceptional circumstances, the Commissioner can seek a temporary order pending the completion of the Commissioner’s investigation.

9.2 Alternative Dispute Resolution

Alternative dispute resolution is available in competition litigation on similar bases as in other forms of civil litigation. Courts cannot compel parties to arbitrate their disputes in the absence of an agreement between them to do so, but courts will rigorously enforce arbitration agreements according to their terms.

Parties to an application to the Competition Tribunal have the option of participating in a mediation with a judicial member of the Tribunal, or any other mediator, for the purpose of resolving

a proceeding or any outstanding issues in the proceeding.

10. Funding and Costs

10.1 Litigation Funding

Class Actions

Subject to court approval, litigation funding, also known as third-party funding (TPF), may be available for competition class actions in Canada. Third-party funding agreements (TPFA) have frequently been approved by courts in Ontario.

In Ontario, the Class Proceedings Act 2002 provides that a court will not approve a TPFA except where it is satisfied that:

- the agreement is fair and reasonable;
- the agreement does not impair the ability of the representative plaintiff to instruct counsel and control the litigation; and
- the funder will be able to satisfy adverse cost awards to the extent it has agreed to provide an indemnity for such risks.

TPFAs have also been approved by the Federal Court of Canada. The general test for approving a TPFA in the Federal Court is whether it would be in the interests of justice to do so. In assessing whether the test is met, the Federal Court will consider the following questions.

- Have the basic procedural and evidentiary requirements for the Court’s consideration of the TPSA been satisfied?
- Is third-party funding necessary to facilitate meaningful access to justice?
- Is the TPSA champertous?
- Is the TPSA fair and reasonable to current and prospective class members as a group?

- Will the TPSA make a meaningful contribution to deterring wrongdoing?
- Does the TPSA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?
- Does the TPSA protect relevant legal privileges and the confidentiality of the parties' information?
- Does the TPSA protect legitimate interests of the defendants?

A negative response to any of the questions listed above can be fatal to the approval of the TPSA.

10.2 Costs

Applications Before the Competition Tribunal

The Competition Tribunal has the discretionary power to award costs on a final or interim basis. The Tribunal has full discretionary power over the amount and allocation of costs, and the determination of who will pay them and to whom they will be paid.

Section 36 Claims

Typically, in Canada the unsuccessful party pays the successful party's costs.

Plaintiffs advancing Section 36 claims can also seek recovery of damages for the full cost of any investigation. The claim of investigation costs must be necessary, reasonable and based on evidence. These are distinct from court costs, which are determined based on normal cost rules that typically award the successful party a portion of their legal costs. Pre- and post-judgment interest is also awarded on damages under provincial statutes.

Class Actions

The traditional loser-pays model has been modified by some class action legislation in Canada for certification motions. In British Columbia, Manitoba, Newfoundland and Labrador, as well as in the Federal Court, the court will not award costs on a certification motion except in narrow circumstances such as vexatious, frivolous or abusive conduct. In contrast, in Ontario, Alberta, Saskatchewan, New Brunswick and Nova Scotia, costs can be awarded on certification motions. Overall, a practice of no costs is developing.

11. Appeals

11.1 Basis of Appeal

Decisions of the Competition Tribunal

Section 13 of the Competition Tribunal Act provides that decisions by the Tribunal may be appealed to the Federal Court of Appeal. Appeals concern questions of law or questions of mixed law and fact, but appeals solely concerning a question of fact may be made only with leave of the Federal Court of Appeal.

Decisions of the Provincial Superior and Federal Courts

Judgments of the provincial Superior Court and the Canadian Federal Court may be appealed to the respective provincial or federal appellate court. Appeals may only concern questions of law or questions of mixed law and fact. A further appeal from the respective appellate court to the Supreme Court of Canada is possible, provided that leave is granted by the Supreme Court.

Trends and Developments

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Fasken is a leading international law firm with more than 925 lawyers and nine offices across Canada, the UK and South Africa. Its lawyers consistently receive accolades worldwide and earn hundreds of rankings each year from prestigious business and legal publications, including Chambers and Partners. Leading companies around the world look to the firm for competition law advice on their daily operations and their most significant commercial transactions. Its lawyers have vast experience in all aspects of competition, marketing and foreign

investment law. The firm is regularly retained to advise on and represent multinational corporations (MNCs) in the Canadian aspects of global M&A. It also defends clients in domestic and cross-border competition investigations and prosecutions, as well as in private actions, including class actions. The firm's clients operate in various sectors, including information technology, telecommunications, transportation, pharmaceutical, financial services, agricultural, food, consumer electronics, automotive, mining, energy, manufacturing and retail.

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Public Versus Private Enforcement

Canada's Competition Act (the "Act") provides for public and private enforcement. Public enforcement arises primarily from Canada's Commissioner of Competition (the "Commissioner") who, for most reviewable practices, has the dual role of investigator and prosecutor before Canada's Competition Tribunal (the "Tribunal") and the courts.

Private enforcement complements public enforcement and permits victims of criminal anti-competitive conduct to seek recovery for loss or damage suffered. As a practical matter, the vast majority of private enforcement actions are commenced as class actions.

There has been significant public and private competition enforcement in Canada. Noteworthy developments and takeaways are summarised below.

Public Enforcement

Merger litigation

Recently, public enforcement has focused on merger review, with the Commissioner contesting (with mixed success) three mergers before the Tribunal.

Rogers/Shaw merger

The Commissioner sought to block Rogers' proposed acquisition of Shaw. Rogers and Shaw are large telecommunications companies and provided wireless services in Canada. In response to competition concerns, Rogers proposed to divest most of Shaw's wireless assets to a third party. The Commissioner challenged the transaction and Rogers' proposed "fix". Following a lengthy trial, the Tribunal dismissed the Commissioner's application, and allowed the merger and proposed fix to proceed. The Tribunal found that Rogers' acquisition of Shaw coupled with

the divesting of Shaw's wireless assets to a third party would not substantially prevent or lessen competition in any relevant market in Canada. The Federal Court of Appeal affirmed the Tribunal's decision.

This was the first fully contested trial considering the merging parties' proposed remedial package when deciding whether the transaction would result in a substantial prevention or lessening of competition.

P&H/LDC merger

The Commissioner challenged Parrish & Heimbekker's (P&H) acquisition of the Louis Dreyfus Company's (LDC) grain elevator located in Virden, Manitoba. The elevator in question was part of a strategic acquisition where P&H would purchase ten LDC facilities.

The Commissioner filed an application with the Tribunal for an order requiring P&H to sell either its own elevator in Moosomin, Saskatchewan or the former LDC elevator in Virden; otherwise, the acquisition would eliminate the rivalry between the only two grain elevators along a 180 km stretch of the TransCanada Highway.

Following a contested hearing, the Tribunal dismissed the Commissioner's application, finding that the Commissioner failed to demonstrate sufficient anti-competitive effects and failed to present relevant markets grounded in commercial reality.

Secure/Tervita merger

The Commissioner successfully challenged Secure Energy Services' ("Secure") acquisition of Tervita Corporation, alleging a substantial lessening of competition for the supply of oil and gas waste services. The Commissioner alleged that the merger substantially lessened competition

in approximately 143 distinct relevant markets for the supply of three different types of oilfield waste disposal services in Western Canada. To remedy the situation, the Commissioner sought the divestiture of 41 facilities previously owned by Tervita.

The Tribunal agreed with the Commissioner's allegation with respect to 136 of the 143 relevant markets. The Tribunal also found that the divestiture of 29 of the facilities identified by the Commissioner would suffice to restore competition to the requisite standard. After a rigorous review with respect to how it substantiated a significant lessening of competition, the Tribunal also determined that Secure had not met the requirements of the efficiencies defence that it had invoked pursuant to Section 96 of the Act, finding that Secure had not been able to demonstrate that its acquisition of Tervita was likely to bring about efficiencies that would be greater than, and would offset, the effects of any lessening of competition that was likely to result from merger. The Federal Court of Appeal affirmed the Tribunal's decision.

Key takeaways

The Commissioner has expressed a greater willingness to contest mergers to trial, whether seeking to block transactions outright or contesting portions of merger before or after closing. Historically, fully litigated mergers reviews were uncommon, with most contested mergers resolved by way of a consent agreement. This trend has been challenged with an increasingly aggressive Commissioner.

Further, appellate courts have now confirmed that a trial judge considering a contested merger is not bound to consider the original transaction, and can consider a late-blooming “fix-it-first” remedy. However, it was acknowledged that a

trial judge could decline to consider a “fix-it-first” proposal if it would result in procedural unfairness.

The Tribunal continues to demonstrate an increasingly quantitative approach when assessing whether a proposed merger will likely prevent or lessen competition substantially. Part of this approach arises from the continued reliance of efficiencies as a basis to counter alleged anti-competitive effects (in the form of deadweight loss). Proposed legislative reforms to the Act include the removal of the efficiencies defence.

Unilateral conduct

The Commissioner has also been active with unilateral conduct challenges.

In an abuse-of-dominance contested trial against the Vancouver Airport Authority (VAA), the Commissioner alleged that the VAA was restricting competition by denying new in-flight catering and galley-handling service suppliers access to the airport. The application sought orders requiring the VAA to open Vancouver International Airport to greater in-flight catering competition.

The application was dismissed by the Tribunal. While the Tribunal agreed with the Commissioner that the VAA substantially controlled the relevant market at the airport, on the evidence, the VAA's conduct was not found to be “anti-competitive” and had not lessened or prevented competition substantially at the airport; the Tribunal found that the VAA had other overriding legitimate business justifications for the conduct, and the conduct did not have the effect of substantially preventing or lessening competition in respect of in-flight catering and galley-handling services.

Among other things, the VAA decision clarified the “plausible competitive interest” screen that

may be used to limit the scope of potential cases alleging abuse of dominance against firms, particularly firms that do not compete in the relevant market they are alleged to control. This is of particular importance in matters involving multi-sided digital platforms, access to data and so-called “gatekeeper” firms that may control aspects of competition in markets they do not directly participate in.

Private Litigation – Class Actions

Recent trends in class actions

Canada (like many jurisdictions around the world) has seen a significant decline in immunity and leniency applications. This decline has resulted in fewer guilty pleas for unlawful conduct under the Act than what Canada has seen historically.

As a result, many class actions have been commenced in the last few years which are *not* based on the existence of a guilty finding or plea entered into in Canada or elsewhere for anti-competitive conduct. In these cases, the courts have been asked to consider whether or not the plaintiff has met the evidentiary standard of establishing *some basis in fact* for the existence of a conspiracy in the absence of a guilty plea in Canada.

Recent cases decided by the Federal Court of Appeal, the Superior Court of Ontario, and the Court of Appeal of Quebec suggest that evidence of a conspiracy in the USA, and evidence of conscious parallelism, will not suffice to establish some basis in fact of the existence of a conspiracy in Canada.

Although certification remains a low bar in Canada, the cases suggest a growing judicial willingness to dismiss proposed competition class actions at the certification stage. Recent decisions of note are discussed below.

In Ontario, a new, stricter certification test has been in force since October 2020; however, it only applies to cases commenced in Ontario after 1 October 2020, and no certification motions have been decided under the new test to date. The stricter test has resulted in a greater number of competition class actions being commenced in the Federal Court of Canada, which, along with the provincial courts, has jurisdiction over competition issues.

Decisions of note

Lilleyman v Bumble Bee Foods LLC, 2023

ONSC 4408 – evidence of a US conspiracy will not suffice

In a recent decision on a certification motion in two proposed competition law class actions, the Superior Court of Ontario found that US plea bargains concerning a US conspiracy did not, on their own, provide some basis in fact for the existence of the alleged conspiracy in Canada.

In this case, the plaintiff alleged that she and the putative class members purchased cans of tuna sold at supra-competitive prices because the defendants and their associated entities conspired together to fix the price of canned tuna sold in Canada by controlling output, price and other aspects of the manufacture, production or supply, thereby causing loss or damage to individuals in Canada who purchased canned tuna.

The court dismissed the plaintiff’s motion for certification, finding that there was no basis in fact that the alleged conspiracy to sell canned tuna to Canadian consumers at supra-competitive prices existed. The plea bargains entered into by the defendants in the USA concerning a US conspiracy did not, on their own, provide some basis in fact for the existence of the alleged conspiracy in Canada.

The court relied heavily on industry evidence tendered by the defendants concerning the differences between the US and Canadian tuna markets.

Jensen v Samsung Electronics Co Ltd, 2021 FC 1185, aff'd 2023 FCA 89 ("Jensen") and Hazan v Micron Technology Inc, 2021 QCCS 2710, aff'd 2023 QCCA 132 ("Hazan") – conscious parallelism will not suffice

In *Jensen* and *Hazan*, the Federal Court of Appeal and the Quebec Court of Appeal each upheld the decisions of the respective lower court to deny certification ("authorisation" in Quebec) of class actions alleging a conspiracy in respect of Dynamic Random Access Memory (DRAM) chips. The plaintiffs in these parallel cases alleged that three manufacturers of DRAM chips conspired to limit supply and thereby to artificially drive up prices through unspecified communications and public statements that could amount to "signalling" among competitors. There were no criminal convictions (guilty pleas or otherwise) or any investigations by the Competition Bureau or any foreign antitrust authority underpinning the alleged conspiracy.

Both lower courts concluded that the criteria for certification/authorisation were not met due to the claims' vague, imprecise and general allegations and the absence of evidence establishing the existence of the alleged unlawful agreement. In particular, the Federal Court concluded that there was no basis in fact for the proposed common issues, noting that the plaintiffs' claim was "doomed to fail", that the "pleadings cannot boil down to mere speculation or a fishing expedition" and that a pleading alleging a conspiracy must detail the "who, when, where, how and what" of the alleged agreement. The Federal Court of Appeal "wholeheartedly" agreed with the motion judge's approach to certification.

The Federal Court also discussed in detail the distinction between unlawful agreements between competitors under Section 45 of the Act, which represents a per se violation of the Act, and "conscious parallelism", where competitors unilaterally adopt similar or identical business practices or pricing, due to rational and profit-maximising strategies based on observations of market trends and the activities of competitors. The Federal Court was explicit in its reminder that Canadian law has long recognised that conscious parallelism, even if it involves parallel conduct in alleged oligopoly markets, falls short of conduct captured by Section 45 of the Act.

Section 45(1) of the Act prohibits conspiracies, agreements or arrangements between competitors to:

- fix, maintain, increase or control the price for the supply of a product;
- allocate sales, territories, customers or markets for the production or supply of a product; or
- fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

If established, the anti-competitive effect of the agreement is presumed, giving rise to both criminal sanctions and private enforcement, including through class actions.

The Federal Court of Appeal agreed that conscious parallelism, as well as "signalling" (the communication by competitors to one another, through public statements, of their intention to not compete for market share) falls short of illegal conduct under Section 45. The Federal Court of Appeal stated: "In other words, unilateral conduct is not sufficient; there must be some form of agreement between the co-conspirators, involv-

ing an offer or invitation and some conduct from which acceptance of the offer may be inferred.”

Mohr v National Hockey League, 2022 FCA 145 – must be competitors and cannot be buyers

In this decision, the Federal Court of Appeal dismissed the plaintiff’s appeal of the Federal Court of Canada’s decision to strike out a putative class action claim relating to alleged anti-competitive conduct in minor hockey. The Federal Court of Appeal upheld the ruling that neither Section 45(1) nor Section 48(1) of the Act applied to the conduct at issue.

Mohr brought a class action in the Federal Court of Canada in 2021 against various hockey leagues alleging a conspiracy contrary to Sections 45(1) and 48(1) of the Act. Mohr alleged that the respondents conspired to:

- impose unreasonable terms and conditions upon all major junior hockey players that signed a standard player agreement, including, for example, the imposition of “nominal wages”; and
- limit the opportunities of hockey players to play in Canadian major junior and professional hockey.

As just noted, Section 45(1) of the Act prohibits conspiracies, agreements or arrangements between competitors for the conduct listed above; and if established, the anti-competitive effect of the agreement is presumed, giving rise to both criminal sanctions and private enforcement, including through class actions. Section 48(1) prohibits agreements or arrangements which:

- unreasonably limit the opportunities of a player to participate in professional sport;

- impose unreasonable terms on players; or
- unreasonably limit the ability of players to negotiate with and play with a team of their choice in a professional league.

The Federal Court granted a preliminary motion to strike out the claim on the basis that, among other things:

- Section 45(1) does not apply to the alleged conduct because the defendants were not “competitors” for the product or service at issue and, further, Section 45 does not apply to agreements among competing buyers for the purchase of a product or service (as the section is restricted to agreements among competing suppliers); and
- Section 48(1) does not apply to the alleged inter-league conspiracy because the provisions apply only to agreements between teams and clubs within the same league.

The Federal Court of Appeal agreed with the court below, and found that:

- the prohibition on anti-competitive arrangements in Section 48(1) is limited to arrangements or agreements between clubs or teams in the same league; and
- Section 45(1) is restricted to agreements or arrangements with respect to the supply or sale of products.

David v Loblaw, 2021 ONSC 7331 – narrowing the scope of umbrella purchaser claims

David involved allegations of a conspiracy among competitors in the packaged bread market. While the action overall was certified, the proposed common issues relating to umbrella purchasers were not certified.

In “umbrella purchaser” claims, plaintiffs generally allege that the behaviour of the alleged participants in the conspiracy set a threshold, leading non-defendant companies in the market to artificially increase prices and causing purchasers of the non-defendants (so-called umbrella purchasers) to suffer a loss. In its 2019 decision in *Pioneer Corp v Godfrey*, 2019 SCC 42, the Supreme Court of Canada concluded that it was not “plain and obvious” that the claims of umbrella purchasers cannot succeed (as would have been required to defeat their cause of action at the certification stage). In doing so, the Supreme Court noted that “it cannot be ruled out that a *competing undertaking*, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel.”

Relying on the Supreme Court’s reference to a “competing undertaking”, the defendants argued that the plaintiffs’ umbrella allegations with respect to fresh bread (as substitutable for packaged bread) were significantly distinct from the types of umbrella effects that the Supreme Court discussed in *Godfrey*.

In its decision, the Ontario Superior Court discussed the economic theory of umbrella effects, which is premised on the notion of product substitutability. Following a product market analysis of bread (fresh versus packaged), and finding a lack of substitutability, the certification judge found no basis in fact to support the proposed umbrella common issues. Importantly, with respect to the *Godfrey* decision, the certification judge made clear that the scope of potential umbrella claims does not extend beyond competing undertakings, noting that: “...the Supreme Court’s point in allowing umbrella claims to proceed is not to allow litigation over

theoretically connected but practically unprovable increases in all products everywhere. Rather, it is to ensure that all damages provably caused by a price fixing cartel – ie, the increased prices for the product and its direct competitors whose price was manipulated – are accounted for.”

Key takeaways

Recent decisions suggest a growing judicial willingness to limit or dismiss proposed competition class actions at and before the certification stage. The decisions also provide important guidance for proposed competition class actions and indicate trends for the future, as follows.

Evidence of an unlawful agreement and harm

When assessing whether the criteria for certification have been met, courts will require plaintiffs to provide evidence of the alleged unlawful agreements and compensable harm. In particular, evidence of “conscious parallelism” is not sufficient to support the “some basis in fact” requirement for proof of the existence of an alleged unlawful agreement. Further, parties should expect courts to look beyond general allegations and to conduct a careful analysis of the evidentiary record at the certification stage.

More pre-certification defence motions to narrow or dispose of proceedings

Historically, courts have been reluctant to hear defence motions to narrow or dispose of proceedings in advance of the certification motions. This trend has seen a dramatic shift. The Federal Court of Canada in *Mohr* and the British Columbia Supreme Court in *Latifi v The TDL Group Corp*, 2021 BCSC 2183 were both prepared to hear defence motions to dispose of the proceedings before the hearing of the certification motions.

Contributed by: Antonio Di Domenico, Vera Toppings, Carolyn Flanagan and Timothy Law, **Fasken**

Courts will assess whether claims fit the parameters of the Act

As was observed by the Federal Court of Canada in *Mohr* and the British Columbia Supreme Court in *Latifi*, courts will closely examine whether claims fit within the statutory framework of the Act, which is informed by the Competition Bureau's enforcement guidelines. *Mohr* is also a reminder that the criminal conspiracy provision applies to alleged agreements, as to a product or service, among competitors with respect to that product or service.

Umbrella purchaser claims will be met with increased scrutiny

Although the Supreme Court of Canada in *Godfrey* concluded that it was not "plain and obvious" that the claims of umbrella purchasers cannot succeed, the Supreme Court also noted that proving statutory claims under the Act for umbrella purchasers may well be complex and difficult for plaintiffs to demonstrate. The Ontario Superior Court's decision in *David*, which declined to certify the proposed umbrella purchaser common issues, is an example of increased scrutiny that umbrella purchaser claims will face.

CHINA

Law and Practice

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ised expertise, division of work, attention to detail, and close teamwork. Zhong Lun's antitrust and competition team is one of the earliest professional teams in China specialised in the field of antitrust law and now consists of ten partners and over 40 associates. The firm's practice covers full range of antitrust law including merger filing, antitrust investigation, antitrust litigation antitrust compliance and consulting.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

China's Anti-Monopoly Law (AML) provides for private right of antitrust enforcement. In 2022, antitrust litigation made further headway and continued to be active. Courts played an increasingly significant role in maintaining fair competition in the market, providing important guidance for interpretation and application of the anti-monopoly legislation.

Statistics on Antitrust Litigation in 2022

Chinese courts have published a total of 30 judgments in antitrust litigation, of which 28 were civil antitrust litigations involving monopoly agreements reached between undertakings and abuse of dominant market position by undertakings and two were administrative antitrust litigation, both of which were filed against administrative penalty decisions of local antitrust enforcement agencies. Although the total number of administrative cases concluded is relatively small and the winning rate is not high, the annual report of the Intellectual Property Division of the Supreme People's Court (SPC) shows that there was a substantial increase in the number of newly filed antitrust administrative cases, rising from two in 2021 to 24 in 2022.

In terms of cause of action, the antitrust civil cases announced by the courts nationwide included 22 disputes over abuse of dominant market position, four disputes over horizontal monopoly agreements, and two disputes over vertical monopoly agreements, similar to the past statistics that dominant firms were major targets in antitrust litigations.

Major Developments in Judicial Practice in 2022

On 18 November 2022, the SPC issued its newest exposure draft of the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases (SPC Draft Judicial Interpretation), which triggered heated discussions. It sorted out the framework of the original judicial interpretation promulgated in 2012 (amended in 2020) and enriched the old version's content, impacting on both substantive and procedural aspects of antitrust litigation.

As to the procedural issue, jurisdictional rules for overseas and arbitration agreement cases are clarified, the burden of proof is set in a more reasonable manner, and the mechanism strengthening cooperation between judicial practices and law enforcement activities is vigorously advocated. As to the substantive issue, some hot issues often arising in recent antitrust practice have been further clarified and guided in the SPC Draft Judicial Interpretation, such as the theory of single economic entity, the definition method of relevant market, the assessment of most-favoured-nation treatment and the criteria for determining the hub-spoke protocol.

In addition, in order to better explain the judicial application of the AML, courts at all levels responded to various complex practical problems, and the SPC also made and publicised a great deal of typical cases which possess significant legal or social impact. Some of the key cases are summarised below:

Reverse Payment

In the case of the patent infringement dispute involving a reverse payment agreement for saxagliptin tablets (*AstraZeneca v Aosaikang*), the SPC's decision pointed out the examination idea

and the basic path of reviewing cases involving reverse payment agreements for pharmaceutical patents, namely, comparing the actual situation after signing and fulfilling the agreement with the hypothetical situation of not signing and fulfilling the agreement, and then reasonably determining on the possibility of invalidating the relevant pharmaceutical patent in the event that the generic drug applicant has not withdrawn the request for declaration of invalidity.

Follow-on claims

In the case of General Motors' vertical monopoly agreement on setting a minimum resale price (Mr Miao v Yilong Company), the SPC clarified how to effectively reduce the plaintiff's burden of proof in the follow-on litigation relating to anti-monopoly administrative penalties, which is of practical significance for aligning judicial activities and law enforcement.

Arbitrability of monopolistic disputes

In the case of the Honeywell vertical monopoly agreement (Longsheng Company v Resideo Company, Honeywell), the SPC's decision made it clear that the determination and handling of monopoly behaviour exceeds the rights and obligations between normal civil litigants, therefore, the arbitration clause under both parties' consensus could not be the basis for excluding the people's courts' jurisdiction over monopoly agreement disputes.

Rules for proving exemption of monopoly agreements

In the case of the Taizhou Jili motor vehicle driving training company, the SPC indicated that while determining whether the circumstances of monopoly agreements meet the exemption clauses stipulated by law, courts could not solely rely on general speculation or abstract presumptions. The parties concerned should provide

concrete and realistic evidence to prove that the monopoly agreement has a positive competitive effect or a positive economic and social effect.

1.2 Other Developments

In 2023, there were also many new regulations issued by the State Administration for Market Regulation (SAMR), the national competition authority, indicating the government's efforts to maintain the market order of fair competition. Specifically, the SAMR issued four newly revised provisions on March 24th, enhancing the regulation over monopoly agreements, abuse of dominant market position, abuse of administrative power to exclude or restrict competition and review of the concentration of undertakings.

Furthermore, the SAMR also issued a document prohibiting the abuse of intellectual property rights from casting an adverse influence on fair competition on June 25th, aiming to strengthen regulation of typical and special monopolistic behaviours pertaining to intellectual property rights. Although those regulations only have binding effect on law enforcement activities, we do expect that those refined rules are also of reference significance in terms of application of law to antitrust litigations considering the extensive influence of the SAMR in the antitrust practice in China. It is expected that more clear guidance on the application of the AML and vigorous enforcement by the SAMR will encourage businesses to wield antitrust litigations as a sword in pursuit of their commercial goals, such as declaring contractual terms void, negotiating better contractual terms in their cooperation with upstream or downstream partners or competitors.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Article 50 of China's Anti-Monopoly Law states that an undertaking that carries out monopoly acts and causes losses to others shall bear civil liability under the law. According to Article 14 of the Provisions of the Supreme Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases (Judicial Interpretation of Monopoly-related Dispute Cases), the people's court may order the undertaking that conducts monopolistic behaviour to bear civil liabilities, such as ceasing infringement and compensating for losses based on the defendant's claims and facts ascertained. Moreover, Article 15 of the Judicial Interpretation of Monopoly-related Dispute Cases provides that where the clauses of the contracts or the articles of association of trade associations involved in lawsuits violate the mandatory provisions of the AML or other laws and administrative regulations, the people's court shall rule such clauses as invalid.

In terms of the litigation form, both standalone and follow-on claims are available. Article 2 of the Judicial Interpretation of Monopoly-related Dispute Cases stipulates that the plaintiff may directly file an antitrust lawsuit to the people's court or file a civil lawsuit after the decision is made by the anti-monopoly law enforcement agency that monopolistic conduct exists and takes effect, and when the lawsuit meets other requirements provided by law at the same time. In this situation, the people's court shall accept the case.

2.2 Specialist Courts

There are no specialist courts for purpose of adjudicating anti-monopoly disputes in China.

According to Article 3 of the Judicial Interpretation of Monopoly-related Dispute Cases, first-instance disputes are centrally handled by intellectual property courts and intermediate people's courts of a province; an autonomous region; a municipality directly under the central government and a city specifically designated in the state plan; or intermediate people's courts determined by the Supreme Court. In particular, first-instance civil monopoly-related dispute cases will be heard by courts in Beijing, Shanghai and Guangdong, and Hainan according to the relevant rules of territorial jurisdiction. The intellectual property courts established in Beijing, Shanghai, Guangzhou and Hainan Free Trade Port (intermediate people's court level) will exercise exclusive jurisdiction.

Monopoly-related disputes may also be transferred between courts. Relevant cases should be transferred in the situation where the dispute was not filed by the cause of a monopoly dispute, but the defendant then raises a defense or counterclaim on the grounds that the plaintiff has carried out monopolistic behaviour and there is sufficient evidence to support it, or where the case needs to be adjudicated according to the AML, but the people's court does not have monopoly jurisdiction over civil cases.

2.3 Decisions of National Competition Authorities

Article 114 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Judicial Interpretation of the Civil Procedure Law) provides that matters recorded in instruments prepared by national authorities or other organisations with lawful social management functions shall be deemed true, unless there is sufficient contrary evidence to overturn them. Accordingly, an effective decision made by a

national competition authority (NCA) and the facts determined therein would have probative value to serve as the basis for the plaintiff to file follow-on litigations. As for the decisions of foreign NCAs, they may only serve as reference to the court, which may only have limited influence.

Although neither the AML nor the Judicial Interpretation of Monopoly-related Dispute Cases has specified as to whether decisions of a NCA have binding effect on the courts, in a recent judicial case, *Miao Chong v SAIC-GM*, the SPC confirmed the probative value of NCA decisions in follow-on claims. If a NCA decision is not challenged by the defendant in the court through the administrative litigation within the statutory period or if a court upholds the penalty decision in the administrative litigation then, in a separate follow-on litigation brought by the plaintiff, there is no need for plaintiff to prove the illegality again unless there is sufficient evidence to the contrary. SPC Draft Judicial Interpretation provides the same rule as that in *Miao Chong v SAIC-GM*.

A NCA cannot intervene in damages actions on its own initiative but only participate in the follow-on litigations by the request of courts. As provided in SPC Draft Judicial Interpretation, the courts may request the anti-monopoly enforcement agency that has made the penalty decision to explain the relevant circumstances if necessary.

2.4 Burden and Standard of Proof

Burden of Proof

As antitrust private lawsuits fall within the scope of civil lawsuits, the general rules in the Civil Procedure Law of the People's Republic of China (Civil Procedure Law) and the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings (Civil Evidence Provisions) apply to antitrust lawsuits. Therefore, the general

principle is that the plaintiff bears the burden of proof for its claims, while the defendant needs to provide the evidence for its defence and counterclaims.

When it comes to antitrust civil lawsuits, the Judicial Interpretation of Monopoly-related Dispute Cases provides more specific rules on allocation of burden of proof in several scenarios.

Horizontal monopoly agreements

For horizontal monopoly agreements, the plaintiff shall bear the burden of proving the existence of the agreement involving one of the activities listed in Article 17 of the AML while the defendant shall bear the burden of proving that the agreement does not have the effects of excluding or restricting the competition.

Vertical monopoly agreements

For vertical monopoly agreements, the AML before amendments does not presume that the vertical restraints have effects of excluding or restricting the competition and the Judicial Interpretation of Monopoly-related Dispute Cases is also silent on the allocation of burden of proof. In principle, the party alleging a vertical monopoly agreement shall be responsible for providing evidence on the existence of the agreement and that the agreement has eliminated or restricted market competition. In the previous judicial practice, the court ruled that the plaintiff shall adduce sufficient evidence to show that the resale price maintenance (RPM) clause actually had an anti-competitive effect in the market. However, the 2022 amendments to the AML made it clear that agreements involving the RPM will not be prohibited if the undertakings can prove that such agreements do not have effects of eliminating or restricting competition indicating that the RPM is presumed to be illegal. To be consistent with the new provisions of the AML, the SPC Draft

Judicial Interpretation provides that the defendant shall bear the burden of proving that the agreement does not have the effects of excluding or restricting the competition. Therefore, in the future, it is highly likely that the defendant shall bear the burden of proving that the agreement does not have the effects of excluding or restricting the competition in an RPM case. As to non-price vertical monopoly agreements, the general principle shall remain applicable.

Abuse of dominance

For abuse of dominance, according to the Judicial Interpretation of Monopoly-related Dispute Cases, the plaintiff shall bear the burden of proving that the defendant possesses market dominance in the relevant market and that it has abused such dominance by violating Article 22 of the AML, while the defendant shall prove that it has justifiable reasons for conducting such behaviour. As for the anti-competitive effects of a violation of abuse of market dominance, it is commonly understood that the burden lies with the plaintiff to prove that the defendant's behaviour has the effects of excluding or restricting market competition.

Standard of proof

The standard of proof, as in civil claims generally, is the balance of probabilities which is commonly understood as high degree of probability in China. According to Article 108 of the Judicial Interpretation of the Civil Procedure Law, with regard to the evidence provided by the party with the burden of proof, where the people's court believes that the existence of a fact to be proved is highly probable upon examination and in light of the relevant facts, it shall affirm the existence of the said fact. With regard to the evidence provided by a party to contradict the facts claimed by the other party with the burden of proof, where the people's court believes that a

fact to be provided is unclear upon examination and in light of the relevant facts, it shall affirm that the said fact does not exist.

2.5 Direct and Indirect Purchasers

As set out in **2.1 Legal Basis for a Claim**, claims for damages before the courts are based on Article 50 of the AML and Article 2 of the Judicial Interpretation of Monopoly-related Dispute Cases. Both direct and indirect purchasers can bring claims for damages as long as they suffer losses attributed to a monopoly conduct which can qualify them as eligible plaintiffs for having a direct stake in the case according to Article 122 of the Civil Procedure Law.

2.6 Timetable

The typical timetable for an antitrust damages claim can range from a few months to several years depending on a lot of factors that may affect litigation proceedings such as whether an objection to jurisdiction is raised and whether the case involve a foreign factor. In general, the Civil Procedure Law provides that:

For a first instance case where the ordinary procedure is adopted, the court trying shall conclude the case within six months from the date when the case is officially accepted. Under special circumstances where an extension is necessary, the period can be extended by six months upon the approval of the president of the court, and upon the approval of the higher level of court, the period can be further extended if necessary. As to a case where the summary procedure is adopted, the court shall conclude within three months from the date of official acceptance.

For a case on appeal against a judgment, the court shall conclude within three months from the date of official acceptance, and under special circumstances where an extension is nec-

essary the period can be extended upon the approval of the president of the court. For a case on appeal against a written order, the court shall conclude within 30 days from the date of official acceptance. The judgment and the written order of a court of second instance shall be final.

For now, the existence of a parallel investigation by a NCA is not a statutory circumstance that can suspend the civil proceeding. However, it may serve as the reason for a suspension in the future as the SPC Draft Judicial Interpretation provides that if the anti-monopoly law enforcement agency is investigating the accused monopoly conduct, the court may, in light of the specific circumstances of the case, rule to suspend the lawsuit.

Article 153 of the Civil Procedure Law provides general circumstances that the court shall order a stay and the circumstances that are likely applicable to an antitrust litigation include: a legal person or an organisation who is a party to the lawsuit has its operation terminated, and the bearer of its rights and obligations has not been determined; and the case is required to use the outcome of the trial of another case as the basis and the trial of the other case has yet to be concluded.

3. Class/Collective Actions

3.1 Availability

The collective redress system in China, commonly referred to as joint litigation/representative litigation and public interest litigation, is primarily established within the framework of the Civil Procedure Law. These two forms of collective redress mechanism are designed to be applicable to various civil lawsuits, including those concerning anti-monopoly claims. Howev-

er, due to the lack of comprehensive regulations governing the litigation processes within the collective redress system, instances of either joint litigation/representative litigation or public interest litigation specifically tied to anti-monopoly claims have been infrequent in court proceedings thus far.

Joint Litigation/Representative Litigation

The Civil Procedure Law stipulates in principle that when multiple litigants are involved in separate lawsuits with claims that share common or analogous subject matter, these cases can be simultaneously heard as a joint litigation by the court. The joint litigation framework is indeed applicable to monopolistic disputes, as it was subsequently incorporated into the Judicial Interpretation of Monopoly-related Dispute Cases, which grants the court the authority to consolidate cases involving the same monopolistic conduct for trial if more than two plaintiffs have filed actions related to the identical monopolistic behaviour.

Representative litigation, similar to the Western-style class action, refers to joint litigation involving a large number of litigants (usually exceeding ten), where one or more parties can be selected as representatives to engage in the joint litigation on behalf of the other litigants. If the number of litigants can be determined when a representative litigation is initiated, those parties can directly coordinate among others to nominate their representatives. Nevertheless, if the number of parties is uncertain upon instituting representative litigation, litigants must register with the court following the publication of relevant notices to participate in the action. In such a scenario, representative parties can be elected through consensus among the litigants or through consultations between the court and the litigants. The court's judgment in representa-

tive litigation is binding on all properly registered litigants, as well as other non-registered parties who have filed actions related to the identical or analogous dispute.

In the context of joint litigation/representative litigation concerning antitrust disputes, any party wishing to participate in the proceedings must comply with the opt-in requirements, either by initiating a lawsuit or registering with the court. Furthermore, joint litigation/representative litigation can be applicable to both indirect purchasers and direct purchasers under Chinese anti-monopoly regime.

Public Interest Litigation

As the other type of collective redress mechanism, public interest litigation has been newly incorporated in the amended Anti-monopoly Law in 2022, allowing the People's Procuratorate to file a lawsuit on behalf of the public against entities suspected of engaging in monopolistic behaviours that pose potential harm to the collective interest. The authority to initiate such public interest litigation is a legally endowed power granted to the People's Procuratorate by law, thereby no authorisation or permission from victims is needed. Consequently, any resulting compensation from such public interest litigation will only be used to enhance overall society welfare and will not be allocated to any parties who may have suffered losses due to the alleged monopolistic behaviours. As such, public interest litigation is not designed to provide the individual victim with a dispute resolution mechanism but served as a remedy for the public interest as a whole.

3.2 Procedure

Under the collective redress system in China, unlike the Western-style class action system, there is no certification process available to liti-

gants. In general, it is possible for any party who suffered from the same or analogous monopolistic behaviours to participate in a representative litigation against such illegal monopolistic behaviours.

As stated in **3.1 Availability**, the procedure for engaging in representative litigation differs slightly between cases with a fixed number of parties and those with an uncertain number when the action is officially commenced. In the former scenario, initiating a representative litigation mandates that the relevant plaintiffs collaboratively identify and designate two to five representatives to present their claims before the court. In contrast, for the latter situation, the court may release a notice outlining the fundamental lawsuit particulars and urge potentially concerned parties to register within a designated timeframe. Any potential parties can, following such opt-in mechanism, register with the court by furnishing preliminary evidence showcasing the harm they've incurred due to the alleged monopolistic behaviours. Upon being accepted as eligible plaintiffs, the plaintiffs can appoint representatives either through joint determination or consultation with the court. In the event that such consultation is unsuccessful, the court reserve the authority to directly designate representatives on behave of the plaintiffs.

In cases of public interest litigation, when the Procuratorate intends to file a lawsuit against monopoly conduct, it shall make a public announcement in advance for the period of 30 days. This announcement shall encompass basic information of the case and inform the qualified and interested parties of their legal right to initiate action in court. Should no qualified parties take action following the announcement period's expiration, the Procuratorate may then formally initiate civil public interest litigation.

3.3 Settlement

In both representative litigation and public interest litigation, the legal option of negotiating a settlement between the litigants exists, although it does prove challenging in practice. In cases of representative litigation, the initiation of settlement negotiations by the representatives with the defendant shall be subject to the unanimous consent of all represented plaintiffs. In other words, achieving a settlement within representative litigation remains unattainable as long as any of the represented plaintiffs withhold their agreement. The exception arises when the dissenting plaintiff opts to withdraw from the representative litigation and files an independent lawsuit. Upon the request of the litigants, the court may release a conciliation statement to officially endorse the mutually agreed-upon settlement arrangement.

In the context of public interest litigation, upon the litigants entering into a settlement agreement, the court is obligated to publicise the settlement for a minimum of 30 days. Following the period of announcement, the court may proceed to issue a conciliation statement once the settlement agreement is ascertained to align with the public interest. Conversely, if the settlement agreement contradicts public interests, the court shall continue to proceed with the hearing and trial of the case.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

In the context of the Chinese civil procedure system, there is no concept exactly equivalent to strike-out or summary judgment which is commonly found in common law jurisdictions. Once a lawsuit is filed by the plaintiff and subsequently accepted by the court, the pertinent dispute is

typically addressed through a court trial. In this regard, the defendant is generally precluded from unilaterally wiping out the dispute or halting the legal proceeding entirely prior to the substantive trial stage.

Nevertheless, a lawsuit can be dismissed during the proceedings if the statutory conditions for filing a lawsuit have not been met. For example, on one hand, the defendant holds the right to challenge the court's jurisdiction if a valid arbitration agreement between the parties exists, which may potentially exclude the court's jurisdiction. On the other, if the court determines that the filing of a lawsuit fails to satisfy the stipulated statutory conditions in the Civil Procedure Law, it can either decline to accept the case or issue a civil ruling to dismiss the case after acceptance. These statutory conditions for initiating a lawsuit include:

- the plaintiff must be a citizen, legal entity or any other organisation directly connected to the case;
- there should be a clearly identifiable defendant;
- the plaintiff must present specific claims, facts, and reasons pertaining to the case;
- the case falls within the realm of civil actions and under the jurisdiction of a specific court; and
- the case is not filed repeatedly.

Furthermore, the Civil Procedure Law establishes a general framework for the summary procedure. Courts at the primary level can apply simplified procedure rules when dealing with cases involving straightforward facts, unambiguous rights and obligations, and minor disputes. However, since antitrust litigation shall be subject to the jurisdiction of the courts at intermediate level

or above, simplified procedure rules cannot be applied in antitrust disputes.

4.2 Jurisdiction/Applicable Law

Jurisdiction

The 2.2 **Specialist Courts** provides a comprehensive overview of the hierarchical jurisdiction regulations pertinent to antitrust lawsuits. As to territorial jurisdiction, Article 4 of the Judicial Interpretation of Monopoly-related Dispute Cases stipulates that the territorial jurisdiction of civil monopoly disputes shall be determined in accordance with the specific details of the case and pursuant to the provisions of the Civil Procedure Law and the relevant judicial interpretations on the jurisdiction for tort disputes, contractual disputes, etc.

Specifically, nuanced distinctions arise in the rules applicable to anti-monopolistic disputes categorised as either tort or contract disputes. In scenarios where an anti-monopolistic dispute can be classified as a tort dispute, the court at the place where the tort occurs or the defendant's domicile is located shall have the jurisdiction over the case. Concurrently, an anti-monopolistic dispute categorised as a contract-based issue shall fall within the jurisdiction of the court at the place where the relevant contact is performed or the defendant's domicile is located.

Applicable Law

The 2022 amendment to the Anti-monopoly Law stands as the primary legislative framework governing monopolistic behaviours currently, which provide the legal foundation for concerned parties to bring civil lawsuits related to monopolistic practices. As articulated in Article 2 of the Anti-monopoly Law, the legislation applies to monopolistic activities within the territory of China, as well as to monopolistic behaviours outside the territory of China that have the effect of preclud-

ing or restricting competition within the domestic market.

4.3 Limitation Periods

According to the Civil Code and the Judicial Interpretation of Monopoly-related Dispute Cases, the statute of limitations for relevant parties to file claims for damages arising from monopolistic conducts in civil litigation is three years from the date on which the plaintiff became aware or should have reasonably become aware of the harm to its rights and interests, as well as the identity of the party responsible. Lawsuits pertaining to claims where the rights and interests in question have been compromised for a period exceeding 20 years will not be afforded protection by the court, unless an extension is specifically granted by the court upon application by the relevant parties and under certain exceptional circumstances. Moreover, the limitation periods can be subject to suspension or interruption where the plaintiff reports the monopolistic conduct to the authorities.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In China, a disclosure or discovery mechanism equivalent to those found in common law jurisdictions is not available the civil lawsuit proceedings. This means that litigants are not legally obligated to proactively present evidence to the court or the opposing parties, nor do they have the right to compel the opposing parties to disclose evidence during the course of the proceeding. Instead, the Civil Procedure Law and supporting regulations have instituted a comprehensive framework of evidence rules for civil litigation, which in certain respects, can lead to effects similar to those achievable through the disclosure or discovery mechanism.

The foundational principle governing the burden of proof in Chinese civil proceedings is that litigants must provide evidence to support their claims or counter the arguments put forth by the opposing parties. Failure to provide appropriate evidence can expose a litigant to the risk of adverse consequences and even losing the case. During the pre-trial stage, the court will organise specific rounds of evidence exchange between the litigants to clarify both parties' viewpoints and summarise the central focus of the dispute. Moreover, at the trial stage, the evidence should be presented in court and subject to cross-examination by the litigants.

Furthermore, certain evidence rules within China's civil proceedings may be perceived as a somewhat analogous yet confined disclosure or discovery mechanism to a certain extent. For instance, in cases where documentary evidence is within the control of the opposing party, the burden-bearing party may submit a formal application to the court, seeking an order to request the opposing party to disclose such documentary evidence. The applicant must provide within this written application the precise description of the documentary document intended for submission, the pertinent facts intended to be proven, the evidence substantiating the opposing party's control over the documentary evidence, as well as the necessity of the submission of this documentary evidence. In situations where such application is accepted and approved by the court yet the opposing party refuses to provide the documentary evidence as requested without justifiable reasons, the court holds the authority to directly affirm the accuracy of the content within the documentary evidence, as contended by the applicant. Similarly, in cases where a party possesses evidence but unreasonably withholds it, and the opposing party asserts the evidence to be adverse to the possessor, the court retains

the right to declare the establishment of the said assertion.

5.2 Legal Professional Privilege

At present, China has not yet introduced the legal professional privilege system within the context of civil lawsuit proceedings. Therefore, even though lawyers are obligated to maintain the confidentiality of state secrets, trade secrets, and other information that clients prefer not to divulge, the court retains the authority to request litigants to submit such pertinent evidence if it deems it necessary. Nevertheless, as stipulated in the Judicial Interpretation of Monopolistic Disputes, when dealing with evidence involving state secrets, trade secrets or any other sensitive content, the court may employ protective measures based on its authority or upon the application of the litigants. These measures may include private hearings, limitations on replication, exclusive disclosure to attorneys, or even mandating litigants to commit the obligations in a letter of confidentiality.

5.3 Leniency Materials/Settlement Agreements

Currently, there are no established laws or regulations to definitively address the question of whether leniency or settlement materials submitted to antitrust enforcement authorities can be legally shielded from disclosure during civil proceedings. Therefore, similar to other types of evidence, and in accordance with applicable civil litigation rules, the court theoretically can request litigants to provide leniency or settlement materials if such materials are necessary to ascertain the facts of the case. Nevertheless, in judicial practice, as of now, there hasn't been an instance in judicial practice where a court has requested litigants to provide leniency or settlement materials as evidence in an antitrust lawsuit.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness testimony constitutes one of the eight admissible forms of evidence in a civil lawsuit. Witnesses may be summoned to provide testimony during the court trial, either at the behest of the litigants' application or at the court's own initiative under its official authority. In this context, witnesses possessing knowledge of the case's facts are legally bound to testify before the court.

In principle, witnesses should appear in court trial, furnish testimony, and field inquiries from both judges and litigants, unless there exist exceptional statutory circumstances. Should witnesses confront challenges that hinder their physical presence in court—such as illness, transportation issues, or other unforeseen events—they can, with the court's consent, deliver their testimony through methods like written statements, audio-visual transmission technology, or audio-visual materials.

6.2 Expert Evidence

The involvement of expert witnesses in cases related to monopolistic disputes, particularly when these disputes involve the abuse of market dominance, is quite commonplace. Antitrust litigation is a highly specialised field that requires intricate knowledge of complex commercial, financial, and accounting matters. To establish crucial elements such as the definition of relevant market, the recognition of dominant position, the occurrence of economic damages, and the competitive impact of monopolistic behaviour, conducting economic analysis based on extensive data review, modelling, and statistical reports is often imperative. Therefore, the contribution of expert witnesses holds greater

significance in antitrust litigation and can potentially impact the outcome of the case.

7. Damages

7.1 Assessment of Damages

According to the Judicial Interpretation of Cases Related to Monopoly Disputes, damages in civil lawsuits related to monopolistic behaviours are granted solely to the plaintiff as compensation for their incurred economic losses attributed to the alleged monopolistic conduct. Consequently, punitive or exemplary damages are generally not applicable in such disputes.

The plaintiff bears the legal responsibility to furnish evidence, which might include financial records, accounting documentation, pertinent contracts, etc, in order to substantiate the precise amount of economic losses due to the alleged monopolistic behaviours. From the perspective of judicial practice, The SPC has acknowledged in a number of cases (eg, Weihai Hongfu Property Co, Ltd v Weihai Water Group) that the amount of damages in monopoly cases could be calculated by contrasting the expected transaction amount of the relevant party in a genuinely competitive market with the actual transaction amount influenced by the alleged monopolistic behaviour. Furthermore, justifiable costs incurred by the plaintiff for investigating and addressing the alleged monopolistic behaviours can also be integrated into the overall damages calculation.

Moreover, the SPC Draft Judicial Interpretation seeks to provide more clarity on the assessment of damages in cases where determining economic losses proves challenging. Under Article 45, if the plaintiff can present evidence demonstrating incurred losses but establishing

the precise damages remains unfeasible, the court possesses the authority to determine the damages amount based on consideration of the nature, extent, duration of the alleged monopolistic behaviours, as well as the circumstances under which benefits were derived from the alleged monopolistic practices.

7.2 “Passing-On” Defences

The clear provision on pass-on defence in an antitrust case is absent from the existing legal framework of China. However, the SPC Draft Judicial Interpretation have added the provisions regarding pass-on defence into the legal landscape. As articulated in Article 45, when a plaintiff seeks compensation from the defendant, and the defendant is able to substantiate that the plaintiff has transferred a portion or the entirety of its economic losses to third parties, the court may deduct the transferred losses when determining the amount of compensation.

7.3 Interest

Existing laws and regulations do not expressly clarify whether pre-judgment interest can be incorporated into the damages awarded in cases of monopolistic practice. In principle, the difficulty of assessing the amount of economic losses and the applicable compensation duration, particularly in cases concerning monopolistic acts that entail tortious disputes, seemingly engender a lack of well-founded grounds for determining the pre-judgment interest in judicial practice. However, the SPC has previously indicated, in certain tort cases, that if the amount of damages and the timing for calculating the corresponding interest are both ascertainable, such interest should be considered as a component of the plaintiff’s financial losses, thereby making it possible for the plaintiff to claim for the pre-judgment interest pertaining to the damages.

Regarding post-judgment interest, in instances where the infringer fails to fulfill the compensation obligations within the designated timeframe as outlined in the court’s judgment, the infringer shall pay an amount equal to double the interest accrued on the damages during the deferred performance period.

8. Liability and Contribution

8.1 Joint and Several Liability

As per Article 1168 of the Civil Code, it is established that when two or more undertakings engage in a tortious act collectively, resulting in harm to third parties, they are bound by joint and several liability. Therefore, if the alleged monopolistic behaviours have been committed jointly by multiple undertakings, such as in cases where multiple undertakings entered into a horizontal monopoly agreement or jointly conducted abuse of market dominance, the plaintiff who suffered damages may claim for joint and several liability against such undertakings.

8.2 Contribution

There exists the concept of right of contribution within the civil proceeding context in China. As articulated in Article 178 of the Civil Code, the apportionment of liability shares among parties jointly and severally liable shall depend on the magnitude of their respective responsibilities. In instances where the actual amount of damages assumed by a party jointly and severally liable exceeds the portion that the party should have assumed according to its gravity of liability, the party shall be entitled to claim indemnities from other parties joint and severally liable.

9. Other Remedies

9.1 Injunctions

In the realm of Chinese civil proceedings, an equivalent concept of injunction, as applicable in common law jurisdictions, does not exist. Permanent relief measures, including actions like halting infringement and compensating for losses in Chinese civil monopoly cases, are generally established by the court through the court trial and final judgment. Concurrently, interim reliefs, commonly referred to as preservation measures in China, can also be adopted during or preceding civil proceedings.

As stipulated by the Civil Procedure Law, preservation measures fall into two categories; preservation during litigation and pre-litigation preservation. Regarding the former, when a defendant's actions or other factors might complicate the future enforcement of a judgment or cause harm to the plaintiff, the court can, upon the plaintiff's application or at its own discretion, decree the preservation of the defendant's assets or issue orders prohibiting certain acts.

Furthermore, during the pre-litigation phase, parties retain the right to seek court-ordered preservation when urgent circumstances imperil their legitimate rights and interests, potentially leading to irrevocable harm if preservation measures are not implemented. For pre-litigation preservation applications, the provision of a guarantee by the applicant is necessary. In contrast, for preservation during litigation, the court may decide to mandate the applicant to furnish a guarantee based on the actual circumstances of the case.

9.2 Alternative Dispute Resolution

Arbitration, court mediation, people's mediation and commercial mediation represent prevalent

avenues of alternative dispute resolution for addressing civil conflicts.

Arbitration stands as a resolution mechanism contingent upon the parties' mutually agreed arbitration contract. However, given that monopoly disputes encompass market competition that may affect public interest matters, exceeding the typical scope of arbitration clauses, the SPC has stated that "arbitration clauses cannot automatically preclude court jurisdiction" in numerous instances. Consequently, arbitration's applicability to monopoly disputes tends to be limited within the Chinese judicial practice.

Mediation, distinguished by its voluntary nature, offers a potential way for addressing monopolistic disputes. Court mediation, serving as a fundamental part of litigation proceedings, can be organised by the court throughout the whole litigation process. Moreover, people's mediation and commercial mediation are arranged by entities like people's mediation committees and commercial mediation organisations, well-established in China. Following mediation efforts, parties can voluntarily finalise mediation agreements to resolve disputes; any breach of such agreements can subsequently be brought before the court for further dispute resolution. While mediation is widely recognised as a convenient and cost-effective route for conflict resolution, its utilisation in civil monopoly cases remains rare, largely due to the intricate nature of such disputes, which often makes achieving consensus between parties become quite difficult.

10. Funding and Costs

10.1 Litigation Funding

Litigation funding of civil claims is less evolved in China, while the law has not provided any provisions on it. In practice, there is no well-known antitrust case where third-party funding has been adopted.

10.2 Costs

The costs in a civil lawsuit could consist of the litigation fee charged by the court, the attorneys' fee and other reasonable expenses arising from the lawsuit, such as notarisation fees, travel expenses, etc.

The Judicial Interpretation of Monopoly-related Dispute Cases provides that the court may, upon the request of the plaintiff, include reasonable expenses incurred by the plaintiff for investigating and preventing the monopolistic act in the scope of losses for compensation. The typical expenses that may be supported in judicial practice include the court fees, investigation and evidence collection fees (eg, notary fees, document copy fees, appraisal fees) and attorneys' fees.

Normally, courts will not order the plaintiff to provide security for the defendant's costs. An exception is that the plaintiff applying for pre-litigation preservation should provide for security.

11. Appeals

11.1 Basis of Appeal

As with other types of cases, against a first instance judgment of a monopoly-related dispute case, the plaintiff and the defendant shall both have the right to file an appeal with the next higher-level court within the prescribed time limit after the service of the written judgment, except if it is made by the SPC. An appeal can be filed based on the grounds of wrongful application of law, wrongful finding of fact and procedural violation.

It should be noted that according to the Provisions of the Supreme People's Court on Several Issues concerning the Intellectual Property Division, the Intellectual Property Division of the Supreme People's Court has the jurisdiction to hear the appeals of the civil monopoly cases whose first instance trial has been concluded.

Trends and Developments

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Zhong Lun Law Firm is a leading full-service law firm in China with over 2,500 professionals including more than 420 equity partners working in 18 offices in Beijing, Shanghai, Shenzhen, Guangzhou, Wuhan, Chengdu, Chongqing, Qingdao, Hangzhou, Nanjing, Haikou, Tokyo, Hong Kong, London, New York, Los Angeles, San Francisco and Almaty. Zhong Lun offers high-quality legal services across a wide range of industries and sectors based on its special-

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A Peek into Anti-Monopoly Litigation in China

The past year of 2022 and the first half of 2023 has witnessed a fruitful agenda of anti-monopoly legislation. On 1 August 2022, the new amendments to the PRC Anti-Monopoly Law (the “AML Amendments”) came into effect, signifying the start of a new era of China’s anti-monopoly legislation. Shortly after, four detailed ministerial regulations took effect on 15 April 2023, together with several other supporting regulations in progress.

Correspondingly, the word fruitful also aptly describes the judicial developments of anti-monopoly litigation. During the past year and a half, the PRC Supreme People’s Court (the “SPC”) has released the Draft Provisions on Several Issues concerning the Application of Laws in the Trial of Monopoly-related Civil Dispute Cases (the “SPC Judicial Interpretation Draft”) to the public for consultation, along with multiple batches of typical monopoly-related dispute cases in a row, marking a new peak of the judicial developments of anti-monopoly litigation in China. By looking into such significant events, this article aims to provide readers with an overview of the highlights in 2022 and an outlook on the trends in 2023.

Introduction: increasingly active judicial activity

Rising numbers of monopoly-related dispute cases

According to the SPC, during the period from the establishment of the SPC Intellectual Property Tribunal on 1 January 2019 to the date of press release on 20 April 2023, a total of 156 monopoly-related dispute cases have been accepted, while the 2022 annual report, released by the SPC Intellectual Property Tribunal on 30 March 2022, states that 83 monopoly-related dispute cases were accepted in 2022. Therefore, it is evident that the number of monopoly-related dispute cases accepted by the SPC has experienced a rocket increase in 2022, accounting for more than a half of the cases (83 out of 156).

Frequent publications of typical monopoly-related dispute cases

Since the SPC published monopoly-related dispute cases on 27 September 2021 for the first time, it has subsequently released another three batches in a row during the past year of 2022 and first half of 2023:

- On 17 November 2022, the SPC presented ten typical monopoly-related dispute cases in a press conference.

- On 30 March 2023, the SPC published four typical monopoly-related dispute cases on its official website.
- On 30 March 2023, the SPC released the Summary of Judgments of the Intellectual Property Tribunal of the Supreme People's Court (2022) on its website. This summary includes 12 typical monopoly-related dispute cases and corresponding key points of judgments.

Although judicial precedents in China are not a kind of formal source of law and thus are not binding on subsequent court judgments, the publication of typical cases has become an important means for courts to interpret the law and is of great significance for reference in China's judicial practice. The same is also true for anti-monopoly litigation in China.

Proposed amendments to the original SPC judicial interpretation

In order to adapt to the AML Amendments, the SPC Judicial Interpretation Draft was released on 18 November 2022. This draft serves as a restatement and replacement to the original SPC judicial interpretation issued a decade ago. It includes not only more detailed and enriched provisions on anti-monopoly civil litigation from both a procedural and a substantive perspective, but also many new provisions tailored to the development over the past decade, such as those in the thriving digital markets. Regarding the anti-monopoly civil litigation, the SPC Judicial Interpretation Draft marks a significant progress worth further attention.

Insights: Review and Forecast

Responding to concerns about public welfare

As indicated in a range of typical cases, the SPC paid close attention to monopoly-related disputes in the fields closely related with people's

livelihood and public utilities, such as driving school, preschool education, concrete supply, water supply and vehicle testing. Given that anti-monopoly in such fields is a public focus at the moment and that the State Administration for Market Regulation is also carrying out ongoing crackdown actions since the beginning of this year, it can be predicted that the SPC will persist in adopting a cautious approach and applying stringent standards when dealing with monopoly-related disputes concerning public welfare.

Attention paid to the protection of IP rights

The proper legal boundary for the exercise of exclusive civil rights such as patent rights (and other IP rights) is another significant focus demonstrated by the SPC in typical cases. The following cases highlight key aspects related to the exercise of exclusive civil rights, particularly patent rights:

In the horizontal monopoly agreement dispute case re “off-circuit tap-charger patent infringement”, the SPC clarified the criteria for analysing horizontal monopoly agreements concerning the exercise of patent rights. It pointed out that a settlement agreement reached as a result of a patent infringement dispute may constitute a horizontal monopoly agreement if it lacks substantial connection with the protection of patent and is aimed at dividing the sales market, limiting the production and sales quantity of goods, fixing prices, etc, under the cover of patent protection.

In the patent infringement dispute case re “Saxagliptin tablets patent reverse payment agreement”, the SPC emphasised the necessity of anti-monopoly review on the pharmaceutical patent reverse payment agreement in cases with non-monopoly cause. This is the first case in which a Chinese court has reviewed a phar-

maceutical patent reverse payment agreement from the anti-monopoly perspective. Although the SPC did not actually conclude whether the agreement in question is in violation of the AML, it did establish a basic framework and methodology for such review, which is of great importance to courts' future judicial activities as well as pharmaceutical enterprises' anti-monopoly compliance.

In the market dominance abusing dispute case re “game pictures of Chinese Football Association Super League (CSL)”, the SPC clarified that the exclusivity of certain civil rights itself is not the object of prohibition under the AML. It ruled in the case that the exclusivity for rights to the operation of sports event and relevant resources is one of the intrinsic attributes of such rights themselves, thus should not be prohibited by the AML unless the rights are improperly exercised.

Furthermore, the SPC Judicial Interpretation Draft also includes IP-related provisions in different sections, such as the relevant market definition, monopoly agreement and abuse of market dominance. In addition to terms and views covered by the Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of Intellectual Property Rights and the Anti-monopoly Guidelines for the Field of Intellectual Property Rights (which will not be discussed in detail in this article), Article 23 of the SPC Judicial Interpretation Draft specifies that a pharmaceutical patent reverse payment agreement may be in violation of the AML.

Recently the interaction between anti-monopoly issues and IP protection issues has become a common scenario and more relevant disputes cases are expected to arise in the coming years. The SPC and other Chinese courts will watch

closely, promoting innovation while maintaining zero tolerance for anti-competitive behavior.

Jurisdiction over monopolistic conduct outside China

Article 2 of the AML establishes the principle of long-arm jurisdiction, stating that “the AML shall also apply to monopolistic conducts outside the territory of the People’s Republic of China if they eliminate or restrict market competition in China”. Such extraterritorial application of the AML is not a rare thing to the SPC, especially when it comes to Standard Essential Patent (SEP) disputes. For instance, in the market dominance abusing dispute case re “TCL vs. Ericsson” and in the market dominance abusing dispute case re “Oppo v Sisvel”, the SPC pointed out that the concerned SEP license disputes shall have the direct, substantial and significant effect of excluding or restricting the licensee from participating in the competition in domestic market, and thus the concerned Chinese court shall have jurisdiction over such cases.

Based on the principle stated in the PRC Civil Procedure Law and its judicial interpretation, the SPC Judicial Interpretation Draft specifies in Article 7 on the matter of court’s jurisdiction over monopolistic conducts outside China. “Where a monopolistic conduct outside China excludes or restricts competition in domestic market and the plaintiff initiates a civil lawsuit in accordance with the AML against a defendant who has no domicile in China, the people’s court in the place where the result of the direct and substantial impact on domestic market competition occurs shall have jurisdiction over such case. If the place where the result occurs is difficult to determine, then the people’s court at the place where exists other appropriate connection with the dispute or where the plaintiff is domiciled shall have jurisdiction”.

Therefore, plaintiffs in China will stand in a better position to protect their rights through anti-monopoly litigation against foreign defendants, as will the Chinese courts to exercise jurisdiction over overseas monopolistic conducts.

New rules of evidence in follow-up anti-monopoly civil litigation

In the vertical monopoly agreement dispute case re “Miao v General Motors”, the SPC clarified the plaintiff’s burden of proof in follow-up anti-monopoly civil litigation. If an administrative penalty decision has not been challenged thorough administrative reconsideration or judicial appeal within the statutory time limit or has been confirmed by the effective judgment of the people’s court, then in the subsequent anti-monopoly civil litigation following such administrative penalty decision, there is no need for the plaintiff to provide further evidence to prove the existence of monopolistic conduct, unless in the case of sufficient evidence to the contrary. Such adjudication views presented by the above case have also been directly incorporated into the Article 11 of the SPC Judicial Interpretation Draft.

The implementation of such new rules is expected to lead to a surge in the anti-monopoly litigations. On one hand, the demonstration effect of the case is likely to trigger a boom in follow-up anti-monopoly civil litigations; on the other hand, we may also expect an increase to the anti-monopoly administrative litigations as more to-be-penalized parties are inclined to challenge the administrative penalty decisions through judicial appeal so as to avoid any follow-on damage claims.

Clarification on more substantive legal matters in anti-monopoly litigation

The typical cases and the SPC Judicial Interpretation Draft also elaborate on a number of

substantive legal matters. This article excerpts some noteworthy parts below for reference.

Sales amount in the previous year

The SPC provided a principal method to determine the “previous year” in one of the typical cases. The “sales amount in the previous year” may sometimes be used as the basis to calculate the amount of anti-monopoly administrative penalty and therefore the determination of the exact “previous year” can be a vital issue. Generally, the “previous year” usually refers to:

- the last fiscal year previous to the time when the anti-monopoly administrative investigation was initiated;
- the last fiscal year previous to the time when the monopolistic conduct ceased if the cessation is before the investigation; or
- the very year when the monopolistic conduct existed if it started and ended in the same year. To our understanding, this principle is also consistent with common practice in past AML enforcement.

Joint market dominance

In another typical case, the SPC further clarified the conditions for determining joint market dominance. Apart from the concerned undertakings’ respective and aggregate market shares, the court should also examine the consistency of such undertakings’ behaviors, ie, whether they have taken the same actions with respect to relevant goods or services. While the SPC Judicial Interpretation Draft provides that the determination of joint market dominance can be overturned if:

- there exists substantial competition between the concerned undertakings; or

- the concerned undertakings as a whole are subject to effective competition from other undertakings in the relevant market.

Conduct indirectly restricting transactions

The SPC ruled in a market dominance abusing dispute case that conduct restricting transactions can be explicit and direct, as well as implicit and indirect. If an undertaking with market dominance (especially the public utilities operators) only recommends specific transaction partners or only discloses the information of specific transaction partners and it is difficult for the transaction counterparty to freely choose other partners, it can usually be preliminarily determined that such undertaking has essentially implemented conduct indirectly restricting transactions.

As one of the most dynamic components of the AML mechanism, China's anti-monopoly litigation has maintained strong momentum in the past year and a half against the background of the AML Amendments and detailed ministerial regulations and will continue to develop rapidly in the future. With the continuous judicial interpretation through both typical cases and the proposed judicial interpretation draft, the SPC will actively facilitate the clarification on the application of the AML, effectively enhance the consistency of the administrative enforcement standards and judicial standards, and continuously provide valuable guidance for undertakings seeking compliance with the AML, especially for those who are engaged in business fields of close concern as mentioned above.

ECUADOR

Law and Practice

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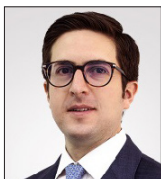
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11.1 Basis of Appeal p.113

Robalino Abogados has more than ten competition lawyers and economists in its five offices in Quito, Guayaquil, Cuenca, Manta, and Machala. Robalino provides sophisticated, solution-oriented advice to clients in a wide variety of industries, on all aspects of Ecuadorian and Andean competition law, including M&A, joint ventures and strategic alliances, government investigations, antitrust litigation, leniency agreements, and counselling. Large corporations and international firms rely on Robalino for guidance on legitimate arrangements between competitors, product distribution systems, and

navigation through complex antitrust investigation including cartels and abuse of dominance, unfair trade, and gun jumping investigations. The firm has unique experience representing buyers in pre-merger clearances in complex markets. Its aim is to provide comprehensive and responsive counsel to its clients with international standards. Robalino's antitrust lawyers include several academics, counting Daniel Robalino who leads the Ecuadorian Institute of Competition Law, and the likes of Fausto Alvarado, the first chief of the competition authority.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Ecuador enacted the Organic Law for Regulation and Control of Market Power in 2011 (“Ecuadorian Competition Law”). The agency, currently named the Superintendency of Economic Competition, was created in 2013. Thus, this year marks ten years of antitrust enforcement with a law that suffered several amendments and with an agency that has had three different chairpersons.

Within this first ten years, antitrust litigation has faced several hurdles in Ecuador due to:

- the embryonic experience of the local authority; and
- the complexities of the Ecuadorian economy that is populated with oligopolist markets, protectionism policies, and sector-specific regulation.

Much of the litigation in this area involves complaints between competitors for alleged unfair competition practices, which captures a large part of the authority’s time and resources. This is because the Ecuadorian Competition Law comprises antitrust and unfair competition matters. However, the cost of investigation of unfair competition practices is reduced since it is not necessary to address relevant market definition or complex econometric tests. Many litigations began with claims presented by consumers.

In matters strictly related to economic competition, there are several ongoing litigations involving horizontal and vertical agreements, abuses of dominance, and gun jumping. Also, every day it is ever more common to see litigation for preventive measures and actions to block mergers.

Actions to block mergers are not specifically provided for in the Ecuadorian Competition Law but are addressed under general administrative law principles.

Robalino represents several clients in these proceedings and has been able to appreciate firsthand the way in which these proceedings are bogged down by the authority’s inexperience, as well as a lack of resources to achieve comprehensive economic analysis.

To mitigate such complexities, the local authority, the Superintendency of Economic Competition, has issued a series of guidelines aimed at generating greater certainty with respect to its actions, as well as a better understanding of the authority’s approach to the analysis of anti-competitive conduct.

1.2 Other Developments

There have been several attempts to separate unfair competition regulation from economic competition, through two separate laws. This will provide focus for the Superintendency of Economic Competition’s efforts regarding economic competition matters exclusively.

The last amendment to the Ecuadorian Competition Law was published in the official gazette in May 2023. However, the published text has inconsistencies with a presidential veto that required proof of consumer damage in cases of abuse of market power, among other relevant and sensitive reforms that were not published. This triggers constitutional concerns in relation to the lawfulness of the published amendment.

The rationale behind these legislative attempts is underpinned in unfair competition, which almost exclusively orbits around private interests’ pro-

tection, rather than competition, consumer welfare, or economic efficiency.

However, the Superintendency of Economic Competition has opted to propose a sort of hybrid system, whereby acts of unfair competition that affect consumers' rights (in general) or somehow distort competition, remain under their control.

In relation to gun-jumping litigation, there are several developments of recent case law issued by the competition agency. For instance, conglomerate mergers are no longer subject to control and thus pre-merger filing is not needed.

In relation to abuse of market power, horizontal and vertical restraints, and cartels, there are very few investigations. Some of them have concluded with fines against the undertakings. However, most of the fines imposed by the Ecuadorian Competition Agency have been overturned by the administrative tribunals of the constitutional courts as a result of due process matters or because of inadequate application of the law.

The future of this discussion remains uncertain, considering that only in November 2023, Ecuador will have a new congress to review these bills. Also, the office term of the current chief of the Superintendency of Economic Competition will terminate in November 2023, and thus a new authority will likely be nominated by the coming government.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Ecuadorian Competition Law is administrative law and thus is enforced by an administrative agency rather than courts. The fines imposed

by the Ecuadorian competition agency are collected – exclusively – by the agency in benefit of the national treasurer. Hence, claimants are not able to recover any damage from the administrative fines.

Nonetheless, Ecuadorian Competition Law, in Article 71, provided the legal basis for a claim for damages for breach of competition law. Article 71 of the Ecuadorian Competition Law provides for follow-on damage claims and therefore standalone damage claims are not available in Ecuador.

This has been confirmed by the courts in *Seitur v Carlson Wagonlit Travel (CWT)*. In this case the claimant intended a standalone action for alleged unfair competition practices regulated in the Ecuadorian Competition Law and in the earlier Intellectual Property Law.

On this matter, there is an ongoing academic discussion that argues that Ecuadorian civil law would allow standalone damage claims, since many anti-competitive conducts tantamount to civil offences that generate tort liability. The final resolution in *Seitur v CWT*, to be granted by the Supreme Court, may settle the debate on the matter.

2.2 Specialist Courts

There are no specialised competition courts and/or judges, although necessary. However, since competition law is administrative law (*derecho administrativo sancionador*), the Administrative Tribunals are competent to review final decisions issued by the Superintendency of Economic Competition, as well as from other control agencies. Follow-on damage claims shall be filed before civil courts through expedited processes.

In relation to the administrative investigation that is held in the Superintendency of Economic Competition, the investigation is brought by the prosecution team of the agency before an administrative tribunal named the First Instance Commission. This Commission is comprised by competition lawyers and economists with previous experience within the agency.

Additionally, several cases enforced by the Ecuadorian competition agency (Superintendency of Economic Competition) have been challenged before the constitutional courts through constitutional protection actions, considering contraventions of due process by the enforcement agency. The Superintendency of Economic Competition has a proven track-record in committing due process contraventions or inadequate application of the law and this is a major concern for follow-on damage actions. Without a definitive decision in relation to antitrust litigation it is not feasible to pursue damages through follow-on actions.

2.3 Decisions of National Competition Authorities

The Ecuadorian Superintendency of Economic Competition is an administrative authority, whose acts can be challenged before local courts, specifically before administrative tribunals. Although, all of the Superintendency of Economic Competition's decisions are binding until overturned by administrative tribunals, or their effects are suspended by constitutional courts.

Regarding damages, Ecuadorian competition law does not provide for the participation of the Superintendency of Economic Competition as a party to follow-on damage claims. However, there is no provision in the Ecuadorian legislation that prevents the Superintendency of Economic

Competition from being summoned to follow-on damage claims to provide support in technical terms, given that local courts have no expertise in competition matters.

Finally, it is relevant to consider that Ecuador is a part to the Andean community. Thus, the decisions issued by the General Secretariat and the Andean Tribunal are binding to the local courts.

2.4 Burden and Standard of Proof

Pursuant to Article 48 of the Ecuadorian Competition Law, the competition agency bears the burden of proof within the administrative process (investigation of anti-competitive or unfair competition practices), unless overturned due to evidence tempering or obstruction of the process.

The standard of proof is based on the verification of the following elements:

- existence of anti-competitive conduct; and
- actual or potential effects on competition, economic efficiency, or general welfare.

The presidential veto in the May 2023 reform to the Ecuadorian Competition Law modified the standard of proof in litigation related to abuse of market power providing demonstration of consumer damages. This veto was not published in the official gazette and thus there are constitutional concerns of the lawfulness of the law.

The defendant has the burden of proof in passing-on defence under procedural rules. However, there is no relevant case-law developed to settle academic discussions around pass-on defence and applicable standard.

2.5 Direct and Indirect Purchasers

Pursuant to Article 71 of the Ecuadorian Competition Law, any person (or company) affected by anti-competitive conduct may file a follow-on claim for damages before civil courts and through expedited proceedings (*vía verbal sumaria*).

Indirect purchasers or consumers, on their own or through an association of consumers, are entitled to file the follow-on actions as long as they can prove:

- the existence of damage; and
- a link between the damage and the anti-competitive conduct executed by the defendant.

However, to successfully bring a follow-on action before civil courts it is necessary to have a previous enforcement and final decision from the Superintendency of Economic Competition against the defendant.

2.6 Timetable

Investigation of antitrust practices, in the administrative stage before the Superintendency of Economic Competition, can take approximately 18 months divided in three stages:

- preliminary investigation;
- formal investigation; and
- administrative trial before the First Instance Commission.

The resolution issued by the First Instance Commission can be appealed before the chairperson of the agency (Superintendent) adding approximately two additional months before resolution. If the final administrative resolution is not challenged before the administrative tribunal by the defendant, then the claimant may bring follow-on actions to claim damages.

Since damage claims must be brought before civil courts, the typical duration of proceedings from the issuance of a claim through to trial can take up to two years in the first instance and are subject to horizontal and vertical recourses, including appeal and cassation before higher courts.

Given that damage claims have a follow-on nature under the Ecuadorian Competition Law, stay proceedings orders are not applicable. Considering timing and costs of follow-on actions, as well as a lack of predictability of the resolution, usually consumers don't have incentives for pursuing follow-on actions.

3. Class/Collective Actions

3.1 Availability

Ecuadorian regulations do not provide for specific mechanisms to implement class actions in Ecuador.

Ecuadorian Competition Law does not provide anything on class or collective actions, therefore opt-in and opt-out rules do not apply. However, under Article 51 of the General Code of Procedure (COGEP), two or more persons can pursue a joint action when their claims are related by cause or object.

Additionally, as per Consumer Law provisions, it can be concluded that a sort of joint action can be presented on an opt-in basis, where a common proxy represents an association of consumers (see **3.2 Procedure**).

If claimants can demonstrate:

- the existence of damage;

- a causal link between the alleged damage and the anti-competitive conduct; and
- foreseeability of the damage,

joint actions can be brought by direct and indirect purchasers.

3.2 Procedure

Ecuadorian regulations do not provide for specific mechanisms to implement class actions in Ecuador. However, under Article 51 of the COGEP, two or more persons can pursue a joint action when their claims are related by cause of object.

Nonetheless, under Article 62 of the Consumer Defence Law, consumer associations can act as proxy of associated members. A certification is needed for its legal capacity to be recognised and each consumer must opt in. Additionally, every consumer association must be registered before the corresponding ministry.

3.3 Settlement

There is a limited judicial oversight in the settlement of judicial actions. Thus, any settlement presented in the context of consumer association, or a joint consumer's action, must be approved by the court to be valid. Approval of the settlement ends the judicial process with effects.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Follow-on actions for damages are deemed in summary judgment (*vía verbal sumaria*) as provided in Article 71 of the Ecuadorian Competition Law in connection with Article 333 of the COGEP applicable to civil procedures.

The aforesaid provision orders a summary proceeding regarding all damages claims on competition matters and thus the civil judge is not able to discuss the merits of competition law, but only the link between the anti-competitive practice with the alleged damage.

Summary judgment in follow-on actions is subject to horizontal and vertical recourses, including appeal before higher courts. In the first ten years of enforcement of Ecuadorian Competition Law, no precedent of follow-on actions is available.

4.2 Jurisdiction/Applicable Law

In competition matters, the Superintendency of Economic Competition is the only controlling entity with jurisdiction over economic competition and unfair competition practices, thus is the only entity to define the existence of an infringement to the Ecuadorian Competition Law and therefore to sanction anti-competitive conducts carried out by any undertaking whose economic activities affect or may affect the Ecuadorian market. The Superintendency of Economic Competition forum jurisdiction applies within the national territory.

Regarding follow-on actions pursued by third parties, civil courts have forum jurisdiction as per Article 71 of the Ecuadorian Competition Law and civil procedure regulation. Thus, the competent judge will be the civil judge of the residency of the parties (personal jurisdiction). In case of conflict of personal jurisdiction, general procedural law provisions apply.

4.3 Limitation Periods

The Statute of Limitations applies both in administrative investigations before the Ecuadorian Superintendency of Economic Competition and in damages follow-on actions before civil courts.

The Superintendency of Economic Competition has four years to investigate and sanction infringements to the Ecuadorian Competition Law. The limitation counts from the day that the agency obtains knowledge of the contravention (non-continued practices) and in cases of continued practices (such as long-term cartels), the Statute of Limitations counts from the day of termination of the anti-competitive conduct.

On the other hand, the Statute of Limitations for follow-on damages actions is five years from the issuance of the final decision of the Superintendency of Economic Competition establishing the contravention to the Ecuadorian Competition Law.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In administrative proceedings, disclosure is mandatory as per Article 48 of the Ecuadorian Competition Law. To this end, the Superintendency of Economic Competition must guard the confidentiality of the disclosed information, in line with its internal regulations for classification of confidential information.

In the context of judicial proceedings, while there is no discovery as such, judges must order the production of public and private documents and/or any other evidence presented or requested by the parties to prove their allegations. General rules of civil procedure apply for follow-on actions.

5.2 Legal Professional Privilege

Documents can be withheld from disclosure in administrative proceedings carried out by the Superintendency of Economic Competition, in the following scenarios.

- When the document and/or information is considered privileged under the ethical guidelines of the Ecuadorian Bar (*Resolución 100A-2018 del Consejo Nacional de la Judicatura*). However, If the document was voluntarily submitted by the client, the privileged information is terminated and cannot be alleged.
- Other documents can be declared confidential within the administrative proceedings before the Superintendency of Economic Competition upon applicable guidelines, except for the defendant who will be granted access.

In judicial proceedings, it is not feasible to withhold information since all proceedings are public, except those related to national security and certain criminal offences.

5.3 Leniency Materials/Settlement Agreements

Leniency and settlement agreements with the Superintendency of Economic Competition are protected from disclosure.

Pursuant to the Leniency Regulation enacted by the Superintendency of Economic Competition in 2019, settlement agreements and any other document in the file of leniency applications are protected from disclosure. Therefore, disclosure of any document must be previously approved by the applicant.

It is worth noting that leniency agreements apply to horizontal and vertical agreements and are mainly designed as a method for cartel detection. However, for unilateral conducts the Ecuadorian Competition Law provides for cease-and-desist agreements. When cease-and-desist agreements are granted, a non-confidential summary is published in the official gazette of the Ecuadorian Superintendency of Economic

Competition explaining the reparatory actions to be carried out by the defendant in order to avoid payment of the applicable fines.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witnesses of fact are relied on in both administrative proceedings before the Superintendency of Economic Competitions as well as before the civil courts in follow-on damage claims.

One of the powers of the Superintendency of Economic Competition is to request witness statements regarding the facts under investigation. These statements can be provided in writing and orally. However, the cross-examination of witnesses is not expressly provided in the context of administrative proceedings before the Superintendency of Economic Competition and in fact cross-examination is not a common practice within the administrative proceedings before the Superintendency of Economic Competition. If required by the investigation team, witnesses can also be compelled to give evidence of their assertions.

Conversely, in the context of damages claims before civil judges, cross-examination of witnesses is possible. In this proceeding, witnesses can be also compelled to give evidence of their assertions upon request of the court or by the defendant.

6.2 Expert Evidence

It is a common practice to rely on expert witnesses within the administrative proceeding carried out before the Ecuadorian Superintendency of Economic Competition. Econometric expert witnesses are relied on in cartels, abuse of dominance, and merger control proceedings.

Expert witnesses do not need permission from the Superintendency of Economic Competition to act, but their report must adduce expert advice. The reports are not binding for the agency, but rather offer persuasive evidence. In the past year, several expert witnesses have filed reports in local litigation, including foreign experts in order to clarify interpretation of soft law cited by the agency.

Typically, in the context of administrative proceedings, evidence given by expert witnesses is presented by written statements. Rebuttal of this and any other evidence is done by written means and oral arguments presented by parties' representatives.

Conversely, in the context of damages claims before civil judges, evidence given by expert witnesses is presented by written statements and is subject to cross-examination. In cases of judicial proceedings, expert witnesses shall bear a registration and accreditation before the judiciary bench.

The concept of the "hot tub" – experts testifying concurrently – is not a common practice in Ecuador but there is no provision forbidding such a method during a hearing. It is also not a common practice to see joint statements by expert witnesses indicating the areas in which they agree/disagree in advance of a trial.

7. Damages

7.1 Assessment of Damages

Under Ecuadorian law, only compensatory damages, actual damages, and loss of profit are available in follow-on claims for anti-competitive practices. Punitive or exemplary damages are not available under Ecuadorian civil law.

However, it is necessary to explain that in the administrative proceeding before the Superintendency, the agency has power to impose the following fines:

- fines up to 12% of the gross sales to the undertakings; and
- fines to the executives that can amount to 200,000 times the basic salary.

Thus, the administrative fines can be considered exemplary to dissuade others in the commission of similar infringements. It is common for the Ecuadorian Superintendency of Economic Competition to aim for higher maximum fines when enforcing antitrust law, especially in cartels and gun-jumping investigations. Fines under Ecuadorian Competition Law can amount up to 12% of the defendant's gross turnover.

7.2 “Passing-On” Defences

Pass-on defence is not expressly provided by Ecuadorian law, however, it is not forbidden and thus is available in follow-on claims per the defendant's litigation strategy. However, there is no relevant case law developed in relation to this defence and thus academic discussion is not settled.

In relation to pass-on defence, the burden of proof is likely to become a major issue since, in Ecuadorian civil procedure, each party shall demonstrate its allegations and the defendant may not have enough evidence to support its position. Although, the defendant may require reasonable disclosure from the claimant per the general rules of civil procedure.

7.3 Interest

Given the nature of the proceedings for the compensation of damages before civil judges, no interest can be awarded since judges' deci-

sions will only conclude whether or not a plaintiff is entitled to compensation for damages and in what amount. Once the indemnity for damages is awarded, non-payment will generate interest that may be collected through an enforcement process.

8. Liability and Contribution

8.1 Joint and Several Liability

Liability is on a joint and several basis upon Ecuadorian Competition Law. Thus, Immunity provided through leniency settlements only covers administrative fines and sanctions within the administrative process without limitation to follow-on claims pursued by their direct purchasers.

Pursuant to Ecuadorian case law, one of the elements that must converge for damage compensation is a causal link between the damage and, in this case, a breach of Ecuadorian Competition Law. Therefore, there is no limitation on liability of immunity applicants towards their purchasers.

8.2 Contribution

Ecuadorian legislation does not provide for a procedure for bringing contribution proceedings against a third party. However, under general civil procedure rules, the defendant can bring a new action against the third party to “repeat” damages that were effectively paid on a joint or several basis (*acción de repetición*). There is no case law available in relation to antitrust or unfair competition infringements.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available in both antitrust administrative investigations and in follow-on damages actions before civil courts.

In administrative proceedings the Superintendency of Economic Competition may grant injunctive relief if the coexistence of two requisites is verified:

- periculum in mora or risk of procedural delay; and
- fumus boni iuris or likelihood of the merits of the case.

These precautionary measures are intended to prevent the effects of anti-competitive conduct from continuing. There is neither a need for prior notice to the defendant, nor is there a duty of full and frank disclosure.

Conversely, given the nature of the proceedings for the compensation of damages before civil judges, injunctive relief can be granted only to assure payment (ie, prohibition to sell or dispose assets). In this case, injunctive relief can be granted without prior notice to the defendant.

9.2 Alternative Dispute Resolution

There are no methods of alternative dispute resolution available in relation to infringements to the Ecuadorian Competition Law. Thus, control of antitrust infringements shall be deemed to be administrative proceedings before the Superintendency of Economic Competition exclusively, since the Ecuadorian Competition Law is administrative law and its enforcement is through public actions exclusively. There is no antitrust private enforcement available in Ecuador.

However, follow-on actions between private actors for damages (ie, consumers and undertakings) may resort to mediation and/or arbitration, upon written agreement and in complying with Mediation and Arbitration Law requirements.

10. Funding and Costs

10.1 Litigation Funding

Given that Ecuadorian legislation does not provide for a litigation funding prohibition, it is entirely possible, and it is available for arbitration and commercial litigation.

In practice, third-party funding is very limited, and mostly non-existent, for antitrust litigation due to the lack of precedents that may allow a certain degree of predictability of antitrust litigation vis-à-vis the decision of the Superintendency of Economic Competition.

10.2 Costs

Costs can be awarded in follow-on claims. Costs are not awarded as a rule, but only when the court finds that a party has litigated in an abusive, malicious, reckless, or disloyal manner. Thus, such party can be condemned to pay the cost incurred by its counterparty and the state. Courts do not grant costs on a regular basis.

11. Appeals

11.1 Basis of Appeal

Horizontal and vertical recourses, including appeals to challenge decisions, are available in both administrative and civil proceedings under the constitutional mandate.

First-instance resolutions of the competition agency are subject to administrative appeal before the chair of the agency. Resolutions issued by the chair of the agency are subject to recourse before the administrative tribunals.

In relation to follow-on damage claims filed before civil courts, judgments may be given by the provincial court. This court can review merits and procedure. Judgments rendered by the provincial court are subject to cassation before the National Court of Justice. However, in this last instance, only merits of law may be reviewed. At the same time, in order to safeguard constitutional rights that can be breached in the context of these proceedings, any decision of authority may be challenged before constitutional judges.

Trends and Developments

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Robalino Abogados has more than ten competition lawyers and economists in its five offices in Quito, Guayaquil, Cuenca, Manta, and Machala. Robalino provides sophisticated, solution-oriented advice to clients in a wide variety of industries, on all aspects of Ecuadorian and Andean competition law, including M&A, joint ventures and strategic alliances, government investigations, antitrust litigation, leniency agreements, and counselling. Large corporations and international firms rely on Robalino for guidance on legitimate arrangements between competitors, product distribution systems, and

navigation through complex antitrust investigation including cartels and abuse of dominance, unfair trade, and gun jumping investigations. The firm has unique experience representing buyers in pre-merger clearances in complex markets. Its aim is to provide comprehensive and responsive counsel to its clients with international standards. Robalino's antitrust lawyers include several academics, counting Daniel Robalino who leads the Ecuadorian Institute of Competition Law, and the likes of Fausto Alvarado, the first chief of the competition authority.

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ROBALINO

The Efforts of the Ecuadorian Competition Authority, From the Secretary of Competition and Consumers of the Ministry of Production to the Superintendence of Economic Competition

In 2009, the Executive Decree 1614 was issued by former President Correa. This Decree contained the regulation that allowed the direct application of the 608 Andean Decision that comprises the antitrust/competition rules applicable for Andean market (Colombia, Ecuador, Perú, and Bolivia) and in addition the position of Secretary of Competition and Consumers of the Ministry of Production was created, becoming the first competition agency in Ecuador. Since the Andean Decision regulates abuse of market power and cartels, the first investigations focused on highly concentrated markets and/or regulated markets such as pharma, airlines, consumer goods, and retail. This initial agency was not able to control mergers and had very limited resources in a country with no awareness of the regulation.

In 2011, the Organic Law for the Regulation and Control of Market Power was enacted (the “Ecuadorian Competition Law”) and the Superintendence of Economic Competition was formed to become the single competition authority in the country.

The Ecuadorian Competition Law regulates:

- antitrust conducts (abuse of dominance, horizontal and vertical restraints, and cartels);
- merger control;
- unfair competition and unfair trade practices;
- public aids; and
- procedural framework for investigations, fines and remedies, leniency, settlements, and pre-merger clearances.

The Organic Law for the Regulation and Control of Market Power overrides the jurisdiction of the Secretary of Competition and Consumers of the Ministry of Production as well as sector-specific antitrust jurisdiction provided by telecom, energy, and other laws for regulated markets towards sector-specific control agencies. In addition, the Organic Law for the Regulation and Control of Market Power outweighed the regulations of unfair competition formerly included in the Intellectual Property Law.

Since then, the passage of time has allowed the Superintendence of Economic Competition to gain significant experience, but, due to limited resources, most of the investigation cases are related to unfair competition practices rather than to economic competition. Therefore, experience in cartels, gun jumping, and dominance in complex markets is still being accumulated.

The Superintendence of Economic Competition has an ongoing process to bolster institutional reputation and strengthen technical analysis. There have been several attempts to improve the legal framework. This process has brought deep discussions towards our national competition policy as well as to the defence of competition while respecting the rights of those under investigation. This happened in a highly polarised political context. On the one hand, the government has a strong pro-market policy. On the other, non-specialised courts and congresspeople had very different perspectives on what the Superintendence of Economic Competition’s purpose ought to be due to a lack of vigorous public policy and awareness on the matter.

Within this context, the Superintendence of Economic Competition has promoted several amendments to the Ecuadorian Competition Law, secondary regulations, and guidelines.

First, the amendments tried to clarify the somehow contradictory conceptual framework provided by the law and the applicable standards, as well as on inefficient procedural matters regarding investigations, leniency settlements, and evidentiary matters such as dawn raids and court approvals. Second, the Superintendence of Economic Competition sought to catch up with the speed of merger control procedures and clarification of applicable standards. Also, on some aspects such as cartel control, the Superintendence of Economic Competition sought to strengthen its enforcement by easing its burden of proof, favouring intervention.

In 2021, the Organisation for Economic Co-operation and Development (OECD) and the Inter-American Development Bank (IDB) conducted a peer review on Ecuadorian competition law and policy, which pointed out that the Superintendence of Economic Competition had carried out significant efforts to meet international good practices. On this, the peer review highlighted the introduction of a fast-track procedure for merger control, the update of the leniency programme, the improvement of the quality and focus of market studies, and the enhancement of the Superintendence of Economic Competition's co-operation with the international competition community.

The perception of Ecuadorian competition law practitioners in relation to the Superintendence of Economic Competition

In spite of the efforts of the Superintendence of Economic Competition, a study published by *Centro de Competencia* (CeCo) in March 2023 shows that practitioners' perception of it is not good overall. This study was conducted through four online surveys, directed to a sample of lawyers listed in 2022, on the category of "Competition/Antitrust" by Chambers and Partners.

According to this study, the Superintendence of Economic Competition has the second lowest grade on the performance of its divisions of anti-competitive conduct prosecution and competition advocacy, while getting the worst grade on the performance of merger control division. Something similar happens with the perception on the professionalism of each of the Superintendence of Economic Competition's divisions, being that Ecuador has the lowest score in all of them.

In terms of the degree of legal and economic analysis, the Superintendence of Economic Competition received the lowest score from respondents specialised in Ecuadorian competition law, but the highest from reviewers not specialised in competition law.

Regarding the degree of deterrence of the current institutional set-up and fines, the Superintendence of Economic Competition received the worst grade. This might be because Ecuador is perceived to perform the worst regarding cartel detection, in comparison with Chile, Colombia, and Peru. The surveyed respondents think that undertakings do not have clarity and predictability on the outcomes of the Superintendence of Economic Competition's investigations and the rules applicable to leniency programmes.

For example, the surveyed respondents think that the Superintendence of Economic Competition will not consider pro-competitive effects and will always opt for sanctions as a general rule. Accordingly, 60% of the surveyed professionals in Ecuador have advised their clients not to sign agreements even if they have pro-competitive effects. This may show that competition law professionals do not trust the consistency of the Superintendence of Economic Competition.

tion's decisions, thus, forcing them to adopt a conservative approach.

Part of this lack of trust in the Superintendence of Economic Competition may have been triggered by past events, like the Kimberly–Clark case in which confidential information presented in a leniency application was declassified for prosecution before the Andean Community. Due to this illegal breach of confidentiality by the Superintendence of Economic Competition, the new regulation requires permission from the undertaking applying for leniency, to disclose any information presented for this purpose.

Leniency is not the only tool for the detection of anti-competitive practices. The Superintendence of Economic Competition can agree to cease and desist agreements applicable to unilateral practices. This tool gives undertakings the opportunity to obtain a cut-rate reparation fee instead of a fully fleshed fine in cases of abuse of dominance, other unilateral conducts, and unfair trade practices.

Furthermore, the Superintendence of Economic Competition has the second lowest score for abuse of dominance detection. In this regard, the OECD/IDB pointed out that in spite of the large number of investigations initiated between 2014 and 2019, the Superintendence of Economic Competition only issued three decisions and two of them were overturned by courts. Also, a large number of ex-officio investigations were initiated and then closed because of lack of merit.

Something similar corresponds to competition advocacy, where the effectiveness of market studies and the selection of the studied markets received the second lowest score. Merger-wise, the Superintendence of Economic Competition

is perceived as the less reliable and professional regarding remedies negotiation. Notwithstanding the foregoing, the Superintendence of Economic Competition obtained the highest score of celerity, but on behalf of non-specialised reviewers.

All these perceptions may be related to the Superintendence of Economic Competition's internal problems. According to the 2021 OECD/IDB peer review, the Superintendence of Economic Competition's annual budget is relatively low under international standards and has been decreasing since 2014, mainly due to the government's austerity policy. This represents a reduction in the investigations and advocacy activities that the agency can carry out.

In the OECD/IDB's opinion, the Superintendence of Economic Competition's resources might not be efficient. Less than half of the Superintendence of Economic Competition's employees are assigned to the agency's core competition activities, while the rest are administrative support staff.

There is also an imbalance on the allocation of staff since most of the human resources in core areas are allocated to competition advocacy. Anti-competitive conduct investigation and enforcement areas are heavily restricted, with a shortage of economists in all areas.

Finally, it is worth mentioning that the Superintendence of Economic Competition's employee rotation rate is high, which could be a reason why this agency has struggled to build knowledge and expertise, which would have improved its performance. Employee rotation could have been caused by low wages in senior analyst positions, and the Superintendent's prerogative for removing senior staff as he pleases.

In late 2023, the agency changed its name from *Superintendencia de Control del Poder de Mercado* (Superintendency for the Control of Market Power) to *Superintendencia de Competencia Económica* (Superintendency of Economic Competition), revealing the shift in public policy in the last decade.

It is worth explaining that the current authority will fulfil its office term in November 2023. Thus, the executive branch shall issue a three-name list of candidates to be evaluated and elected by the National Council of Citizen Control and later to be appointed by Congress.

New legislative developments

The 2023 revision to the Ecuadorian Competition Law brought several changes, following a US antitrust line rather than European competition model usually adopted in Ecuador. Some of the aforesaid changes are explained as follows.

- It includes every public entity that performs economic activities as part of the scope of the law, even those that hire goods or services through public procurement.
- It rules out the obligation of defining relevant markets on preliminary phases of an investigation. Instead, at this procedural phase, the Superintendence of Economic Competition will only have to characterise the focal goods or services and their substitutes. Therefore, a substitution analysis is not required in this phase.
- It eliminates the obligation of the Superintendence of Economic Competition to define a relevant market in proceedings unrelated to the investigation of anti-competitive conduct. This will reduce the lead time in unfair competition processes.
- It's explicit that potential effects of abuse of dominance are also forbidden by the law.

- It eliminated the abuse of economic dependence figure.
- It eliminates conscious parallelism from the prohibition of anti-competitive agreements.
- It clarifies that de minimis rules do not apply for hardcore cartels with anti-competitive objectives to restrict competition.
- It includes a new obligation for the Superintendence of Economic Competition to control certain practices of supermarkets over small suppliers.

Case law

In the past year, several litigation precedents have arisen.

- Two large merger control litigations were resolved; the Difare/Leterago, a large pharma deal, was blocked – the first of this kind in Ecuador. This is a relevant precedent since the agency clarifies that both the dominance and substantial lessening of competition standards are applicable for analysis.
- In the same line, the Happag–Lloyd/SAAM deal was cleared without remedies, in the maritime ports market, upon an analysis of the sector-specific regulation.
- The MAN pre-merger control case recognised that the effect test is applicable for merger control in Ecuador, in contradiction to past precedents.
- Gun-jumping fines were applied in the SCE v Unicon case, analysing the effects of repetitive infringements to merger control regulation by a foreign corporation.
- The Superintendence of Economic Competition applied fines in the following cases:
 - (a) Zumba v Superintendence of Economic Competition related to a public procurement cartel within family members; and
 - (b) Industria Cartonera Palmar Incapalm v Superintendence of Economic Competition.

tion case related to gun jumping, deriving from the enforcement of a court order.

Both cases were overturned, and fines were suspended by competent courts.

In relation to some of these cases, it is noted that foreign experts, such as lawyers Carlos Mena-Labarthe (México), Luis Berenguer (Spain), and international econometric firms, have been retained to present expert witness reports.

ENGLAND & WALES



Law and Practice

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Clifford Chance LLP has a global antitrust litigation group that has handled many of the most significant antitrust damages claims over

the past 20 years, including leading judgments on issues relating to disclosure, limitation, and quantum, as well as group actions.

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C L I F F O R D
C H A N C E

1. Overview

1.1 Recent Developments in Antitrust Litigation

England and Wales has been one of the leading jurisdictions for antitrust litigation in Europe for over 20 years. The combination of a well-regulated jurisdiction for commercial litigation, specialist competition judges, and wide-ranging disclosure has attracted numerous significant international antitrust claims to the English courts. In addition, the availability of opt-out collective actions before the Competition Appeal Tribunal (CAT) has led to an increasing flow of applications for collective proceedings orders (CPO) in recent years.

1.2 Other Developments

Following the UK's formal withdrawal from the EU on 31 January 2020, a number of statutory changes have brought the direct jurisdiction of EU institutions and treaties to an end, enabling the UK courts to diverge from EU competition law. European Commission (EC) decisions issued after 1 January 2021 will no longer be binding on the UK courts. EC decisions issued prior to the end of the transition period remain binding in the UK courts, and if breaches of EU competition law are alleged to have taken place

before Brexit, UK courts will be required to apply EU law as it applied at the end of the Brexit transition period.

In 2022, the UK Government announced a consultation to reform the CAT Rules governing applicable procedure for cases in the CAT. Following this, the UK government intends to expand the CAT's jurisdiction to include the ability to grant declaratory relief, and give the CAT discretion to award exemplary damages for breaches of competition law (aside from in collective proceedings).

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Claims for damages arising from a breach of UK or EU competition law can be brought in the High Court (either in the Chancery Division or the Commercial Court) or before the CAT. In the High Court, claims are based on the tort of breach of statutory duty of Chapters I/II of the UK Competition Act 1998 (CA 1998), and/or – for conduct occurring prior to December 2020 – Section 2(1) of the European Communities Act 1972 (as preserved by Section 1 of the EU (Withdrawal Agreement) Act 2020), which imported into Eng-

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lish law Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Claims for damages before the CAT are based on Section 47A CA 1998 and/or Section 47B of the CA 1998. Section 47B CA 1998 forms the basis for collective actions before the CAT.

Standalone and Follow-On Claims

Claims may either be on a “standalone” or “follow-on” basis. In standalone claims, the claimant must establish:

- the anti-competitive conduct of the defendant(s); and
- that the defendant’s/defendants’ behaviour caused loss to the claimant.

In follow-on actions, the claimant may rely on a decision by a UK competition authority (eg, the UK’s Competition and Markets Authority, or CMA) or the EC (provided it was made prior to 31 December 2020) to find an infringement of competition law. Provided that the decision is final (ie, all appeals or time limits for making appeals have been exhausted), it will be binding on UK courts, and the claimant is not required to prove the anti-competitive conduct as they would be in a standalone claim. Findings and decisions by EU member state competition authorities prior to 31 December 2020 are considered *prima facie* evidence of an infringement.

2.2 Specialist Courts

Standalone and follow-on claims may be brought in either the High Court or the CAT.

Comparison Between the CAT and the High Court

The CAT is a specialist tribunal established for the sole purpose of hearing competition disputes. It has its own rules and procedures, as well as specialist judges. Panels of the CAT are

typically chaired by a High Court judge, and include two other members who may be lawyers, judges, and relevant specialists such as economists or accountants. Proceedings in the High Court are typically presided over by a single judge who may or may not have specialist competition law expertise.

The powers of the High Court and the CAT are broadly similar; both can make orders for interim measures such as injunctions, and neither has a limit on the compensation it can award. However, only the CAT can hear collective actions initiated under Section 47B of the CA 1998. In the High Court, the civil procedure rules (CPR) do permit claims to be combined under a group litigation order, where those claims have “the same interest”. Currently, only the High Court can grant declaratory relief, but, following the recent UK government consultation, there are plans to extend this power to the CAT.

Transferral of Cases Between Courts

The High Court may transfer as much of the proceedings to the CAT as relate to the infringement of competition law. This means that claims can be transferred in whole or in part. The High Court has held that the complexity of the issues involved, the extent to which economic evidence is at issue, as well as cost implications, are all relevant to whether a transfer to the CAT will be ordered. Conversely, CAT Rule 71 allows the CAT to transfer a claim to the High Court.

2.3 Decisions of National Competition Authorities

Under Section 58A of the CA 1998, decisions of the CMA or of the EC (made prior to 31 December 2020), once final (ie, once all appeals have been exhausted, or the deadlines for making appeals have passed), are binding in UK courts as they relate to the existence of an infringement

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of competition law. In such claims, a claimant need not prove the infringement of competition law, and instead the proceedings will focus solely on the extent of the loss suffered by the claimant, and whether the claimant can establish that the defendant's/defendants' anti-competitive conduct caused the loss claimed.

Infringement decisions by another EU member state's national competition authority (NCA) on EU competition law made after 9 March 2017 and prior to 31 December 2020 are treated as *prima facie* evidence of an infringement of EU competition law for the purposes of a claim for damages under paragraph 35 of Schedule 8A of the CA 1998.

Under paragraphs 4.1 and 4.1A of the Competition Law Practice Direction, competition authorities have the right to make written observations and to apply to make oral observations on issues relating to the application of Chapter I or II of the CA 1998 and/or of Articles 101 or 102 of the TFEU. The CMA may make written observations or, with the permission of the tribunal, oral observations, in CAT cases (permission being given for the first time in a Section 47A CA 1998 claim in *Epic Games, Inc and Others v Alphabet Inc, Google LLC and Others*).

2.4 Burden and Standard of Proof

In both follow-on and standalone claims, the burden of proof is on the claimant. In follow-on claims the infringement decision will establish the existence of the infringement but the claimant will have to prove that the infringement caused them to suffer loss. In a standalone claim, a claimant will have to establish the infringement and that this caused them to suffer loss. The standard of proof, as in civil claims generally, is the "balance of probabilities". However, the High Court has indicated that, given the seriousness

of finding an infringement of competition law, a heightened civil standard may be required so that evidence is "commensurately cogent and convincing" (see *Attheraces v British Horseracing Board* [2005] EWHC 3015 (Ch)).

In addition, for claims where the loss or damage occurred wholly on or after 9 March 2017, there is a rebuttable presumption that cartels cause loss or damage (see Article 17 of the EU Damages Directive and Schedule 8A paragraph 13 CA 1998).

If defendants can demonstrate that the alleged damage suffered by the claimant was passed on to the claimant's own customers, then this may constitute a (whole or partial) defence to the claim. This is known as the "passing-on" defence. The burden of proving the pass-on defence lies with the defendant.

2.5 Direct and Indirect Purchasers

As set out in 2.1 **Legal Basis for a Claim**, in the High Court, claims are based on the tort of breach of statutory duty of Chapters I/II of the CA 1998, and/or Section 2(1) of the European Communities Act 1972 (which imports into English law Articles 101 and 102 of the TFEU, to the extent applicable to pre-Brexit damage or conduct). Claims for damages before the CAT are based on Section 47A of the CA 1998 and/or Section 47B of the CA 1998. Section 47B forms the basis for collective actions, and allows both direct and indirect purchasers to bring claims for their losses.

2.6 Timetable

The typical timetable for an antitrust damages claim is around three to five years depending on a variety of factors, including the extent of disclosure, the number of witnesses and experts, whether the court or tribunal orders a stay, and

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whether applications are made for strikeout/summary judgment or for the determination of preliminary issues. The status of related cases may also give rise to delays or applications for stays (eg, *David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others* [2021] CAT 38). Expedited trials may also be ordered in certain circumstances.

High Court

In the High Court, a case management conference (CMC) will typically take place after the close of pleadings. The purpose of a CMC is to set a timetable for the litigation, including, for example, deadlines for disclosure and the exchange of evidence. Parties may bring applications for the expedition of proceedings (in limited circumstances), and cases can be subject to strikeout or summary judgment applications (see **4.1 Strike-Out/Summary Judgment**).

The courts have wide-ranging case management powers to order the trial of preliminary issues which may lead to proceedings being brought to a quicker resolution. For example, in claims alleging an abuse of dominance, courts have tried the question of abuse as a preliminary issue (eg, *Streetmap.Eu Limited v Google Inc and Others* [2016] EWHC 253 (Ch)). In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 16, the CAT struck out a claim brought against Morgan on the basis that it was brought out of time. This decision was ultimately upheld by the UK Supreme Court (*Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24).

CAT

The timetable of cases before the CAT will be similar to those before the High Court, and subject to close case management as described above. However, since 2015, a “fast-track” procedure has been available in the CAT. If ordered,

the main substantive hearing must commence as soon as practicable within six months of the order to fast-track proceedings, and the amount of recoverable costs (see **10.2 Costs**) will be capped at a level to be determined by the CAT.

An application for fast-track proceedings will be determined with reference to the size of the parties, the time estimate for the main substantive hearing, the complexity of the issues, whether any additional claims have or will be made, the volume of documentary and witness evidence, and the remedy or amount of damages claimed. The CAT has refused to fast-track proceedings where the main hearing was estimated to last two weeks, where disclosure was particularly extensive, and where there was no particular urgency in the case. The CAT has also held that a follow-on damages claim of several years’ duration was unlikely to satisfy the criteria of the fast-track procedure.

Socrates Training Limited v The Law Society of England and Wales [2017] CAT 10 was the first case to proceed to trial under the fast-track procedure. The trial as to the existence of an infringement was completed in four days. In *Instaplanta (Yorkshire) Limited v Leeds City Council* [2023] CAT 11, the CAT refused an application to apply the fast-track procedure, given that the nature of the factual evidence in the case meant a three-day trial would not have been feasible and the range of issues and degree of complexity of some of those issues created a material risk that the parties might not properly be prepared for a hearing in six months’ time, leading to further delay and inefficiency.

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3. Class/Collective Actions

3.1 Availability

Procedures for bringing claims on a group or collective basis differ depending on whether such claims are brought in either the High Court or the CAT.

High Court

Collective claims have been brought in the High Court as so-called representative actions. CPR 19.6(1) allows a representative action to be brought by a claimant representing themselves and other claimants, where the group have the “same interest” and have opted in to the action. Representative actions are typically difficult to bring in private antitrust litigation. In *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch), the High Court struck out a representative action on behalf of both direct and indirect purchasers on the basis that the criteria for inclusion in the class depended on the outcome of the claim itself, and the direct and indirect purchasers would not all benefit from the relief sought by the claimant, because of the need for direct purchasers to pass on the overcharge to indirect purchasers in order for the latter to benefit from the damages awarded. The Court of Appeal upheld this decision, rejecting the claim as a means of engineering a class-action mechanism where one did not exist. The Court held that the “same interest” required a degree of certainty to constitute a class of persons capable of being represented by one person.

Group litigation orders (GLOs) under CPR 19.11 are available where one or more claims raise “common or related issues”. In practice, GLOs are rarely used, and have not, to date, been used in the context of competition litigation.

CAT

Collective actions have been available in the CAT since October 2015 for follow-on and standalone antitrust damages claims, following changes implemented by the Consumer Rights Act 2015 (CRA 2015). Claims may be brought on an opt-in or opt-out basis. The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a claim where it is brought by a representative proposing to bring the claim on behalf of the class. The representative need not be a member of the class, if the CAT considers that it is just and reasonable for the representative to bring the claim in that capacity.

Collective proceedings will only continue if the CAT makes a collective proceedings order (CPO). The CAT will make a CPO if it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, the claims must raise the same, similar or related issues of fact or law. The CAT will also consider, among other factors, whether collective proceedings are an appropriate means for fair and efficient resolution of the collective issues, whether separate claims of the same or similar nature have already been commenced by members of the class, the class size and nature, whether it is possible to determine for any given person if they are a member of the class, and whether claims are suitable for an aggregate award of damages.

In making a CPO, the CAT must also decide whether the proceedings should be opt-in or opt-out. In *O’Higgins v Barclays and ors* and *Evans v Barclays and ors* [2023] EWCA Civ 876, the Court of Appeal stated that a powerful indicator towards a claim being certified as opt-out arises in scenarios where there would be no proceedings save on an opt-out basis. In addition, while the strength of the claim is usually to be a

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neutral factor in determining whether proceedings should be opt-in or opt-out, to the extent that it is taken into account, there needs to be a relevant connection between the strength of the claim and the decision made as to whether proceedings should go ahead on an opt-in or opt-out basis. The Court of Appeal also acknowledged that the existence of parallel individual or opt-in proceedings could be considered to demonstrate the feasibility of opt-in proceedings and clarified that whether or not the proposed class representative is a pre-existing body, such as a trade union, should not be taken into account. Non-UK residents must opt in to proceedings, even where the CAT has granted a CPO on an opt-out basis.

In *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, one of the first CPO applications to be brought, the CAT held that the approach to the certification of claims should be rigorous, and considered that drawing from the American approach to certification of common issues was of limited assistance. The approach under the UK regime was intended to be very different, with either no or only very limited disclosure and shorter hearings. The CAT followed the approach in Canada, holding that the expert methodology must be sufficiently credible or plausible to establish some basis for loss across the class. The principles governing certification have subsequently been clarified by the UK Supreme Court, see *Merricks v Mastercard* below.

3.2 Procedure

CAT

Collective proceedings in the CAT require a CPO, for which the CAT must be satisfied that the person bringing the proceedings is someone it could authorise to act as the representative, and that the claims are eligible for collective pro-

ceedings. They must raise the same, similar, or related issues of fact or law.

Merricks v Mastercard

The most prominent ongoing collective proceedings, *Walter Merricks CBE v Mastercard*, were brought in September 2016 and proposed to combine follow-on actions for damages under Section 47A of the CA 1998, arising from a decision of the EC that the Mastercard payment organisation had infringed competition law by setting a minimum price that merchants had to pay to their acquiring bank to accept payment cards in the EEA. The proposed claim, in effect, included an estimated 47 million people. The CAT ruled that the claim was not appropriate to be brought as a collective proceeding. This judgment was overturned by the Court of Appeal, and Mastercard successfully sought leave to appeal to the UK Supreme Court, which was heard in June 2020.

The Supreme Court's judgment in December 2020 determined that the CAT made a series of errors of law. First, it failed to recognise that merchant pass-on was a common issue. Had it done so, this should have been a powerful factor in favour of certification. Second, the CAT treated suitability of the claims for aggregate damages as if it were a hurdle, rather than one of many factors relevant to suitability for collective proceedings. Third, the CAT should have applied a test of relative suitability. If the forensic difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not have been sufficient to deny certification for collective proceedings. Fourth, the CAT did not take into account the general principle that the court must do what it can with the evidence available when quantifying damages. Incomplete data and the difficulties interpreting it

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are frequent problems with which the civil courts are often faced. This was not a good reason for a court refusing a trial to an individual or to a large class who have a reasonable prospect of proving some loss, breach of statutory duty having been established. Fifth, the power to award aggregate damages in collective proceedings is supposed to avoid the need for individual assessments of loss, and the CAT was thus wrong to require the class representative's proposed method of distributing aggregate damages to take account of each class member's loss.

Proceedings were remitted to the CAT, which certified Merricks' application for a CPO on 18 August 2021. Many CPO applications which had been stayed pending the outcome of the Merricks proceedings have now begun to be certified by the CAT; with ten collective proceedings claims being certified, 14 still awaiting certification, and five which are either discontinued or on appeal. Whilst the UK Supreme Court judgment in Merricks effectively lowered the bar to certification for many claims, the CAT has so far refused certification in four claims.

High Court

In High Court representative proceedings, the representing claimant must demonstrate that the "same interest" test is satisfied. The Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 held that this is a high bar in the context of follow-on damages claims. A High Court GLO can be made either on the Court's own initiative or on application by one of the parties. GLOs require "common or related issues", a concept that is wider than the "same interest" requirement for representative proceedings.

3.3 Settlement

In general, settlement agreements entered into between parties to litigation do not require the consent of the courts. On settlement, the claimant will usually discontinue the claim and there will be a separate, confidential agreement on settlement including costs. In proceedings brought by more than one claimant, the consent of the court may be required to discontinue the claim if consent of other claimants is not obtained.

This general position is subject to the regime for opt-out collective proceedings in the CAT, the settlement of which must be judicially approved. A collective settlement approval order must be issued by the CAT, and applied for by the class representative and the defendant(s) wishing to be bound by the proposed settlement. The application must be supported by evidence on the merits of the settlement, explaining how the collective settlement is to be paid and distributed. The CAT must satisfy itself that its terms are just and reasonable.

If authorised, the settlement will bind all those falling within the class described in the CPO who were domiciled in the UK and did not opt out, or who were not UK-domiciled and opted in to the collective proceedings.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Cases in the High Court can be subject to strike-out or summary judgment applications where the claimant or defendant has no real prospect of success or the statements of case disclose no cause for action.

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A trial of “preliminary issues” (see **3.1 Availability**) may take place which allows the court to dispose of proceedings expeditiously. In *Tesco Stores Ltd and Others v Mastercard* [2015] EWHC 1145 (Ch), the Court refused strikeout on the basis that complex questions of law arose which should be decided at trial once the parties had the benefit of full disclosure. In this case, the Court held that only once arguments over whether the claimants consisted of a single economic entity were determined could the case proceed to considering where the infringement of competition law arose. This preliminary issue required disclosure to be undertaken for it to be determined.

A party may also obtain summary judgment in the CAT if it can show that:

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

The CAT can also strike out claims at any stage of the proceedings if:

- the CAT lacks jurisdiction;
- the claim has no reasonable grounds;
- the claimant has pursued vexatious proceedings or applications;
- a claim is made out of time; or
- a party fails to comply with any rule, direction, practice direction, or order of the CAT.

In *PSA Automobiles SA & Others v Autoliv AB & Others* [2023] CAT 27, the CAT refused to exercise its strike out power. The CAT found that the claimant did have a realistic chance of showing that the entity concerned was engaged in cartel activity and that there were reasonable grounds

that a fuller investigation of the facts would put more material before the CAT at trial to determine the matter. The CAT noted that, in cases where there are allegations of concealment and destruction, it is expected that the evidence the claimants can show would be fragmentary which should be considered when determining whether the claim has a realistic chance of success.

4.2 Jurisdiction/Applicable Law Common-Law Jurisdiction Regime

For claims brought following 31 December 2020, and in respect of all defendants domiciled in jurisdictions outside the EU, the common-law jurisdiction regime applies, in which the English courts’ jurisdiction depends on the defendant being located within England or Wales, unless (on an application) it can be shown that another state’s courts are a more appropriate forum. Claimants can apply for permission to serve a defendant domiciled in another jurisdiction if they can show:

- that the claim has a reasonable prospect of success;
- that there is a basis for jurisdiction set out in the CPR; and
- that England and Wales is the proper place to bring the claim.

On 28 September 2020, the UK submitted a new accession instrument to the Hague Convention on Choice of Court Agreements. The UK is now bound by the Hague Convention in its own right rather than by virtue of its former EU membership; under the convention, EU member states must give effect to exclusive jurisdiction agreements in favour of the English courts.

The Brussels Regulation

For claims brought prior to the conclusion of the UK’s Brexit transition period, and where

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the defendant is domiciled in an EU member state, jurisdiction is governed by EU Regulation 1215/2012 (the Brussels Regulation). The Brussels Regulation contains various bases for determining the jurisdiction in which antitrust claims may be brought, including:

- where the defendant is domiciled;
- the place where an obligation under a contract was to be performed;
- in tort, the place where the harmful event occurred (the place where the damage was sustained or where the event giving rise to it took place);
- any jurisdiction agreement;
- whether a party submits to a jurisdiction; and
- the jurisdiction of any related actions.

4.3 Limitation Periods

Rules on limitation differ depending on whether the claim is brought before the High Court or CAT and when the cause of action accrues (ie, when the infringement causes damage to the claimant). New limitation rules apply to claims (whether brought in the High Court or CAT) where the loss or damage took place wholly on or after 9 March 2017 (paragraphs 17–26, Schedule 8A, CA 1998). These new limitation rules displace the Limitation Act 1980 in relation to antitrust claims.

Claims Where Loss or Damage Occurred Before 9 March 2017

For High Court claims where the loss or damage occurred wholly before 9 March 2017, the limitation period is six years from the date on which a cause of action accrues. The High Court in *Gemalto Holding and Thales DIS France v Infineon Technologies and ors* [2022] EWHC 156 clarified that the six years starts to run when the claimant's state of knowledge is such that it and its professional advisers can properly plead a

claim that would not be liable to be struck out as unarguable or lacking sufficient evidential basis. The limitation period is not postponed until the claimant has completed its investigations or is certain that the claim will succeed. Mere suspicion will not, however, be enough, particularly if it is vague and unsupported. Rather, the standard is one of “reasonable belief” of the facts giving rise to the relevant cause of action.

Where there is deliberate concealment (or fraud), the six-year period will not begin to run until such time as the claimant either discovered the concealment or ought reasonably to have discovered it. There must either be active and intentional concealment of a fact relevant to a cause of action, or at least intentional concealment by omission of a fact which the defendant knew they were under a duty to disclose. A fact relevant to the claimant's cause of action refers to a fact without which the cause of action would be incomplete. It is not relevant that a defendant has concealed a fact which, if known, would merely strengthen a claimant's case. Follow-on claims which are issued more than six years after the date of the underlying infringement decision (and depending on the context, the statement of objections preceding that decision – see *Gemalto Holding and Thales DIS France v Infineon Technologies and ors* [2022] EWHC 156) may be time-barred. However, defendants often argue that claimants either discovered or ought to have discovered any concealment earlier than the publication of the infringement decision, for instance, from the date of a press release relating to dawn raids or a statement of objections.

Claims Where Loss or Damage Occurred On or After 9 March 2017

Where the loss or damage occurred wholly on or after 9 March 2017, proceedings may not be brought before a court or tribunal after the end of

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a six-year limitation period. The limitation period begins on whichever is later – the day on which the infringement ceases, or the claimant’s “day of knowledge”. The latter is the day on which the claimant first knew, or could reasonably be expected to have known:

- the identity of the infringer;
- about the existence of the infringer’s behaviour;
- that the behaviour infringed competition law; and
- that the claimant itself had suffered loss or damage due to the infringement (paragraphs 17–26, Schedule 8A, CA 1998).

This period may also be suspended in various circumstances, including during investigation by a competition authority or during a consensual dispute resolution process.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure Standard and Specific Disclosure

Disclosure generally takes place once particulars of the claim, defence, and any replies have been served. If standard disclosure is ordered, parties to the litigation must search for and disclose all documents in their control on which they rely, and documents that adversely affect their own case, adversely affect another party’s case, or support another party’s case. Specific disclosure is commonly ordered in antitrust claims, requiring the disclosure of specific documents or categories of documents. The CAT Rules are supplemented by the CAT Practice Direction relating to Disclosure and Inspection of Evidence 2017. An order for disclosure may also be made requiring non-parties to disclose documents if the disclosure is likely to support the case and

is necessary to dispose of the claim fairly or to save costs.

Pre-Action Disclosure

This may be ordered before a claim is issued. Parties are encouraged to agree to exchange documents pre-action in order to seek to resolve legal disputes before proceedings are commenced. Pre-action disclosure may be ordered where the documents or classes of documents to be disclosed would fall within the test for standard disclosure, and the court believes that pre-action disclosure is desirable to dispose fairly of anticipated proceedings or to assist in the resolution of the dispute without proceedings or at a lower cost. Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should carefully consider the scope of any requests they make.

With the introduction of the Disclosure Practice Direction 57AD (formerly the Disclosure Pilot) in the business and property courts of England and Wales, there has been a change to the disclosure regime; however, the Direction does not currently apply to competition law claims, unless otherwise ordered.

See 5.3 **Leniency Materials/Settlement Agreements** in relation to leniency statements and settlement submissions.

Restriction on Documents

There is a general restriction on parties not to use documents received during disclosure other than for the purpose of the litigation. However, if those documents are referred to in open court, then this protection may be lost. Confidential and irrelevant material may be redacted, although significant redaction may be resisted by the court. Confidential material may also be protected by way of a “confidentiality ring”, in

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which only specified persons will be permitted to access these documents.

5.2 Legal Professional Privilege

Documents may be withheld from inspection on the basis that they are protected by legal professional privilege, which falls into two broad categories:

- legal advice privilege; and
- litigation privilege.

Legal Advice Privilege

Legal advice privilege protects communications which are:

- confidential;
- between a client and lawyer; and
- made for the purpose of giving or receiving legal advice.

Confidentiality is key – if a communication has become public, been shared with a third party (on a non-limited waiver basis), or been circulated widely, it will no longer be privileged.

The communication must be between lawyer and client, for the purposes of which a “lawyer” includes both external and in-house counsel, who may be qualified in any jurisdiction. The definition of a “client” for the purposes of privilege includes those authorised to give and receive legal advice (following *Three Rivers No 5*), rather than all employees within the undertaking. In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal held that communications between an employee and the corporation’s lawyers could only be privileged if that employee was tasked with seeking and receiving advice on behalf of the corporation. The dominant purpose of the communication must be the giving or receiving

of legal advice (*R (Jet2) v CAA* [2020] EWCA Civ 35).

Litigation Privilege

Litigation privilege applies to confidential communications between a lawyer and client and communications between a lawyer or client and a third party which come into existence after litigation is contemplated. The communication must be for the sole or dominant purpose of:

- obtaining or giving legal advice in relation to the litigation;
- obtaining evidence to be used in litigation; or
- obtaining information that may lead to the obtaining of evidence.

In *Tesco Stores v OFT* [2012] CAT 6, the CAT found that proceedings were sufficiently adversarial, at least by the time that the OFT had issued a statement of objections. In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal found that where the Serious Fraud Office had made the prospect of criminal prosecution clear to the defendant and lawyers had been engaged, there was a basis for concluding that criminal prosecution was in reasonable contemplation.

5.3 Leniency Materials/Settlement Agreements

Leniency statements and settlement agreements are protected from disclosure under Part 6 of the 2017 UK Regulations implementing the EU Damages Directive.

Claims Issued on or After 9 March 2017

For claims issued wholly on or after 9 March 2017, the CA 1998 prohibits a court or tribunal from making a disclosure order in respect of a settlement submission that has not been withdrawn, or a cartel leniency statement. In addition, a competition authority’s investiga-

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tion materials are not admissible in evidence in competition proceedings at any time before the competition authority has closed the investigation, unless a party obtains them lawfully and by other means than from the authority's file.

Claims Issued Prior to 9 March 2017

For cases that began prior to 9 March 2017, the position is governed by case law. The ECJ held, in *Pfleiderer v Bundeskartellamt*, that EU law allows member state courts and tribunals to determine when materials may be disclosed. In *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869 (Ch), the High Court held that a number of factors were relevant in the balancing exercise between disclosure and confidentiality of leniency and investigation materials. Firstly, the Court considered whether such disclosure would increase the leniency applicants' exposure to liability or whether it would put these parties at a relative disadvantage compared with the parties that did not co-operate with the investigating authority. Secondly, the Court considered whether the potential effect of a disclosure order would deter potential leniency applicants in future investigations. Thirdly, the Court considered whether the disclosure sought was proportionate in the circumstances. The EC intervened, making submissions against the disclosure of leniency documents. The judge decided that the question of relevance needed to be determined on the basis of each document and ordered only limited disclosure of those documents requested.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

High Court

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

Witness evidence is provided in witness statements (which are exchanged in advance of trial) and oral evidence given at trial. A witness may be cross-examined and re-examined at trial on the basis of their witness statement. The weight given to witness evidence will depend on the credibility of the witness, as well as the other circumstances of the case. A party wishing to secure the evidence of a witness present within the jurisdiction, in the form of oral evidence at trial, can also issue a witness summons under CPR 34.31.

CAT

The CAT proceeds on the basis that it will "be guided by overall considerations of fairness rather than technical rules of evidence" (*Argos v OFT* [2003] CAT 16). The CAT has the general power to control the evidence placed before it by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires, and the way in which the evidence is to be placed before it. The CAT may also dispense with hearing oral evidence if a written witness statement suffices, or it may limit cross-examination of witnesses. The CAT also has the power to issue a summons requiring a person in the UK to attend as a witness before the CAT and produce documents.

6.2 Expert Evidence

Expert evidence in the High Court may only be given with the permission of the Court and follows the exchange of witness statements from the witnesses of fact. The expert has a duty to the court overriding any obligation to the instructing party. Expert evidence is normally in the form of a written report followed by written questions to the expert and possible cross-examination at trial. The courts may request that experts prepare joint statements which seek to clarify the areas of agreement and disagreement

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in advance of the trial. The court may also order the appointment of a single joint expert (though this is less common in antitrust claims).

There have also been cases where courts have ordered that expert evidence be given concurrently, also known as “hot-tubbing”, which is typically judge-led and results in more limited time for cross-examination by the parties (recently in *National Grid Electricity Transmission plc v ABB Ltd*).

The CAT also has similar rules for dealing with expert evidence, and may also appoint its own expert.

7. Damages

7.1 Assessment of Damages

Damages are awarded on a tortious basis. ECJ case law requires compensation to be available not only for actual loss but also for lost profit and interest. There is a rebuttable presumption, following the implementation of the EU Damages Directive, that cartels cause harm.

In *BritNed Development Limited v ABB AB and ABB Limited* [2019] EWCA Civ 1840, the Court of Appeal found that damages can only be awarded on a compensatory, rather than punitive basis. In the High Court’s earlier judgment, it had found that damages should be awarded based on savings ABB was said to have made, rather than the loss suffered by BritNed through paying an inflated price due to the competition law infringement. The Court of Appeal found this was an error of law and that the High Court’s decision did not comply with the compensatory principle in English law. The Court of Appeal did, however, agree with the High Court that claimants must show actionable harm, which

required demonstrating a causal link between the infringement and the damages, generally through the “but for” test of causation. The elements of the cause of action have to be proved on the balance of probabilities, and damages awarded in order to put the claimant in the position it would have been in had the tort not been committed. A claimant’s inability to prove the exact sum of its loss was not a bar to recovery. The assessment of damages would often involve some estimation and assumption, and the court could take a broad-brush approach based on an understanding of the context in which the harm was suffered. However, the assessment had to be grounded in the evidence.

For claims where the loss or damage suffered was wholly on or after 9 March 2017, under paragraph 36, Schedule 8A of the CA 1998 (as amended), a court or tribunal may not award exemplary damages in competition proceedings (although, note that the UK government has announced plans to give the CAT discretion to award exemplary damages for breaches of competition law (aside from in collective proceedings)). For claims where loss or damage was before 9 March 2017, punitive and exemplary damages are available in certain limited circumstances in England and Wales. Section 47C of the CA 1998 also prevents the CAT from awarding exemplary damages in collective proceedings.

7.2 “Passing-On” Defences

Damages awarded to a claimant as a purchaser of a cartelised product may be reduced if the defendant can prove that the overcharge was passed on to the claimant’s own customers.

In *Sainsbury’s v Mastercard* [2016] CAT 11, the CAT held that the pass-on defence is only available for identifiable increases in prices by a firm

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to its customers. The CAT also held that the defendant must show on the balance of probabilities that there is another class of claimant, to whom the overcharge has been passed on, in the absence of which a claimant's damages should not be reduced. The Court of Appeal upheld the CAT's finding that Mastercard's defence failed because no identifiable increase in retail price had been established, let alone one causally connected to the UK Multilateral interchange fee. In an appeal from the Court of Appeal, the Supreme Court held that the Court of Appeal erred insofar as it required a greater degree of precision in the quantification of pass-on from the defendant than from the claimant. Once a defendant has raised pass-on, there is a heavy evidential burden on the claimant to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about what a claimant has done to cover its costs will be exclusively in the hands of the merchant itself, and the claimant must produce evidence in order to forestall adverse inferences being taken against it by a court applying the compensatory principle. The Supreme Court concluded that the law does not require unreasonable precision in the proof of the amount of the prima facie loss which the merchants have passed on to suppliers and customers.

For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, the claimant is presumed (subject to rebutting evidence) to have proved that the overcharge or underpayment was passed on if:

- the defendant infringed competition law;
- there was an overcharge or underpayment as a result of the infringement; and

- the product or service was provided to the customer by the claimant.

This was applied by the CAT in *Royal Mail Group Limited v DAF Trucks Limited and Others*, *BT Group PLC and Others v DAF Trucks Limited and Others* [2023] CAT 6 in which the CAT clarified that the legal test for causation in relation to a pass-on defence required the defendant to prove a direct and proximate causative link between the overcharge and any increase in prices by the claimants.

7.3 Interest

The English courts have discretion to order pre-judgment interest on damages, awarded at the claimant's borrowing rate or a fair commercial rate. If the claimant can show that it has had to pay interest on the debt as a result of its principal losses, the claimant may obtain compound interest. The CAT may also order that interest is payable on damages for any part of the period between the date when the action arose and the date of decision of the award for damages. In *Royal Mail Group Limited v DAF Trucks Limited and Others*, and *BT Group PLC and Others v DAF Trucks Limited and Others* [2023] CAT 6, the CAT followed the approach in *Sainsbury's v Mastercard* [2016] CAT 11 and awarded compound interest. The CAT noted that a claim for compound interest can better reflect a claimant's actual interest losses and that it is perhaps surprising that compound interest is not ordered more often.

8. Liability and Contribution

8.1 Joint and Several Liability

It is generally understood that defendants in a cartel action are jointly and severally liable. Article 11 of the EU Damages Directive also requires

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member states to ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law. There is a statutory exception to this position for small and medium-sized enterprises set out in Part 3 of Schedule 8A of the CA 1998, for infringements of competition law which took place on or after 9 March 2017.

For claims where the loss or damage suffered as a result of a cartel took place wholly on or after 9 March 2017, an immunity recipient is not liable (either alone or jointly) to pay damages as a result of the cartel infringement, subject to certain exceptions (paragraph 15, Schedule 8A, CA 1998), namely if:

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

The principle of joint and several liability is also subject to certain modifications in the context of settlements where the infringement of competition law occurred on or after 9 March 2017.

8.2 Contribution

In England and Wales, the Civil Liability (Contribution) Act 1978 allows for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage, either in the same or new proceedings. The court may determine how liability between defendants is apportioned. In cases of cartel infringements, the approach that the courts will take to contributory liability is unclear; the court may, for instance, apportion according to perceived cartel member culpability, and/or based on volume of sales. A defendant can still bring a claim for contribution against another party even when it has settled its dispute with the claimant.

Where the loss or damage in a claim took place wholly on or after 9 March 2017, the amount of recoverable contribution must be determined in light of the parties' relative responsibility for the whole of the loss or damage caused by the infringement, taking into account any damages paid by the other person in respect of the loss or damage, in accordance with a settlement between an infringer and a claimant. This is likely to take account of the volume of sales of the parties.

9. Other Remedies

9.1 Injunctions

Injunctions are available both in the High Court and in the CAT.

High Court

Claimants can seek injunctions in the High Court for ongoing or anticipated breaches of competition law. These may be prohibitory, mandatory, or quia timet (relating to future conduct). The applicant must show:

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- a good, arguable case;
- that damages would be inadequate to remedy its losses; and
- that the balance of convenience favours ordering the injunction.

Where an interim injunction is sought, a claimant must give a cross-undertaking in damages to cover any loss suffered by the defendant if the former were to lose the substantive case which follows. The High Court can also award security for costs.

The timing of an application is a critical issue. In *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565 (Ch), the last-minute nature of the application and the complexity of the analysis required to establish whether Pfizer's actions were anti-competitive caused the Court to refuse the wholesalers' application. Although injunction applications may be made without notice, this is only in exceptional circumstances which must be justified to the court. In such an *ex parte* application (ie, made on a without-notice basis), the applicant bears the burden of full and frank disclosure to the court and, in the absence of the respondent party, must not withhold evidence which is adverse to its case.

CAT

The CRA 2015 introduced powers under which the CAT may grant injunctions in individual claims or collective proceedings. An injunction granted by the CAT has the same effect as an injunction granted by the High Court, and the CAT must apply the same principles as outlined above. Failure to comply with an injunction allows the CAT to certify the matter to the High Court, which may deal with that person as if they were in contempt. An application for an interim injunction can be made without notice if it appears to the CAT that there are good reasons

for not giving notice which must be stated as part of the evidence in support of the application.

9.2 Alternative Dispute Resolution

Alternative dispute resolution (ADR) is available and encouraged by the courts in England and Wales, but is not mandatory. Antitrust disputes are arbitrable if the claim alleging an antitrust infringement falls within the ambit of an arbitration clause. The courts have held that antitrust claims are arbitrable. In *Microsoft Mobile v Sony* [2017] EWHC 374 (Ch), the High Court considered the application of an arbitration clause in a tortious claim arising from allegations of anti-competitive conduct and determined that the claim could be stayed under Section 9 of the Arbitration Act 1996. This approach was confirmed in *Gazprom Export LLC v DDI Holdings Ltd* [2020] EWHC 303 (Comm).

The CAT appears reluctant to embrace ADR. In *Claymore Dairies* [2006] CAT 3, the CAT emphasised that proceedings must protect the public interest. Where parties wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the CAT's consent to a stay of the proceedings. However, proceedings can be withdrawn without the tribunal's permission, provided the defendant gives consent. The Damages Directive also seeks to encourage consensual dispute resolution.

10. Funding and Costs

10.1 Litigation Funding Damages-Based Agreements (DBAs)

DBAs are available, under which lawyers can agree to accept a share of the clients' winnings, capped at 50%. DBAs must be on a no win, no fee basis. DBAs are not available in opt-out

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collective proceedings (as confirmed in *Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited* [2023] UKSC 28).

Litigation Funding Agreements (LFAs)

Following the Supreme Court's judgment on 26 July 2023 in *Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited* [2023] UKSC 28, LFAs, in which the funder's return is a share of damages ultimately awarded to the Claimant, are now also categorised as DBAs and are therefore not enforceable if they do not meet the requirements set out in the applicable regulations, such as capping the share of winnings at 50% and being on a no win, no fee basis. Most LFAs would not currently meet the requirements of the legislation and so the validity of LFAs currently in force will need to be considered and a new approach to LFAs in the future will need to be taken. The consequences will be particularly significant in opt-out collective actions in the CAT.

Conditional Fee Arrangements (CFAs)

CFAs, in which lawyers act on a "no win, no fee" basis, with provision for a "success fee" uplift in the event of a successful outcome, are available in England and Wales. CFAs must be in writing and the percentage uplift cannot be more than 100% of the lawyer's normal fees. The uplift is no longer recoverable from the losing party in most cases. If the CFA was entered into before 6 April 2016, then the uplift may be recoverable from the losing party. Following *Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited* [2023] UKSC 28, if the funder's return is a share of damages ultimately awarded to the claimant, CFAs will now also need to comply with the requirements of a DBA.

Third-Party Funding

Third-party funding by a professional litigation funder is also available in competition cases. The Court of Appeal has held that professional funders should be liable to pay the costs of opposing parties, capped at the amount of funding they provided. Following *Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited* [2023] UKSC 28, if the third-party funder's return is a share of damages ultimately awarded to the claimant, these arrangements will now also need to comply with the requirements of a DBA.

Insurance

Legal expenses insurance, or after-the-event insurance, is also available to cover costs, although such insurance is normally expensive.

10.2 Costs

High Court

Costs follow the event

The general rule in the High Court is that costs follow the event, namely, that the unsuccessful party pays the reasonable costs of the successful party (CPR 44.2). However, the courts have general discretion in awarding costs, and will have regard to all the circumstances of the case, including the conduct of the parties, whether a party was partially successful, and any payment into a court or settlement offer that is drawn to the court's attention. Note that even where a costs order is made, the successful party is generally only likely to recover around two thirds of its costs.

Costs orders against third parties

In exceptional cases, a successful party may seek a costs order against a third party, for example, if a third party has helped to fund litigation on behalf of the losing party. However, following *Arkin v Borchard Lines Limited* [2005] EWCA Civ

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655, it is necessary to distinguish between “pure funders” (who personally have no interest in the litigation and do not stand to benefit from it) and professional funders. The Court in *Arkin* held that costs orders would not be made against pure funders, but against professional funders costs orders may be made to the extent of the funding provided.

Offers to settle

Offers to settle can also be made under CPR Part 36, which may have certain costs consequences. For example, a defendant can make a Part 36 offer, and if the claimant accepts, that ends the litigation. However, if the claimant rejects the offer and succeeds at trial but is awarded less at trial than the amount of the offer, the claimant will generally have to pay the defendant’s costs from the 21st day of the offer. A claimant can also make an offer under Part 36. If the defendant refuses the offer and the claimant recovers more at trial, the court can order the defendant to pay a 10% uplift on that sum and interest on all or part of the sum recovered.

CAT

Factors determining costs

CAT Rule 104 provides that the CAT may, at its discretion, make any order it considers fit in relation to the payment of costs. In contrast to the provisions in relation to the High Court, in the CAT there is no general rule that costs follow the event. However, the CAT Rules provide a number of factors that the CAT may take into account when determining the amount of costs. These factors are set out in CAT Rule 104(4) and include:

- the conduct of all parties in relation to the proceedings;
- any schedule of incurred or estimated costs filed by the parties;

- whether a party has succeeded in part of its case, even if that party has not been wholly successful;
- any admissible offer to settle that is drawn to the CAT’s attention, and that is not a settlement offer to which cost consequences apply;
- whether costs were proportionately and reasonably incurred; and
- whether costs are proportionate and reasonable in amount.

The general approach in the CAT is that the appropriate starting point is that the successful party should be awarded its costs (*Albion Water v Dwr Cymru Cyfngedig* [2013] CAT 16). However, the CAT acknowledges that a balance must be struck between ensuring that costs awards do not undermine the effectiveness of the competition regime whilst ensuring a just result for both parties (*CMA v Flynn Pharma* [2020] UKSC 12).

Offers to settle

The CAT Rules also include specific cost consequences relating to the acceptance or rejection of a settlement offer that are similar to those applicable in the High Court under the rules on offers to settle in CPR Part 36. Under the CAT Rules, an offer to settle is labelled a “Rule 45 Offer”.

Costs orders

In addition, CAT Rule 57(1)(d) states that if any party fails to comply with any direction, the CAT may order that the party (or its representative) be subject to an order for costs as the CAT sees fit.

In June 2016, in *Socrates Trading Limited v The Law Society of England and Wales*, the CAT decided to exercise its powers under Rule 58(2)(b) to cap the level of recoverable costs in the case.

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11. Appeals

11.1 Basis of Appeal

Judgments of the CAT and the High Court may be appealed to the Court of Appeal, provided the permission of the lower court or the Court of Appeal has been obtained. Appeals are typically only permitted on points of law. They can be made either by a party to the proceedings or by someone who has sufficient interest in the matter. A further appeal from the Court of Appeal to the Supreme Court is possible, again provided permission is granted either by the Court of Appeal or the Supreme Court.

Trends and Developments

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Clifford Chance LLP has a global antitrust litigation group that has handled many of the most significant antitrust damages claims over

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ENGLAND & WALES TRENDS AND DEVELOPMENTS

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C L I F F O R D
C H A N C E

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Recent Developments in Antitrust Litigation in England and Wales

To date, England and Wales has been the leading jurisdiction within Europe for EU-wide antitrust damages claims, in light of its highly respected commercial courts, specialist competition judges and a litigation procedure most like the USA's, including extensive disclosure requirements on both claimants and defendants. The changes to antitrust litigation across EU member states, introduced by the EU Damages Directive, in large part reflected existing practice in English courts, particularly in terms of the approach to disclosure.

This year has seen continued growth in collective (or class) actions, including those claims relying on Chapter 2 of the Competition Act 1998 (CA 1998) for abuse of a dominant position, with important clarification provided as to the factors courts should be considering when deciding whether claims should proceed on an opt-in or opt-out basis. This year has also seen a significant change to the way in which claims in the UK can be funded, which will be particularly significant in opt-out collective actions.

Reform of procedure has continued, with the government publishing its proposals following a consultation on new rules for the UK Competition Appeal Tribunal (CAT) and we are now seeing the implementation of the new practice directions in the CAT.

Trends in antitrust investigations

In recent years, authorities around the globe have been focused on investigating a number of prominent technology companies. This includes the EC's investigations into Apple's App Store rules and Apple Pay, the US Department of Justice (DOJ) and 11 State Attorneys General filing a civil antitrust lawsuit relating to alleged

exclusionary practices in the search and search advertising markets, and the UK's CMA opening an investigation into Apple over suspected anti-competitive behaviour. The CMA has also completed a market study into mobile ecosystems, as a result of which it is contemplating a market investigation into mobile gaming, and has opened an investigation into Google over suspected anti-competitive behaviour. There has also been a particular focus in Europe and the UK in recent years on investigations into pharmaceutical companies, which have principally focused on allegations of excessive pricing and/or anti-competitive agreements. These investigations may lead to follow-on damages claims.

Cost of living

As cost of living pressures have escalated in the UK, the government has directed the CMA to pursue potential breaches of competition law, in particular where there is evidence of price gouging and cartel activity affecting consumer prices. The CMA has stated that it will consider any evidence that companies have broken competition law, for example by charging excessive prices, and take appropriate action. Follow-on damages claims may result from any such enforcement action. While the publication of the CMA's investigation in July 2023 into lack of competition among fuel retailers concluded there was no evidence of cartel behaviour, the CMA has recommended a new fuel monitor oversight body to ensure competition is reignited. The CMA's attention has now turned to how retail competition is working in the UK grocery sector and the relevant supply chains, with further findings expected in August 2023.

Collective actions

Collective actions have been available in the CAT since October 2015 for follow-on and standalone antitrust damages claims, following

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changes implemented by the Consumer Rights Act 2015. Claims may be brought on an opt-in or opt-out basis. The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a claim where it is brought by a representative proposing to bring the claim on behalf of the class. The representative need not be a member of the class, if the CAT considers that it is just and reasonable for the representative to bring the claim in that capacity.

Collective proceedings will only continue if the CAT makes a collective proceedings order (CPO). The CAT will make a CPO if it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, the claims must raise the same, similar, or related issues of fact or law. The CAT will also consider whether collective proceedings are an appropriate means for fair and efficient resolution of the collective issues, whether separate claims of the same or similar nature have already been commenced by members of the class, the class size and nature, whether it is possible to determine for any given person whether they are a member of the class, and whether claims are suitable for an aggregate award of damages.

In making a CPO, the CAT must also decide whether the proceedings should be opt-in or opt out.

Merricks v Mastercard

The CPO granted by the CAT in the *Merricks v Mastercard* collective action in August 2021 was a huge boost to the development of collective actions in the UK. In the most prominent ongoing collective proceedings, *Walter Merricks CBE v Mastercard*, the claim was brought in September 2016 and proposed to combine follow-on actions for damages under Section 47A of the

CA 1998, arising from a decision of the commission that the Mastercard payment organisation had infringed competition law by setting a minimum price that merchants had to pay to their acquiring bank to accept payment cards in the European Economic Area (EEA).

The proposed claim, in effect, included an estimated 47 million people. The CAT ruled that the claim was not appropriate to be brought as a collective proceeding. This judgment was overturned by the Court of Appeal and the claim was remitted to the CAT. Mastercard successfully sought leave to appeal to the UK Supreme Court which, in its judgment in December 2020, determined that the CAT made a series of errors of law.

First, it failed to recognise that merchant pass-on was a common issue. Had it done so, this would have been a powerful factor in favour of certification. Second, the CAT treated suitability of the claims for aggregate damages as if it were a hurdle, rather than one of many factors relevant to suitability for collective proceedings. Third, the CAT should have applied a test of relative suitability. If the forensic difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not have been sufficient to deny certification for collective proceedings. Fourth, the CAT did not take into account the general principle that the court must do what it can with the evidence available when quantifying damages. Incomplete data and the difficulties of interpreting it are frequent problems with which the civil courts are often faced. This was not a good reason for a court refusing a trial to an individual or to a large class who have a reasonable prospect of proving some loss, breach of statutory duty having been established. Fifth, the power to award aggregate

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damages in collective proceedings is supposed to avoid the need for individual assessments of loss, and the CAT was thus wrong to require the class representative's proposed method of distributing aggregate damages to take account of each class member's loss.

The claim was remitted back to the CAT to reconsider the grant of a CPO. Following this, in August 2021 the CAT granted the first CPO in the UK and the claim is now proceeding in the CAT.

There are now over 30 collective actions before the CAT. The CAT continues to grapple with issues beyond whether to certify, including the factors to take into account when deciding whether claims should be brought on an opt-in or opt-out basis.

O'Higgins v Barclays and ors and Evans v Barclays and ors

The issue of certification on an opt-in or opt-out basis was considered in the Court of Appeal in *O'Higgins v Barclays and ors* and *Evans v Barclays and ors* [2023] EWCA Civ 876, in which the Court of Appeal overturned the CAT's findings as to whether the claim should proceed on an opt-in or opt-out basis.

The Court of Appeal stated that a powerful indicator towards a claim being certified as opt-out arises in scenarios where there would be no proceedings save on an opt-out basis. In addition, while the strength of the claim is usually to be a neutral factor in determining whether proceedings should be opt-in or opt-out, to the extent that it is taken into account, there needs to be a relevant connection between the strength of the claim and the decision made as to whether proceedings should advance on an opt-in or opt-out basis. The Court of Appeal also acknowledged that the existence of parallel individual or opt-

in proceedings could be considered to demonstrate the feasibility of opt-in proceedings and clarified that whether or not the proposed class representative is a pre-existing body, such as a trade union, should not be taken into account.

The case will now be remitted to the CAT on an opt-out basis and re-opens the gates to opt-out collective actions, which are now purporting to represent both individuals and businesses.

Litigation funding

Following the Supreme Court's judgment on 26 July 2023 in *Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited* [2023] UKSC 28, litigation funding agreements, in which the funder's return is a share of damages ultimately awarded to the claimant, are now also categorised as damages based agreements and are therefore not enforceable if they do not meet the requirements set out in the applicable regulations, such as capping the share of winnings at 50% and being on a no win, no fee basis. Most litigation funding agreements would not currently meet the requirements of the legislation and so the validity of LFAs currently in force will need to be considered and a new approach to LFAs in the future will need to be taken.

The consequences could be particularly significant in opt-out collective actions in the CAT as it could strike a powerful blow against the regime for opt-out antitrust collective actions. Even where CPOs have already been granted, the question of whether funding arrangements are in place to meet the claimants' own costs and any adverse costs order will have to be revisited – this will pose a real issue for ongoing claims based on a litigation funding agreement that is no longer valid. However, there are other ways litigation funding agreements can be draft-

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ed, such as firms entering into damages-based agreements with clients directly, with the firms backed by external funders. Given the amount of money already invested into these proceedings and the need for litigation funding in class actions, the industry seems likely to find ways to continue despite this judgment.

Rules reform

The Court of Appeal in *Le Patourel* [2022] EWCA Civ 593 indicated that the CAT Guide to Proceedings, which has governed the approach of CAT practitioners since its last revision in 2015, includes certain points which might warrant reconsideration, in particular regarding the approach to CPO certification. This has been followed by the results of the UK government's consultation to reform the CAT Rules governing applicable procedure for cases in the CAT. Following this, the UK government intends to expand the CAT's jurisdiction to include the ability to grant declaratory relief, and give the CAT discretion to award exemplary damages for breaches of competition law (aside from in collective proceedings).

In 2022, the President of the CAT, Sir Marcus Smith, set down a number of new practice directions, including regarding witness statements for trial, confidentiality, and a new process for so-called “umbrella proceedings”, where a number of related cases may have common issues decided by a single “umbrella tribunal”, on application by the parties or of the tribunal's own motion. We can now see these reforms taking effect, for example, an Umbrella Proceedings Order was made under one of these practice directions in *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, on the basis that certain common issues could be agreed between the parties and determined by “host cases” in the first instance. Further reforms

can be expected in the coming year, as these new practice directions take effect and further changes are considered.

Abuse of a dominant position

The other major trend is an increase in the volume of claims arguing abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and/or Chapter 2 of the CA 1998.

In Europe more generally, as the competition regulators switch their focus to the big technology companies and increase the number of abuse of dominance investigations based on Article 102 of the TFEU, antitrust claims based on Article 102 are growing. Such claims are not limited to follow-on damages claims, but encompass standalone damages claims based on Article 102 of the TFEU and/or injunction applications to prevent alleged abuse of a dominant position, often as a matter of urgency. Such injunction applications are frequently settled privately, without a court hearing. However, most of these claims are unsuccessful and the cost consequences in those jurisdictions which order costs to be paid by the losing party (including the UK) can be significant, so such claims – particularly on a standalone basis – should be considered very carefully. Post Brexit, such claims can still be brought in the UK in some circumstances based on breaches of Article 102 of the TFEU and/or under UK competition law (Section 18 of the CA 1998). If breaches of EU competition law are alleged to have taken place before Brexit, the UK courts will be required to apply EU law as it applied at the end of the Brexit transition period.

Unlocked v Google

In *Unlocked v Google* [2019] CAT 17, *Unlocked* sought urgent relief based on an allegation of abuse of a dominant position. The CAT granted

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an interim injunction and ordered an expedited trial on abuse (assuming that Google was dominant in the relevant market for the purpose of the trial). However, when Unlockd went into administration and was unable to secure further funding, it discontinued its claim. Unlockd argued that, as the tribunal had a wide discretion to order costs, no order for costs should be made. The CAT ruled that the starting point was that the losing party ought to pay the successful party's costs, and that, although the tribunal may make a different order, this was a claim by one commercial party against another and there was no other factor that justified making a different order. Unlockd was ordered to pay costs of GBP200,000 (though, this was less than a quarter of the costs Google first claimed).

Socrates Training v The Law Society of England and Wales

In *Socrates Training v The Law Society of England and Wales* [2017] CAT 10, Socrates argued that the Law Society was abusing its dominant position by requiring certain accredited courses to be obtained exclusively from the Law Society. The CAT held that the Law Society had breached Chapters 1 and 2 of the CA 1998. This was the first case to proceed to trial under the fast-track procedure. The trial as to the existence of an infringement was completed in four days. Each side adduced two factual witnesses and called one economist. The evidence of the experts was heard concurrently, in a "hot tub". The CAT exercised its discretion to cap the level of recoverable costs. Roth J stated that there was no magic formula that produces an objectively correct figure for the level of recoverable costs. However, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims

but also from the burden of having to defend a claim that is assumed, for this purpose, to be unfounded.

Gormsen v Meta Platforms, Inc and Others [2023] CAT 10

In *Gormsen v Meta Platforms, Inc and Others* [2023] CAT 10, the CAT refused to certify a standalone CPO application alleging an abuse of a dominant position by Meta in breach of the Chapter II prohibition of the CA 1998. The CAT found significant problems with the pleaded claims in the CPO application and with the methodology proposed by the "proposed class representative" (PCR). Specifically, the CAT found that the proposed legal basis for assessing compensation owing to the class varied materially between the three alleged abuses, whereas the proposed economic analysis sought to provide a singular response to the Respondents' alleged wrongs. Furthermore, the PCR's economic analysis failed to consider the two-sided nature of the relevant market, and risked incorrectly matching alleged "excess profits" earned by Meta with alleged losses suffered by the class.

The CAT considered that there were two key points to address in order to determine the CPO application:

- whether the CPO application met the test in *Pro-Sys Consultants v Microsoft* (the Pro-Sys test); and
- whether, under Rule 79(2)(b) of the CAT Rules, the continuation of the proceedings could be justified in terms of cost/benefit.

In relation to the first point, the CAT found that the PCR had failed to meet the Pro-Sys test because of inadequacies identified in the pleading of the abuses alleged in the CPO application, and the methodology proposed by the PCR for

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the quantification of loss. The CAT considered that there is no effective blueprint for the efficient and effective trial of the issues raised by the PCR. In respect of the second point, the CAT considered that the problems identified in respect of the application of the Pro-Sys test to the CPO application meant that no cost/benefit analysis could be properly carried out at this stage. The CAT therefore stayed the CPO application for a period of six months to enable the PCR to file additional evidence setting out a new and better blueprint for the effective trial of the proceedings. Absent a new and better blueprint, the CAT will then lift the stay and reject the CPO application.

Brexit

On 1 January 2021, the UK completed its post-exit transition period from the EU. From this point, EU institutions no longer had direct jurisdiction in the UK, UK courts could diverge from EU competition law, and EC decisions issued after the UK's Brexit transition period were no longer binding on UK courts. However, there are a number of grandfathering provisions which will preserve elements of the pre-Brexit framework, and UK courts will be free to have regard to EU jurisprudence in applying competition law in the UK. Importantly, decisions of the EC issued prior to the end of the Brexit transition will still be binding in the UK courts. In addition, if alleged breaches of EU competition law took place before the end of the transition period, UK courts will be required to apply EU law as at the end of the transition.

The post-Brexit jurisdiction regime

The first examples of the English courts' application of the post-Brexit jurisdiction regime show that the English courts will be pragmatic in their approach to considering questions around geographic presence, where harm is suffered, and the effect on consumers in any given jurisdiction. For defendants domiciled inside the EU, the common law jurisdiction regime now applies: even where jurisdiction over a claim is established, proceedings can be stayed if it is shown that another court which also has jurisdiction is a more appropriate forum.

FRANCE



Law and Practice

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Gide Loyrette Nouel was founded in Paris in 1920 and is a leading international law firm with 11 offices worldwide. With 550 lawyers, including more than 100 partners, the firm offers legal advice and assistance across many disciplines to public and private sector institutions. Gide boasts a wealth of experience in antitrust procedures (cartels and abuse of dominant position) before the French Competition Authority, the EC and other national competition authorities. The firm also has extensive expertise in

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Following the implementation of Directive 2014/104/EU of 26 November 2014 into French law by Ordinance No 2017-303 and a Decree on 9 March 2017, the antitrust activity of French courts has intensified. Several issues are recurrent, such as those related to the limitation period (and, in particular, its starting point), the jurisdiction of the courts in cases of international disputes, and compensation for damages. Some key recent cases/decisions are summarised here.

Limitation Period

The French courts ruled that the decision of the competition authority finding anti-competitive practices is the starting point for the limitation period (Council of State, 22 November 2019, SNCF Mobilités; French Supreme Court, 27 January 2021, No S 18-16.279). Conversely, the hearing of the victim by the services of the French Competition Authority (FCA), the knowledge of a cartel gained through a press article, or the imprecise knowledge of a cartel held by a manager of the victim company are not sufficient to start the limitation period (Paris Court of Appeal, 14 April 2021, No 19/19448; French Supreme Court, 27 January 2021, No S 18-16.279; Paris Court of Appeal, 5 January 2022, No 19/22293).

Jurisdiction

As regards the jurisdiction of the courts in the case of an international dispute, the French courts have applied the case law of the Court of Justice of the European Union (ECJ, 5 July 2018, FlyLal, C-27/17; ECJ, Tibor-Trans, 29 July 2019, C-451/18), in which it ruled that the damage materialises at the place where the market is affected by the anti-competitive prac-

tices that the victim claims led to their damage (Paris Commercial Court, 9 April 2021, No 2020004977; Paris Court of Appeal, 7 January 2020, No 19/12553).

Procedure and Stay of Proceedings

The Paris Commercial Court ruled in two cases that the judgment of the General Court of the EU (GCEU) confirming the EC's decision did not constitute a "definitive decision" under European law, on account of the pending appeal before the ECJ (Paris Commercial Court, 4 July 2022, No 2017015670; Paris Commercial Court, 18 July 2022, No 2020004977).

However, in the Twenga case, the Paris Commercial Court refused to stay the proceedings, considering such a stay "prejudicial to the claimant by being contrary to one of the fundamental principles of law set forth in Article 6 of the European Convention on Human Rights and, in particular, the right to be judged within a reasonable time – even though more than 15 years have passed since the facts in dispute". The Paris Commercial Court then ordered the parties to submit their briefs on the merits.

Damages

As regards damages, the Paris Court of Appeal has accepted compensation of the loss of opportunity (Paris Court of Appeal, 8 February 2019, No 16/06164) and increasingly also accepts compensation for moral damages suffered (Paris Court of Appeal, 17 May 2023, No 21/01033) as a result of "negotiating for years with suppliers who pretend to negotiate" (Paris Court of Appeal, 23 June 2021, No 17/0410) or where the eviction of a daily newspaper had "damaged the confidence and the dynamics created around the launch of this new daily newspaper" (Paris Court of Appeal, 23 February 2022, No

19/19239). See **7.1 Assessment of Damages** for further details.

In addition to the guidance provided on 23 March 2017 by the Ministry of Justice, new soft legal instruments are emerging to assist courts and parties in their private enforcement proceedings. On 1 March 2021, the Paris Court of Appeal published methodological sheets (guidance) on the evaluation of economic loss, including regarding private enforcement claims. These sheets provide useful guidelines on applicable law, the limitation period, the damages that can be compensated, and the elements of proof in the context of a claim stemming from an anti-competitive practice.

Furthermore, guidance on damage classification is currently being discussed in working groups involving practitioners, professors and experts, further to the nomenclature “of damages caused by anti-competitive practices” proposed in January 2022 by Professor Rafael Amaro, which distinguishes and specifies five categories of damage:

- overcharge damage;
- eviction damage;
- investment damage;
- loss of value of intangible property; and
- moral damage.

This nomenclature is not intended to be binding. Nonetheless, it could be a useful tool to guide interested parties and the courts in the assessment of damages.

1.2 Other Developments

Another interesting point is the development of the use of criminal procedural law when launching investigations in relation to competition law issues, which was not particularly common until

recently. Several cases initiated in recent years are currently in the hands of investigating judges under criminal law and this raises various issues, such as:

- potential overlap between the activities of the criminal courts and those of the FCA;
- the extent of their co-operation;
- the question of access to the relevant file for the parties; and
- the effect on leniency policy both in France and within the EU.

Article L420-6 of the French Commercial Code (FCC) provides that any natural person who fraudulently takes a personal and decisive part in the conception, organisation or implementation of an infringement of competition law may incur a fine of EUR75,000 and a maximum prison term of four years.

Article L463-5 of the FCC authorises investigating judges and criminal courts to communicate to the FCA, at its request, documents contained in the criminal case file that are directly related to the facts being investigated by the FCA.

The FCA may also, pursuant to Article L462-6 of the FCC, refer a case to the public prosecutor when it considers that the nature of the facts appears to justify the application of Article L420-6 of the FCC. However, the prosecutors decide at their discretion what further action they intend to initiate further to this referral.

In addition, a law of 24 December 2020 gives the financial public prosecutor, the investigating judge, and the criminal court of Paris concurrent jurisdiction throughout France for the prosecution, investigation and judgment of the offences provided for in Article L420-6 of the FCC. The attribution to a specialised national prosecu-

tor's office with concurrent jurisdiction in this area could lead to the strengthening of criminal law enforcement with regard to anti-competitive practices.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Ordinance No 2017-303 was adopted on 9 March 2017. Its substantive provisions relating to liability, burden of proof, presumptions, and various questions on the admissibility of evidence are applicable to claims in which the infringement occurred after the Ordinance came into force (ie, 11 March 2017). As an exception, its procedural rules on disclosure and access to evidence are applicable to private enforcement claims brought before the competent courts from 26 December 2014 onwards (Paris Court of Appeal, 28 June 2023, RG No 21/13172).

In this context, some claimants try to use the provisions of the Ordinance before the courts even though there are not applicable *ratione temporis*. Nevertheless, and recently, the French courts ruled against the provisions of the Ordinance being applicable to private enforcement claims brought on grounds of infringements pre-dating the Ordinance (French Supreme Court, 19 October 2022, No 21-19.197; Paris Court of Appeal, 23 June 2021, RG No 17/0410; Paris Court of Appeal 24 November 2021, No 20/04265, Paris Court of Appeal, 5 January 2022, No 19/22293).

The Ordinance is deemed to provide “special rules”. Therefore, standard civil law rules on liability and procedure remain in force for all issues not within its scope. The standard provision applicable to private enforcement actions – whether follow-on or standalone – is Article 1240 of the French Civil Code on tortious liabil-

ity, where the claimant must establish a “fault” (ie, an infringement of competition law), damage, and a direct causal link between the fault and the damage suffered.

Compared with the standard regime, in which the claimant must establish these three fundamental elements, the Ordinance alleviates the claimant's burden of proof. It creates a non-rebuttable presumption of the existence of a fault for all claims based on final infringement decisions adopted by the FCA or the EC (Article L481-2 of the FCC). Claimants also benefit from a rebuttable presumption that cartels cause harm (Article L481-7 of the FCC).

Follow-on and standalone proceedings are both available under French law. Although standalone actions are rarer, the Paris Commercial Court recently ruled that a company had implemented several practices of abuse of its dominant position (without prior sanction by the FCA) and, as such, awarded damages to the victim of the anti-competitive practice. In qualifying the abuse of dominant position, the Paris Commercial Court relied on a previous FCA decision concerning the same defendant (Paris Commercial Court, 10 February 2021, Oxone Technologies e.a c/ Google Ireland Ltd RG 2020035242).

2.2 Specialist Courts

Claims for damages resulting from anti-competitive practices fall within the exclusive jurisdiction of specialised judicial courts, pursuant to Article L420-7 of the FCC, or administrative courts where the author (French Supreme Court 29 September 2004, EDF v SNIET) or the victim (Council of State, 19 December 2007, CAMPENON-BERNARD, Council of State, 10 July 2020, Lacroix Signalisation No 420045) of an anti-competitive practice is a public person.

If this exclusive jurisdiction is violated, the writ of summons will be sanctioned by a rejection.

Among the judicial courts, eight commercial courts and eight high civil courts of first instance have jurisdiction to deal with competition law litigation, as follows:

- commercial courts – Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes; and
- high civil courts of first instance – Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes.

On appeal, the Paris Court of Appeal has exclusive jurisdiction. In addition, specific chambers have been appointed at the Paris Commercial Court and at the Paris Court of Appeal to deal with competition law litigation.

The courts have also set up international chambers responsible for hearing disputes affecting international trade. Pleadings may be conducted in English before these chambers.

2.3 Decisions of National Competition Authorities

For proceedings that fall within the scope of Ordinance No 2017-303, final decisions of the FCA (ie, those that can no longer be overruled through ordinary appeal procedures) are binding and irrefutably establish the existence of a fault (Article L481-2 paragraph 1 of the FCC).

The Ministry of Justice provided guidance in a *circulaire* (soft legal instrument), dated 23 March 2017, to assist the courts and the parties in private enforcement litigation. The *circulaire* indicates that Article L481-2 of the FCC is applicable to infringement decisions (including settlement decisions and injunction decisions)

before the FCA and/or the EC. Decisions that identify competition concerns (such as interim measures proceedings) or commitment decisions may serve as *prima facie* evidence.

Final decisions issued by another national competition authority (NCA) constitute evidence in support of the existence of a fault but are not binding (Article L481-2 paragraph 2 of the FCC). Article L481-2 paragraph 3 of the FCC states that national courts may not decide cases in a way that runs counter to a decision adopted by the EC. Before the FCA, the EC (or another NCA) can be involved in damages actions using the *amicus curiae* instrument. Article 15 of Regulation No 1/2003 allows the EC and any NCA, at the request of a national judge or on their own initiative, to submit their observations in cases where the application of competition law is involved. Such observations are, however, not binding on French courts.

Between 2006 and 2008, the EC intervened – through the *amicus curiae* instrument – in competition disputes before national judges at least 18 times. More than half of these interventions took place before appellate courts. The instrument of *amicus curiae*, which is rarely used in practice, seems to have been implemented in the context of actions for damages before administrative courts where the public rapporteur (*le rapporteur public*) referred to the FCA observations (Council of State, 10 July 2020, Lacroix Signalisation No 420045).

2.4 Burden and Standard of Proof

According to the general principle of tortious liability under French law, the burden of proof rests on the claimant.

As discussed in 2.1 **Legal Basis for a Claim**, the standard provision applicable to private enforce-

ment actions – whether follow-on or standalone – is Article 1240 of the FCC on tortious liability, where the claimant must establish a “fault” (ie, an infringement of competition law), damage, and a direct causal link between the fault and the damage suffered. However, for claims relating to infringements occurring after 11 March 2017, Ordinance No 2017-303 alleviates the claimant’s burden of proof. It creates a non-rebuttable presumption of fault for all claims based on final infringement decisions by the FCA (Article L481-2 of the FCC). Claimants also benefit from a rebuttable presumption that cartels cause harm (Article L481-7 of the FCC).

In the same way, again regarding the infringements that occurred after the entry into force of the Ordinance, Article L481-4 of the FCC provides that the direct or indirect purchaser of the products or services concerned by the anti-competitive practices is deemed not to have passed on the additional cost to its direct contractors – unless the defendant proves otherwise. Hence, for infringements occurring after 11 March 2017, the burden of proof for the pass-on defence rests on the defendant. In this respect, the Paris Court of Appeal ruled that the Ordinance was not applicable to a case where the events giving rise to the liability occurred prior to 11 March 2017 and therefore the claimants were required to prove that they had not passed the loss of profit due to the reduced margins resulting from the sanctioned cartel on to consumers (Paris Court of Appeal, 5 January 2022, No 19/22293).

In a recent case, the Paris Court of Appeal rejected the claimant’s argument challenging the expert’s conclusions that there was no damage. The court ruled that the provisions of Article L481-7 of the FCC – according to which, it is presumed until proved otherwise that a cartel

between competitors causes harm – is not applicable to a cartel that took place between September 1993 to February 2004. The Paris Court of Appeal then applied the transitional rules of French law strictly (Paris Court of Appeal, 23 June 2021, RG No 17/0410).

2.5 Direct and Indirect Purchasers

Claims can be brought by direct and indirect purchasers, pursuant to Article L481-5 of the FCC, which refers to both types of purchasers. The indirect purchaser, whether of goods or services, is deemed to have provided proof that it incurred overcharges where it can prove that:

- the defendant has committed an anti-competitive practice mentioned in Article L481-1 of the FCC;
- this practice has resulted in additional costs for the direct contractor of the defendant; and
- it has purchased goods or used services affected by the anti-competitive practice or purchased goods or used services derived from or containing them.

The defendant may, however, demonstrate that such additional cost was not passed on to the indirect buyer or that it was only partially passed on by its direct contractor.

2.6 Timetable

The duration of proceedings will vary depending on the complexity of the case (procedural issues, stays of proceedings, communication of documents, expert opinions on the amount of damages, etc).

A stay of proceedings is often requested by defendants in private enforcement litigation pending the outcome of a parallel investigation by a competition authority and/or an appeals court. On the basis of Articles 377 et seq of the

French Civil Procedure Code (FCPC), a judge may – depending on the circumstances of the case – decide to stay the progress of the proceeding for a given period or until the occurrence of an event that they specify.

The grounds for a stay are the effect a public enforcement decision can have on the judgment to come in a compensation claim and the need to guarantee the proper administration of justice. On such grounds, French judges often grant stays of proceedings until the competent competition authority issues a final decision. The stay can be extended at the request of any party pending the decision of appeal courts, as long as the judge is satisfied that the aforementioned conditions are fulfilled.

3. Class/Collective Actions

3.1 Availability

Hamon Law

Law No 2014-344 of 17 March 2014, the so-called Hamon Law, introduced a new form of collective action under French law in the event of damage resulting from various infringements – including, notably, anti-competitive practices – under a regulated regime open only to individual consumers. This collective action may only be initiated:

- after a final decision establishing the infringement has been issued by the “competent national or European Union authorities or courts”; and
- within a limitation period of five years from the final decision (Articles L623-24 and L623-25 of the French Consumer Code).

The action allows consumers who consider themselves to be victims of similar kinds of dam-

age caused by one or more professionals – for which they would not bring an action before the courts, owing to the low amount of potential compensation or because they are unaware of existing actions and procedures – to have their rights collectively recognised. Consumers must be in a similar legal situation with regard to the identified breach. However, the damages suffered need not be identical.

Consumers must have expressed their unequivocal willingness to participate in the collective action (ie, an opt-in system). Only consumers, defined as natural persons acting for non-professional purposes, can seek compensation for their loss through collective action. A collective action can be brought on behalf of both direct and indirect purchasers.

So far, this new set of rules has been used in consumer law proceedings more often than in competition law matters.

Syndicate Actions

Aside from this specific form of collective action, associations and syndicates gathering economic operators together can claim for compensation of the “collective interest” of a given profession or business sector. This collective interest is distinct from the cumulative individual interests of their members.

The High First Instance Civil Court of Rennes ruled in a case initiated by a professional syndicate seeking compensation for the damage caused by the phosphates cartel condemned in 2010 by the EC. The court held that the syndicate had both the collective interest and the standing to sue for compensation for the harm caused by the actions of a cartel to the community of the syndicate’s members (High First Instance Civil Court of Rennes, 7 October 2019,

FRSEA v Roullier). This is known under French law as an action syndicale, based on Article L2132-3 of the French Labour Code and Article L490-10 of the FCC.

Class Actions

Discussions are currently underway in the French Parliament to implement a new class action regime, which is expected to extend to actions for damages arising from anti-competitive practices. This should be adopted in the second half of 2023.

3.2 Procedure

Article L623-1 of the French Consumer Code provides that only nationally representative consumer associations authorised by public authorities may bring a collective action against one or more professionals. In this respect, consumers are not parties to the proceedings in the procedural sense.

In France, the associations which are legally authorised to bring collective actions are the following:

- *Conseil National des Associations Familiales Laïques* (Cnafal), the *Confédération des Associations Familiales Catholiques* (CNAFC), the *Confédération Syndicale des Familles* (CSF), *Familles de France* and *Familles Rurales*, grouped together within the *Union Nationale des Associations Familiales* (Unaf) for family matters;
- *Association de Défense, d'Éducation et d'Information du Consommateur* (Adeic), *Association Force Ouvrière de Consommateurs* (AFOC), *Indecosa-CGT* and the *Association Léo Lagrange pour la Défense des Consommateurs* (ALLDC) for trade unions;

- *UFC-Que Choisir* and the *Consommation Logement Cadre de vie* (CLCV) for consumer issues;
- *Confédération Générale du Logement* (CGL) and the *Confédération Nationale du Logement* (CNL) for housing; and
- *Fédération Nationale des Associations d'Usagers des Transports* (Fnaut) for transport.

3.3 Settlement

Article L623-22 of the FCC provides that only the applicant association may take part in a mediation in order to obtain compensation for the individual losses suffered by the consumers that it represents.

The agreement resulting from the mediation must be submitted to the judge for approval (Article L623-22 of the FCC). This certification will ensure that the agreement is in accordance with the interests of the parties and will make it enforceable.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Before French high first instance civil courts and commercial courts, a pre-trial judge is designated to guarantee the fairness of the proceedings – in particular, regarding the timely exchange of pleadings and the production of documents, when applicable.

Pre-trial judges are also competent to rule on various procedural issues – although they cannot issue summary judgments on the merits of a case. All claims are answered by the court within the final ruling on the merits.

4.2 Jurisdiction/Applicable Law

In international disputes, the relevant jurisdiction is determined pursuant to EU international private law or French international private law, depending on the foreign state or states involved. The relevant rules of EU international private law can be found in Regulation No 1215/2012 of 12 December 2012 (Brussels I Recast Regulation). A defendant domiciled in an EU member state may be sued in the courts of that state (Article 4 of the Brussels I Recast Regulation). It may only be sued in the courts of another member state under certain conditions.

In matters relating to tort (delict or quasi-delict), the general rule is that the courts of the place where the harmful event occurred have jurisdiction (Article 7 Section 2 of the Brussels I Recast Regulation). This covers both the place where the event giving rise to the damage occurred and the place where the damage was suffered.

As regards the concept of “harmful event”, the French courts have applied the principle of the *FlyLal* and *Tibor-Trans* judgments (ECJ, 5 July 2018, *FlyLal*, C-27/17; ECJ, *Tibor-Trans*, 29 July 2019, C-451/18) – ie, the damage materialises at the place where the market is affected by the anti-competitive practices within which the victim claims to have suffered their damage. Indeed, in a recent case concerning an action for damages by the price comparison service *Twenga* as a result of anti-competitive practices implemented by Google and sanctioned by the EC, the Paris Commercial Court considered that it had jurisdiction, given that:

- *Twenga* provided evidence that it carried out all of its price comparison activity from its head office in Paris (and not from its foreign subsidiaries); and

- *Twenga*’s French entity was solely responsible for the design, publication and management of all websites, whether they were intended for a French or foreign audience (Paris Commercial Court, 9 April 2021, No 2020004977; see also Paris Court of Appeal, 7 January 2020, No 19/12553).

Where the defendant is not domiciled in a member state, French courts will apply French international private law. Under French law, in matters relating to tort (delict or quasi-delict), the alleged victim shall bring their claim before the courts of the country where the defendant is domiciled or before the courts of the places where the harmful event occurred or where the loss was suffered (Article 46 of the FCPC).

Applicable Law

Under French law, the law applicable to contractual obligations is determined in accordance with the provisions of Regulation No 593/2008 of 17 June 2008 (Rome I Regulation), whereas the law applicable to non-contractual obligations is determined pursuant to the provisions of Regulation No 864/2007 of 11 July 2007 (Rome II Regulation). Whether an obligation is contractual or non-contractual (ie, tortious) must be assessed from an EU law perspective, in light of the rulings of the ECJ.

From a general perspective, the law applicable to a non-contractual obligation arising from a tort is the law of the country in which the damage occurred (Article 4 Section 1 of the Rome II Regulation), unless the alleged liable person and the alleged victim both have their habitual residence in the same country at the time when the damage occurs – in which case, the law of that country will apply (Article 4 Section 2 of the Rome II Regulation) – or unless the tort is manifestly more closely connected with another country

(Article 4 Section 3 of the Rome II Regulation). This set of rules also applies in the specific case of an act of unfair competition exclusively affecting the interests of a specific competitor (Article 6 Section 2 of the Rome II Regulation).

Specific rules apply to other unfair competition acts and acts restricting free competition. Under Article 6 of the Rome II Regulation, the law applicable to a non-contractual obligation arising from an act of unfair competition is the law of the country where competitive relations or the interests of consumers are – or are likely to be – affected (Article 6 Section 1 of the Rome II Regulation). The law applicable to a non-contractual obligation arising from a restriction of competition is the law of the country in which the market is – or is likely to be – affected (Article 6 Section 3(a) of the Rome II Regulation). Where several markets may be affected, the law of the court of the defendant may also apply, under certain conditions (Article 6 Section 3(b) of the Rome II Regulation).

4.3 Limitation Periods

The limitation period applicable to actions for compensation in connection with anti-competitive practices is five years (Article L482-1 of the FCC), which is identical to ordinary civil law actions (Article 2224 of the French Civil Code). The period begins to run from the day on which the victim knows or ought to have known (Article L482-1 of the FCC) of the existence of an infringement, the fact that such infringement caused them harm, and the identity of at least one infringing party.

In the event the contemplated action concerns a continuous infringement, the limitation period does not run until the practice has ceased (Article L482-1 of the FCC). All the standard provisions of the French Civil Code relating to the

postponement, suspension and interruption of the limitation period are applicable to these actions unless other special rules should be taken into account.

Furthermore, acts of competition authorities (the FCA, other NCAs or the EC) aimed at investigating, detecting or punishing anti-competitive practices also interrupt the limitation period of private litigation until the issuance of a final decision from the relevant competition authority (Article L462-7 of the FCC).

Limitation Litigation

Determining the starting point of the limitation period for actions for damages caused by anti-competitive practices gives rise to extensive litigation. When Article L482-1 of the FCC is not applicable *ratione temporis* to the case, it is the general law of Article 2224 of the French Civil Code that applies, and which makes the limitation period begin to run from the date on which the victim becomes aware of the damage they have suffered.

Recently, the method used by the courts to determine the starting point of limitation periods on the basis of Article 2224 of the French Civil Code has been close to that provided for by Article L482-1 of the FCC, even if it is not applicable *ratione temporis*. So, in most cases, the competition authority's decision that finds anti-competitive practices is the starting point of the limitation period (Paris Commercial Court, 23 January 2023, RG No 2021037634).

Otherwise, a reading of recent case law suggests that – in the presence of a decision on provisional measures – decisions on the merits are most often taken as the starting point for the limitation period. Decisions on provisional measures are less likely to be taken into account; however, in

view of the *in concreto* approach to be adopted by judges, this possibility cannot be ruled out (eg, Paris Court of Appeal, 6 March 2019, SARL Arkeos v SA EDF, No 17/21261).

The Paris Court of Appeal also held that the hearing of the victim by the services of the FCA or knowledge of a cartel gained through a press article is not sufficient to start the limitation period (Paris Court of Appeal, 14 April 2021, No 19/19448). The Paris Court of Appeal also ruled, on the basis of Article 2224 of the French Civil Code, that – although the companies in the case may have suspected that they had been victims of an anti-competitive cartel through press articles and, more specifically, during their hearing by the Competition Authority – the materiality of the facts and the identification of the companies that had taken part in the cartel were not specified at the time and thus the injured companies were not in a position to take legal action (Paris Court of Appeal, 5 January 2022, No 19/22293). Conversely, a competition authority's press release relating to the decision may be sufficient to start the limitation period according to the courts' *in concreto* assessment (Paris Court of Appeal, 1 June 2023, RG No 468098).

As regards horizontal practices, hearings of alleged victims as witnesses during the investigation before the FCA are unlikely to be the starting point of the limitation period (eg, High First Instance Civil Court of Paris, 23 September 2019, Carrefour v Johnson & Johnson, No 2017013944).

The Paris Court of Appeal ruled that the claimant, having initially participated in the cartel, had been aware of all the necessary facts to bring an action before the commercial court, even before the date of the FCA's decision. The limitation period had therefore begun to run before

the date of the FCA's decision (Paris Court of Appeal, 14 September 2022, RG No 20/17560).

Recently, the French Supreme Court confirmed that the knowledge of pre-existing and distinct cartels or the imprecise knowledge of the cartel in question by a manager of the victim company does not constitute the starting point of the limitation period (French Supreme Court, 27 January 2021, No S 18-16.279).

As regards abuse of dominant position, certain replies by alleged victims to requests for information from the investigation services may be taken as the starting point for the limitation period. Again, this will depend on the information provided to the FCA's investigation services in the context of those replies.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Courts apply the provisions of the FCPC (Articles 132–142 and Article 145) to disclosure requests and the production of documents filed for or in connection with private enforcement litigation (Article L483-1 of the FCC).

For each request for disclosure, a judge must balance the legitimate interest of the claimant with the need to guarantee the protection of confidential information (Article L483-1 paragraph 2 of the FCC). This means:

- checking the usefulness of evidence;
- protecting the confidentiality of documents, particularly with regard to business secrets; and
- preserving the effectiveness of competition law (implementing Decree No 2017-305 of 9 March 2017).

Several categories of documents are distinguished (Articles L483-2 to L483-11 of the FCC), such as business secrets, privileged documents, and certain categories of evidence submitted or held by the FCA.

Fines of up to EUR10,000 may be imposed in the case of a failure or refusal to comply with the court's order of disclosure or if the evidence is destroyed (Article R483-14 of the FCC).

Article 145 of the FCPC allows for in futurum disclosure measures. This provision allows a party to seek an ex parte judicial order to force the opposing party to produce documents and information that are considered useful for its lawsuit. The judge may order a set of measures such as a bailiff's inspection, the hearing of individuals, or the disclosure of evidence by third parties.

Recently, in an interlocutory proceeding based on Article 145 of the FCPC, the Paris Court of Appeal ordered (inter alia) the production of the statement of objections that the EC had addressed to Renault Trucks in connection with the trucks cartel, along with the list of documents supporting that statement. However, it refused to order the production of documents such as the list of gross prices and Renault Trucks' costs and margins, as these requests were not proportionate to the damage they would cause to the defendant in its future negotiations with the applicant (Paris Court of Appeal, 25 October 2019, *X Y v Renault Trucks*, No 19/05356). Nevertheless, this decision was partially overturned by the French Supreme Court, which criticised the Paris Court of Appeal for not having examined whether the statement of objections was proportionate with regard to the confidential nature of the proof and the preservation of the effectiveness of competition law implemented in the public sphere (French Supreme Court, 8 July

2020, No 19-25.065). The Paris Court of Appeal, to which the case was subsequently referred, ultimately rejected the disclosure of the requested documents (Paris Court of Appeal, 18 May 2022, No 20/13878).

More recently, still in the "trucks cartel case" and in proceedings based on Article 145 of the FCPC, the Paris Court of Appeal refused to order the disclosure of extracts from the confidential version of the EC's cartel decision – given that the claimants did not justify the usefulness of obtaining these documents for their assessment of their alleged damage. The court also refused to order the disclosure of the index of the EC's file because such disclosure would undermine the leniency procedure. However, the court ordered the disclosure of the average sales prices of heavy trucks applied by the manufacturer in question in France and in each EU member state, as these average prices would facilitate the assessment of the damage that the companies believe they have suffered as a result of the anti-competitive practices (Paris Court of Appeal, 20 April 2022, No 21/06313).

5.2 Legal Professional Privilege

According to the Law of 31 December 1971, the following – in all matters, whether in the field of counsel or defence – are covered by professional secrecy:

- written advice addressed by a lawyer (subject to that lawyer being an outside counsel) to, or intended for, their client;
- correspondence exchanged between the client and their lawyer; or
- correspondence between the lawyer and their colleagues (unless expressly identified as "official").

5.3 Leniency Materials/Settlement Agreements

A judge cannot order the disclosure of the “written statement or the transcription of oral statements” by leniency applicants and undertakings involved in a settlement procedure before a competition authority (Article L483-5 of the FCC). The text extends this protection to “parts of a document drawn up in the course of the investigations and which would include a transcription or literal citation of these statements”.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Third-party statements may be requested by a judge or the parties and provided in writing or orally (Articles 199 et seq of the FCPC). Judges can ask questions after the witness has submitted its statement (Article 213 of the FCPC). Cross-examination is not usually performed in French courts, except in the International Chamber of the Paris Court of Appeal, where the parties may be allowed to rely on various common-law procedural rules under the control of the judge.

Summons to appear in front of a judge are mandatory. Defaulting witnesses who, without legitimate reason, refuse to testify or to take the oath may be fined a maximum of EUR10,000 (Article 207 of the FCPC).

6.2 Expert Evidence

It is common practice for economic experts to be consulted to determine the existence and extent of possible damages suffered by the claimant or caused to the market. Very recently, in the context of an interim payment procedure, the Administrative Court of Appeal of Nantes relied on the observations of the FCA to demonstrate

the existence of a fault (a horizontal price cartel) and on the conclusions of the expert to increase the amount of an interim payment granted in the first instance (Administrative Court of Appeal of Nantes, 22 January 2021, No 19NT05057).

The parties can, of their own volition, submit expert reports. Furthermore, an expert report can be ordered by the court when the judge is not supplied with sufficient material to determine the matter (Articles 263 of the FCPC). When a judge orders an expert report, they must determine the scope of the issue assigned to the expert and specify the period during which the expert will work on it (Article 265 of the FCPC).

Usually, only one person will be appointed as an expert, unless the judge deems it appropriate to appoint more than one (Article 264 of the FCPC). If the expert opinion does not require written explanations, the judge may allow the expert to present it orally at the hearing; it will be recorded in the minutes. The drafting of the minutes may, however, be replaced by a reference in the judgment if the matter is judged in a court of final resort (Article 282 of the FCPC). The judge may – at any time, on their own initiative or at the request of the parties – increase or restrict the scope of the investigative measures they have organised and amend the terms of the assignment given to the expert (Article 236 of the FCPC).

The expert must take into consideration the findings or claims of the parties and, where they are written, will attach them to their opinion if the parties so request. The expert must state in their opinion the decision they have taken in respect of these findings or claims (Article 276 of the FCPC). The expert cannot decide questions of law (Administrative Court of Appeal of Nancy, 22 September 2022, No 21NC0297).

7. Damages

7.1 Assessment of Damages

Article L481-3 of the FCC provides a non-exhaustive list of the types of damage for which victims of competition infringements may seek compensation, as follows:

- the loss resulting from an overcharge or from excessively low prices;
- the loss resulting from the decrease in sales volume;
- loss of opportunity; and
- non-pecuniary harm.

In a recent standalone action concerning an abuse of dominant position, the Paris Court of Appeal accepted the necessity of compensation for the loss of opportunity (Paris Court of Appeal, 8 February 2019, No 16/06164).

Again, as mentioned in **1.1 Recent Developments in Antitrust Litigation**, a judge recently recognised that the victim of a cartel who brought a private enforcement claim suffered moral damage as a result of “negotiating for years with suppliers who pretended to negotiate” (Paris Court of Appeal, 23 June 2021, No 17/0410). The Paris Court of Appeal also recently ruled that the eviction of a daily newspaper due to abuse of a dominant position could cause moral damage. Indeed, the court ruled that the eviction of the daily newspaper “tarnished the image and reputation” of the publishing company and “damaged the confidence and dynamics created around the launch of this new daily newspaper, undermining its ability to attract and retain new talent” (Paris Court of Appeal, 23 February 2022, No 19/19239).

In order to determine the damage, the courts have various procedural and non-procedural tools at their disposal, such as:

- an expert opinion in the event that the victim encounters difficulties in assessing the economic loss suffered;
- the opinion of the competition authority (Article R.481-1 of the FCC);
- the collection of methodological sheets on the evaluation of damages of the Paris Court of Appeal, updated in 2021 (see **1.1 Recent Developments in Antitrust Litigation** for further detail); and
- the nomenclature of damages caused by anti-competitive practices proposed by Professor Rafael Amaro in January 2022 (see **1.1 Recent Developments in Antitrust Litigation** for further detail).

Damages awarded by French courts are compensatory in nature. They correspond to the full damage suffered by the victim but are limited to this amount (ie, the amount necessary to place the victim in the position in which the victim would have been in the absence of the infringement). French law does not provide for any additional damages (eg, punitive damages).

When the court finds that the plaintiff’s quantification of damages is insufficiently demonstrated, it may rely on the facts of the case to assess damages and award a minimum amount of compensation to the plaintiff (Paris Commercial Court, 9 March 2023, No 2019063474). In this respect, compensation for damages is paid as a nominal amount, increased by the payment of either the statutory (legal) interest rate or a compensatory rate – for example, the weighted average cost of capital (WACC).

Recently, the French Supreme Court confirmed the approach taken by the Paris Court of Appeal that rejected the application of the WACC method on the grounds that the claimant “failed to demonstrate that the non-availability of the sums it was deprived of had led it either to restrict its activity without being able to find alternative financing through loans or equity, or to abandon duly identified investment projects that were likely to yield the equivalent of the average cost of capital” (French Supreme Court, 1 March 2023, No 20-18.356 and 20-20.416). In another case, the Paris Court of Appeal ruled that – unless it can be presumed that the victim company was deprived of the opportunity to invest the sums as a result – the application of the WACC to a failed project requires prior proof that the project could not be carried out because of the unavailability of capital. The WACC includes a component remunerating the risk so that it does not apply to known and determined past flows when no alternative investment is proved to have been lost. Therefore, the “hazardous” listing of projects that are not proven to have been thoroughly studied is not sufficient for the application of the WACC (Paris Court of Appeal, 23 February 2022, No 19/19239).

It is also possible that the cartel caused “umbrella effects”. This raises the question of whether “indirect” buyers, who are collateral victims of the price increase, are entitled to claim compensation. The Council of State has acknowledged compensation for damage caused by an umbrella effect. In that case, the decision of the EC had established that the practices of the cartellists had a general effect on market prices, including those of companies – such as the plaintiff’s main supplier during the period – that were not members of the cartel (Council of State, 12 October 2020, SNCF Mobilités, No 432981; Paris Admin-

istrative Court of Appeal, 17 February 2023, No 14PA02419).

7.2 “Passing-On” Defences

According to Article L481-4 of the FCC, introduced into French law by Ordinance No 2017-303, the direct or indirect buyer is deemed not to have passed on the overcharge to its direct clients. In other words, the new regime applicable to private enforcement litigation provides for rebuttable presumptions regarding passing on, with the burden of rebutting the presumption resting on defendants. It should be noted that this presumption counts among the substantive provisions of the Ordinance, which are not applicable retroactively.

For all claims falling outside the scope of the Ordinance, one should refer to previous case law on this specific question. In this respect, the French Supreme Court ruled that no compensation is due if the claimant has passed on its loss to its clients and that the burden of proof of the absence of passing on lies on the claimant (French Supreme Court, 19 October 2022, No 21-19.197; French Supreme Court, 15 June 2010, No 09-15.816).

In other words, the claimant requesting the reparation of harm must prove that it actually suffered such harm and thus must provide evidence that it did not pass on the overcharge allegedly causing such harm. It should be noted that, recently, the Paris Court of Appeal found that the extra costs could only have been partially passed on to final prices in the case at hand (Paris Court of Appeal, 24 November 2021, No 20/04265).

Indeed, under French law (and as discussed in **7.1 Assessment of Damages**), damages awarded are compensatory in nature – meaning that they must correspond to the full damage suf-

ferred by the victim but cannot exceed the damage actually suffered. Under this general principle, claimants can only recover the amounts actually lost and not the amounts passed on.

Finally, the Council of State ruled that the burden of proof relating to the passing on of the extra costs to customers was not exclusively on the claimant. The solution thus adopted seems to comply with Directive 2014/104/TFUE and Ordinance No 2017-303 (Council of State, 12 October 2020, SNCF Mobilités No 432981).

7.3 Interest

According to Article L481-8 of the FCC, damages awarded are to be assessed on the day of the decision, taking into account the passage of time. This is consistent with the general principle applicable under French law – according to which, damages are assessed at the time of the judgment.

Claimants are automatically entitled to statutory interests, but only as from the ruling (Article 1231-7 of the French Civil Code). The applicable interest rates are published on the website of the *Banque de France*.

A French court has discretion to award interest from an earlier date in order to fully compensate for the damage suffered. Such interest is known as “compensating interest” related to the unavailability of capital during the period of the infringement (ie, the amount of damages). Unlike statutory interest, which is granted by law, compensating interest is granted subject to the claimant evidencing a specific loss due to the unavailability of capital. Compensating interest may be based either on the statutory interest rate – possibly increased by a co-efficient decided by the courts – or on the WACC. Additionally, although interest granted does not automatically

produce compound interest, the claimant can make such a request.

The Paris Court of Appeal notably awarded more than EUR180 million to an electronic communications operator (Digiciel Antilles) as compensation for damages caused by the anti-competitive practices of Orange Caraïbes. Specifically, the court agreed to compensate for the loss suffered as a result of the additional costs incurred by the company owing to the disputed practices (for distribution exclusivities and under the exclusive rights of repair). As compensation for its financial loss, the Paris Court of Appeal rejected the application of the WACC method, as Digiciel Antilles had not succeeded in showing that the unavailability of the sums of which it was deprived had led it either:

- to restrict its activity because of an inability to find alternative financing; or
- to abandon duly identified investment projects that were likely to yield the equivalent of the average cost of capital.

However, the Paris Court of Appeal noted that the financial loss could be assessed until 31 December 2005 on the basis of the average interest rate paid at the time by the victim of the practices, and then on the basis of the legal interest rate (Paris Court of Appeal, 17 June 2020, *Orange Caraïbes v Digiciel Antilles Françaises Guyane*, No 17/23041). Recently, the French Supreme Court censured the Paris Court of Appeal on the assessment of the starting point of such compensatory interest, which must be awarded taking into account the progressive nature of the creation of this loss and not from the moment when the entire loss was created (French Supreme Court, 7 June 2023, No 22-10.545).

8. Liability and Contribution

8.1 Joint and Several Liability

Ordinance No 2017-303 created, by law, a principle of joint and several liability between undertakings found to have breached competition law. For all claims falling outside the scope of Ordinance No 2017-303, the general standards of French tort law – and, in particular, of Article 1240 of the French Civil Code – are applicable. On these grounds, French courts may find that the co-authors of a breach of competition law are liable in solidum towards victims of anti-competitive practices. French law distinguishes joint and several liability (*responsabilité solidaire*), which can only be based on legal or conventional provisions (Article 1310 of the French Civil Code), from in solidum liability, which may only be ordered by courts in the absence of a legal textual basis.

Under the new regime of joint and several liability introduced by Ordinance No 2017-303, leniency applicants benefiting from a total exemption from fines are only required to compensate the harm caused to their direct or indirect contracting parties. They may still be liable to other victims if such victims are unable to obtain full compensation from the other infringers (Article L481-11 of the FCC).

8.2 Contribution

Under French law, contribution proceedings against a third party may be brought by means of a writ of summons in an *intervention forcée* (Article 331 of the FCPC). The right to initiate requests for bringing contribution proceedings is not reserved to the parties. The judge may invite them to question all the interested parties whose presence seems necessary to resolve the dispute (Article 332 of the FCPC).

9. Other Remedies

9.1 Injunctions

Depending on the case, a judge may order a wide range of interim or final measures, such as resuming business relations or granting access to essential facilities. Injunctions are often backed up by a daily penalty (*astreinte*). Such measures are available when the case is decided on the merits or through summary proceedings (*référé*).

In all cases of urgency, the president of the court may order in summary proceedings any measure that does not encounter any serious challenge or that the existence of the dispute justifies (Articles 808 and 872 of the FCPC). In certain circumstances, the president may – even where confronted with a serious challenge – order in summary proceedings such protective measures as are required to restore the parties to their previous state. This is done either to avoid imminent damages or to abate a manifestly illegal nuisance. In cases where the existence of the obligation is not seriously challenged, the president may award an interim payment to the creditor or order the mandatory performance of the obligation even where it is an obligation to perform (Articles 809 and 873 of the FCPC).

These are “regular” summary proceedings, enabling a preliminary decision to be issued within a few weeks or months. However, the judge will not rule on the merits of the case but will only order interim measures. In cases of extreme emergency, an expedited proceeding can be requested, whereby the judge sets a binding hearing date within a few days of receipt of the claimant’s request (Article 485 of the FCPC). In this situation, a preliminary decision may be issued within a few days. In all cases, both par-

ties are heard at a final hearing, during which they must develop their arguments.

The summary proceeding orders are provisionally enforceable. However, the judge may make provisional enforcement subject to the granting of a guarantee in the form of security of real or personal property, sufficient to cover all restitutions and damages (Articles 489 and 517-522 of the FCPC).

9.2 Alternative Dispute Resolution

The parties may, on their own initiative or upon a judge's request, use ADR methods such as conciliation (Article 128 of the FCPC) or mediation (Article 131-1 of the FCPC). This is a voluntary process, which cannot be imposed by a judge. Also, the initiation of a mediation or conciliation procedure will suspend the limitation period (Article 2238 of the FCC).

Ordinance No 2017-303 anticipated the recourse to alternative modes of resolution and their effect on compensation from joint and several co-debtors. Victims who have settled a dispute with one co-debtor may only claim compensation from the other co-debtors not party to that settlement. Such compensation should not include the amount attributable to the co-debtor that is party to the settlement (Article L481-13 of the FCC). In addition, while ruling on contribution claims between co-debtors, courts must take into account the amounts already paid to victims following previous settlements (Article L483-14 of the FCC).

10. Funding and Costs

10.1 Litigation Funding

In France, although third-party funding is not prohibited, it is not governed by any specific

regulation. Ruling on a funding contract in the context of an international arbitration case, the Court of Appeal of Versailles indicated that “a contract for the funding of trials is sui generis and unknown in most member states of the EU except countries with a Germanic legal culture” (CA Versailles, 1 June 2006, No 05/01038). On 21 February 2017, the Paris Bar Council issued a resolution on the practice of third-party funding in international arbitration, whereby it set out basic principles applicable to such cases.

10.2 Costs

Costs pertaining to proceedings, processes and enforcement procedures include fees, taxes, government royalties, cost of translation, allowances for witnesses, and expert fees. These legal costs are usually borne by the losing party, unless the judge imposes the entirety or part of them on another party by a reasoned decision (Articles 695-696 of the FCPC).

Attorney's fees are not included in the legal costs. A judge may, however, order the losing party to pay additional sums that are not part of the legal costs – taking into consideration the rules of equity and the financial condition of this party (Article 700 of the FCPC).

Orders to deposit funds as security to cover costs are rarely granted. They usually only concern experts' fees.

11. Appeals

11.1 Basis of Appeal

According to Article R420-3 of the FCC, the Paris Court of Appeal has exclusive jurisdiction to rule on appeals against decisions rendered in private enforcement competition cases. In September 2016, Chamber 5-4 of the Paris Court of

Appeal specialised in hearing appeals against first-instance judgments on private enforcement antitrust cases. Additionally, in 2018, an international chamber was created within the Paris Court of Appeal allowing the parties to plead in English.

The decisions of the Paris Court of Appeal are themselves subject to appeal to the French Supreme Court. This is not a third level of jurisdiction, as the French Supreme Court does not rule on the merits of a case. Instead, the French Supreme Court is only required to decide whether the rules of law have been correctly applied.

Trends and Developments

Contributed by:

Thomas Rouhette and Claire Massiera

Signature Litigation

Signature Litigation is a law firm dedicated to dispute resolution with offices in London, Paris and Gibraltar. It has 23 lawyers in Paris (five partners, three counsel and 15 associates), who all practised at major international law firms before joining Signature Litigation. The team mainly represents clients in commercial, antitrust,

banking, corporate and post-M&A disputes, complex and international litigation, arbitration, product liability and insurance/reinsurance. The firm advises companies on the scope of their compliance with vigilance duties. Thomas Rouhette and Claire Massiera have developed the firm's antitrust litigation practice in Paris.

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Introduction

As pointed out by the French Competition Authority in its 2022 annual report published in July 2023, “anti-competitive practices are now even more risky for companies, which are faced with significant additional financial risks as a result of the rise in actions for damages”. The trending rise of such actions is an observation made year on year which is unlikely to be reversed.

Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions has set out several rules to ensure that undertakings “can effectively exercise the right to claim full compensation”. Several mechanisms are provided for in the directive, which are innovative for some jurisdictions, such as the rebuttable presumption of fault in follow-on cases or access to evidence aimed at ensuring the effectiveness of the right to compensation.

While we have been witnessing an increase in follow-on cases, courts are still in the process of clarifying the rules governing actions for damages in light of the core foundations of civil liability. This chapter will focus on recent decisions

handed down by the French Cour de Cassation and their takeaways.

The Quantification of Losses

The quantification of losses is one of the thorniest issues which courts have to address considering the technicality of the matters at hand. The Commission has provided a general communication on quantifying harm in which it acknowledged that “A major difficulty encountered by courts, tribunals and parties in damages actions is how to quantify the harm suffered. Quantification is based on comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred. In any hypothetical assessment of how market conditions and the interactions of market participants would have evolved without the infringement, complex and specific economic and competition law issues often arise. Courts and parties are increasingly confronted with these matters and with considering the methods and techniques available to address them” (Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07)).

The Commission has drawn up a practical guide detailing the methods to use for quantifying harm. The Paris Court of Appeal has also issued several very useful guides on the quantification of losses which cover topics such as “How to compensate for damage caused by the passage of time”, “What consideration is to be given to the role of victims of economic loss?”, “How do you compensate for the damage caused by an anti-competitive practice?” or “What are the economic methods that can be used to assess loss?”.

This guide notably explores the use of the counterfactual method which has been retained in a recent landmark decision by the Cour de Cassation in order to assess the loss resulting from the barriers to the growth from which the victim would have benefited had anti-competitive practices not been carried out (Cour de Cassation, Commercial Chamber, 1st March 2023, nos. 20-18.356 and 20-20.416).

The proceedings were brought by Digicel, a mobile telephone operator, which had sustained damage due to exclusionary practices implemented by the incumbent operator in the French West Indies-Guyana region. Such practices included exclusive agreements entered into with independent local distributors and with the only authorised cell phone repair center in the Caribbean, a customer loyalty program acting as deterrent for consumers to change their mobile operator at the end of their subscription period and price discrimination.

The takeaways from this decision regarding loss assessment are the following.

- The Cour de Cassation acknowledged the possibility of an overall assessment of the damage, even though several practices had

been identified. The Cour de Cassation considered that insofar as “the various practices implemented accumulated over time and reinforced one another” (Section 22), and that they led “to a single overall outcome hindering Digicel’s development on the mobile telephone market in the West Indies-Guyana region, thereby jeopardising its growth” (Section 22), the Court of Appeal therefore rightly “decided that the loss should have been assessed globally” (Section 23).

- The Cour de Cassation considered that the harm to Digicel’s growth was not a loss of opportunity, but a lost profit and that this loss was duly quantified using a dual counterfactual analysis based on a comparison over time (before/after the practices) and with similar geographic areas. The Cour de Cassation considered that “the loss sustained by an operator active on a market distorted by abusive loyalty, price discrimination and exclusivity practices that foreclose access to customers consists of restrictions on sales, the amount of which was recovered by implementing counterfactual methods, acknowledged by economic legal authors and necessarily based on theories whose relevance has been discussed by the parties and analysed by the judgment, on the grounds of a market functioning that would not have been distorted by the wrongful conduct identified” (Section 25).
- The Cour de Cassation acknowledged the existence of an additional loss that could be compensated alongside the loss resulting from the eviction practices implemented by the incumbent operator. According to the Cour de Cassation, Digicel “may, in addition, request compensation for additional loss resulting, the case arising, from the loss of the opportunity to re-use, with remuneration, the sums of which it was deprived. Where

the loss of opportunity claimed arises from the impossibility of carrying out an investment, the requested compensation for which is assessed at the average profitability on the capital invested in the sector at stake, it is for the victim to establish the certain and direct nature of this loss of opportunity, by providing evidence for the reality of the investment project that could not have been carried out as well as the impossibility of financing it other than with the sums of which it was deprived” (Section 37).

- Regarding the starting point for the damages, the Cour de Cassation considered that the Court of Appeal wrongly took into account the beginning of the wrongful practices as the starting point of the interests attached to the compensation for the additional loss arising from the unavailability of the sum allocated by it for the loss of development. The Court in fact considered that such practices have lasted for several years and that at their beginning, the above-mentioned loss had not been fully established and was necessarily progressive (Section 49).
- Lastly, the Cour de Cassation considered that the Court of Appeal had properly assessed the parties’ competing private expert opinions on loss assessment, and that it had correctly arbitrated between the diverging expert reports filed by the parties. The Court hence considered that the Court of Appeal could not be criticised for deciding to follow the analysis resulting from the expert report of one of the parties.

This landmark decision is in line with the principle of full compensation, with the Cour de Cassation affirming the Court of Appeal’s decision to acknowledge both the eviction loss and additional loss.

While there has been a strong tendency to rely on court-appointed experts for damage assessment rather than on private experts, such finding is a strong reminder that parties should absolutely appoint private experts. The parties should also ensure that they provide the court with a solid and comprehensive expert opinion, that addresses the opposing party’s potential criticisms.

Temporal Applicability of Article 13 of the Damages Directive on the Passing-On Defence

While the Damages Directive was to be transposed into national laws in December 2016 at the latest (it was transposed into French Law by Order of 9 March 2017), issues relating to the application *ratione temporis* remain frequent issues in antitrust litigation.

The CJEU handed down an important decision on this matter (CJEU, 22 June 2022, C-267/20, *Volvo AB/DAF Trucjs NV*), in which it set out the analysis to be carried out by national judges in order to determine the temporal applicability of the provisions of Directive 2014/104. The CJEU’s decision provided that “it is necessary to establish, in the first place, whether or not the provision concerned constitutes a substantive provision”. As a second step in the analysis, the CJEU ruled that “Once it has been determined whether the provision concerned is substantive or not, it is necessary to ascertain, in the second place, whether, in circumstances such as those at issue in the main proceedings, in which that directive was transposed late, the situation at issue, in so far as it cannot be described as new, arose before the expiry of the time limit for the transposition of that directive or whether it continued to produce effects after the expiry of that time limit.” The Court added that “The fact remains that, where a national court has to

determine a dispute between individuals, it is for that court, where appropriate, to interpret the national provisions at issue in the main proceedings, so far as possible, in the light of EU law and [...] without, however, interpreting those national provisions *contra legem*”.

The Cour de Cassation applied this ruling in a case between Carrefour and Johnson & Johnson relating to the temporal applicability of Article 13 of the Damages Directive per which the burden of proving, in a passing-on defence, that an overcharge was passed on lies with the defendant (Cour de Cassation, 19 October 2022, no. 21-19.197). In this case, Carrefour had brought an action for damages against Johnson & Johnson, its supplier of hygiene products, on 23 January 2017, ie, after the expiry of the deadline for transposing the Damages Directive, but before the transposition into French Law.

The Court of Appeal dismissed Carrefour’s action as it failed to prove it did not benefit from the anti-competitive practices, prompting it to lodge an appeal on the ground that direct effect of EU law should have led the Court to apply Article 13 of the Damages Directive and therefore reverse the burden of proof, the transposition period having expired.

The Cour de Cassation reminded that based on CJEU case law, a directive cannot, by itself, create obligations for an individual and cannot therefore be invoked as such against them. The Cour de Cassation then applied the Volvo case, ie, it considered whether it could interpret national law, upon expiry of the time limit for transposing the Damages Directive not yet transposed, “so as to render the situation at stake immediately compatible with the provisions of that directive” without interpreting French law *contra legem*. The Cour de Cassation considered

“for acts committed prior to the entry into force of these provisions, pursuant to Articles 1382 and 1315 of the Civil Code, which have become Articles 1240 and 1353 of the Civil Code [...] that the burden of proving the existence of the damage caused by an anti-competitive practice lies with the claimant for compensation and that the claimant must, in light of the usual business practices, establish that it did not pass on the additional costs arising from a cartel to its own customers [...]” (Section 11).

The Cour de Cassation therefore considered that “After having established that the facts giving rise to the liability action brought by the Carrefour companies predated the entry into force of Article L. 481-4 of the Commercial Code and after having ruled that the provisions of Article 13 of the Directive were incompatible with the national law in force on the date of its transposition, the Court of Appeal rightly inferred that it could not interpret the rules of evidence applicable to the action referred to it in light of the latter text [...]” (Section 12).

While this decision clarifies the issue on the temporal applicability for the passing-on defence, it is not exempt of criticism. One might argue that Article 13 should not have been considered as a substantive provision but rather a procedural one. In fact, in the Volvo case, the CJEU underlined that “it is apparent from the case-law of the Court that the rules on the burden of proof and the standard of proof are, in principle, classified as procedural rules”.

Liability of Parent Companies for their Subsidiaries’ Practices

A recent decision handed down by the Cour de Cassation (Cour de Cassation, 7 June 2023, no. 22-10.545) in the scope of the so-called dairy products cartel (French Competition Author-

ity, no. 15-D-03, 11 March 2015) has enshrined vicarious liability in a private enforcement case: the Court relied on the European case law relating to the requirement lying with the parent company to bear the burden of its subsidiary's condemnation over which it exercises decisive influence which had been applied in the public enforcement field and ruled that it ought to be extended to actions for damages.

The Court specified that such presumption could be rebutted if the parent company provides “any evidence relating to the organisational, economic and legal links between itself and its subsidiary such as to show that the latter acted autonomously on the market and that they do not form a single economic entity” (Section 7).

GERMANY

Law and Practice

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BUNTSHECK Rechtsanwälts-gesellschaft mbH is an independent, Munich-based law firm specialising in German and European competition law. It offers a combination of personalised services from highly specialised lawyers who have accumulated years of experience working in large international commercial law firms. Founded in 2008, it has grown to become one of Germany's leading competition law firms, with a reputation built on quality work, responsiveness, diligence and commitment, while

the firm's lean and efficient structure delivers cost-effective results for its clients. The practice offers expertise in the following aspects of competition law: representation of defendants in cartel investigations; enforcement of, and defence against, damages claims under competition law; representation in merger control proceedings; structuring of distribution systems and commercial co-operation agreements; and advice on competition law compliance.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Germany has a vibrant private antitrust litigation culture. Recent years have seen a massive surge in multimillion-euro lawsuits for cartel damages. In the trucks case alone numerous actions for damages in an amount of several billion euros have been filed and are currently pending in courts across Germany.

Private antitrust litigation in Germany comes in many different forms – proceedings are not limited to follow-on damages claims; rather, there is a high proportion of standalone litigation, often closely related to contract disputes or to the abusive behaviour of dominant companies.

Due to the high relevance of cartel damages claims across Europe, the following review, however, mainly focuses on damages claims.

Legislation

In 2017, Germany implemented the EU Damages Directive (2014/104/EU) in the form of the Ninth Amendment to the Act against Restraints of Competition (ARC), resulting in comprehensive changes, particularly to German antitrust damages law. The Ninth ARC Amendment further facilitated the assertion of cartel damages claims. For instance:

- the limitation period for damages claims under competition law was further extended;
- entitlement to disclosure of evidence (for both plaintiffs and defendants), which previously did not exist under German law, was created; and
- a statutory presumption that damage/harm has occurred in cases involving hardcore cartels was introduced.

In 2021, the Tenth Amendment to the ARC made additional adjustments further facilitating private damages claims.

- In response to the Federal Court of Justice (FCJ)'s second railway cartel decision, the legislature further strengthened the position of potential victims of anti-competitive behaviour by introducing a rebuttable assumption of cartel exposure for products or services purchased from one of the infringers within the scope of the cartel; this rule applies for claims for damages arising after January 2021.
- In reaction to a contrary judgment by the Higher Regional Court of Düsseldorf, the legislature explicitly clarified that the new right for access to information under Section 33g of the ARC also applies to claims that originated before 26 December 2016 (see **5.1 Disclosure/Discovery Procedure**).
- While highly discussed, the legislature did not introduce a provision that presumes the amount of damages but leaves it to the judge to assess the amount of damages that could be awarded under Section 287 of the German Code of Civil Procedure (CCP), mostly with the help of economic experts (see **7.1 Assessment of Damages**).

The Eleventh Amendment to the ARC, which will enter into force in autumn 2023, will implement provisions which allow the private enforcement of the newly introduced Regulation (EU) No 1215/2012 on contestable and fair markets in the digital sector (the “Digital Market Act”, or DMA), a European law aiming to prevent large online platforms from abusing their market power.

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New Judgments by the FCJ

In 2020/2021, the FCJ issued several landmark judgments concerning private enforcement in the railway tracks case and in the trucks case.

The railway tracks case concerned a hardcore cartel between several manufacturers and distributors of rails in the form of price, quota and customer allocation agreements. In various decisions the FCJ dealt with the burden and standard of proof (see **2.4 Burden and Standard of Proof**), the pass-on defence, umbrella effects, lump-sum damage clauses, etc (see **7. Damages**).

In its trucks decisions of 23 September 2020 (KZR 35/19) and of 13 April 2021 (KZR 19/20 and almost identical KZR 20/20), the FCJ stressed the binding effect of the factual and legal findings of the European Commission decision. The FCJ also confirmed the existence of a factual presumption for damages in cartel follow-on cases. Nevertheless, in its first trucks decision, the FCJ referred the case back to the Stuttgart Court as the lower instance court had not sufficiently taken into account all factual circumstances in its assessment of the present case. In its second trucks decision, the FCJ referred the case back to the Higher Regional Court of Schleswig as the court had not sufficiently taken into account the defendants' economic expert opinions (see **2.4 Burden and Standard of Proof**).

As the disputed damages occurred before 26 December 2016, these cases all concern previous law, prior to the changes made by the Ninth and Tenth Amendment to the ARC (see above). Nevertheless, these decisions are both relevant for most of the hundreds of private damages actions pending before the German regional courts (see Germany as a Jurisdiction of Choice below) as well as for cases to be assessed under

recent law because the FCJ clarified several questions which are still relevant under recent law (such as umbrella damages).

Germany as a Jurisdiction of Choice

As a result of the new rules and increased marketing efforts of litigation firms, the number of private cartel damages claims in Germany has increased substantially in recent years, with hundreds of private damages actions pending in consequence of prominent cartel cases at EU and German level, such as the trucks case, the sugar case, the airfreight case, the railway tracks case and the auto glass case. From 2012, the number of new private damage claims in Germany increased by 160–185 per year. In the years 2017–18, the number increased by over 300 per year, mainly due to the trucks case. It is estimated that approximately 650 private damage claims were pending before German courts in 2019. Between 2020 and 2022, the number of new private damage claims in Germany decreased to an average of 145 per year due to the sharp drop in the number of new claims related to the trucks case, which with at least 470 claims is by far the largest case in Germany. A high number of cases do not make their way to the courts, but are settled in out-of-court negotiations.

Due to the comparatively experienced commercial judges and the moderate costs involved, Germany has become one of the jurisdictions of choice for plaintiffs in Europe and is probably the closest runner-up to England and the Netherlands in this regard. It is fair to state that the importance of Germany as a forum for follow-on claims further increased after Brexit, the plaintiff-friendly reforms to the ARC and several recent judgments by the FCJ, which enhanced legal certainty.

1.2 Other Developments

As illustrated by the significant number of private cartel damages cases brought before German courts each year, Germany is a very attractive jurisdiction for plaintiffs. However, even though German courts have issued numerous decisions – including several in which damages were awarded – there are still a number of open issues to be decided, either by the courts or the German legislature.

Standing in Cases

One of the open issues which has a major impact on litigation strategies is the question of whether and how individual customers may assign their damages claims to especially created trial vehicles in return for financial participation if the assigned claims are successfully asserted in court (see 3. **Class/Collective Actions**). As US-style class actions do not exist in Germany, these models are intended to facilitate the collective assertion of antitrust damages claims. From 2020–22, the Regional Court of Munich I dismissed such claims in the trucks case, the Regional Court of Hanover in the sugar cartel case and the Regional Court of Stuttgart in the round timber cartel case due to breach of the German Legal Services Act (RDG) by the plaintiffs. The plaintiffs have appealed this decision and they are currently under review by the higher regional courts. As yet, it remains unclear whether and under what conditions such models are admissible under German law.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

In Germany, both standalone and follow-on claims are available. Cartel damages claims are predominantly follow-on cases, since the infringement decisions of national competition

authorities and the European Commission (EC) are binding on the courts in any subsequent private antitrust litigation, which facilitates bringing such claims. There is also a high proportion of standalone claims, which are available for any kind of breach of competition law.

The legal basis for such claims is established by statute, mainly the ARC. Claims for injunctive relief are usually based on Section 33 of the ARC, and claims for damages on Section 33a to 33h of the ARC. General tort law, especially Section 823 of the German Civil Code (GCC), can also serve as a legal basis for private antitrust claims.

2.2 Specialist Courts

Designated Regional Courts

In Germany, no specialist competition courts exist. Cases concerning a breach of German or European antitrust law are heard before civil courts. The exclusive jurisdiction lies with the regional courts (*Landgerichte*), regardless of the value of the matter in dispute (Section 87, ARC). In most of the German federal states, competition matters are concentrated in one to three regional courts (Section 89, ARC). These courts usually establish special antitrust chambers which hear all antitrust law cases brought to the court. The judges dealing with antitrust litigation cases are therefore experts in their field. This also applies to the courts of appeal (see 11. **Appeals**).

German Code of Civil Procedure

As German law provides for the special jurisdiction of certain courts, parties cannot diverge from their jurisdiction and agree to negotiate their disputes on antitrust law in other courts of law.

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If an antitrust claim is brought in an inconvenient forum (*forum non conveniens*), it will not automatically be referred to the court of competent jurisdiction in antitrust matters for the relevant judicial district. Instead, Section 281 of the CCP requires the plaintiff to petition the court to refer the claim to the proper legal venue.

2.3 Decisions of National Competition Authorities

According to Section 33b of the ARC, the court is bound by a finding that an infringement has occurred, as made in a final decision by the National Competition Authority (NCA), the EC, or the competition authority in another member state of the EU. The specific scope of this binding effect is still in dispute.

The German Federal Cartel Office

The German Federal Cartel Office (FCO) can intervene in private antitrust litigation according to Section 90 of the ARC. In all legal actions in which the decision depends in whole or in part on the application of the provisions of the ARC or on Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), the court has to inform the FCO about the action. If the FCO considers it to be appropriate to protect the public interest, it may appoint a representative authorised to submit written statements to the court, to point out facts and evidence, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings. So far, the FCO has not intervened on a regular basis in private antitrust actions but has participated on a regular basis in the oral hearings at the FCJ.

2.4 Burden and Standard of Proof

Burden of Proof

Each party has to prove the premises justifying its claim. Regarding cartel damages claims,

however, there are some important exceptions to this general rule.

According to Section 33b of the ARC, the plaintiff does not need to show and prove the infringement of antitrust law, if a final decision of an NCA or the EC finds that an infringement has occurred. The court is bound by such a decision (see 2.3 Decisions of National Competition Authorities).

Standing as a Party “Being Affected” by the Infringement

The plaintiff must be affected by the infringement (*Kartellbetroffenheit/Anspruchsberechtigung*), showing that there is a causation between the violation of competition law and the damage.

The “being affected” test has been widely softened by the FCJ. In its second and third railway cartel decisions, the FCJ found that the “being affected” test is easily fulfilled. It is sufficient to show that the plaintiff has acquired goods that generally fall within the product, temporal and geographical scope of the infringement. According to the FCJ, it is not necessary to establish a causal link between the infringement and each specific procurement. In its trucks decisions, the FCJ held that the “being affected” test is not a question of causality giving rise to liability and is easily fulfilled in cases in which the plaintiffs purchased products covered by the cartel infringement. The “being affected” has nevertheless to be assessed for each separate damage claim.

Causation of Damages

According to Section 33a (2) of the ARC, there is a rebuttable presumption that a cartel causes damages. This rebuttable presumption does, however, only apply to infringements after 26 December 2016.

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For all cartel damages prior to this date, the injured party bears the burden of proof for the causation of damages by the cartel. According to the FCJ in its first railway cartel decision and confirmed in its trucks decisions, there is no legal presumption or *prima facie* proof (*Anscheinsbeweis*) for the causation of damage by a cartel. The FCJ, however, also ruled that a factual assumption (*tatsächliche Vermutung*) exists, based on economic experience, that a cartel causes damages. Due to the variety and complexity of anti-competitive behaviour, this is but one of all the different aspects of each case (including, for example, economic reports submitted by the parties) that have to be taken into account by the court. In November 2022,, in a case brought by the insolvent drugstore chain Schlecker against several manufacturers of drugstore products, the FCJ ruled that, when information is exchanged between producers about prices for a buyer, a factual assumption based on economic experience (*tatsächliche Vermutung im Sinne eines Erfahrungssatzes*) exists that higher prices have developed as a result of the information exchange.

Pass-On Defence

The defendant, on their part, can raise the pass-on defence, claiming that the damages that occurred have been passed on by the direct purchaser to the next market level. In an action for damages raised by a direct purchaser, the defendant bears the burden of proof for the pass-on defence. If, however, an indirect purchaser claims damages, the rebuttable presumption of Section 33c (2) of the ARC presumes in their favour that the damages have been passed on to the next market level (see **2.5 Direct and Indirect Purchasers**). This inverse burden of proof regarding the pass-on defence in actions for damages by direct or respectively indirect purchasers, causes a risk of multiple liability for the

defendant, which can only partially be averted by third-party notices.

Despite the fact that punitive damages do not exist and the concept of compensation applies, in its fourth railway cartel decision the FCJ increased the requirements of a successful pass-on defence by clarifying that the injured party has no secondary burden of proof and is, in particular, not obliged to provide details of its price-calculation, if:

- a passing-on of damages is difficult to determine even for a court-appointed expert and only concerns a marginal amount of price difference; and
- the customers of the injured party are highly unlikely to pursue their damages and this may cause an unfair relief for the injuring party – this applies in particular to stray damages on an end-consumer level.

In its second trucks decision, the FCJ rejected the inadmissibility of the pass-on defence for reasons of general policy (eg, because it is highly unlikely that end customers would pursue their claims). The FCJ emphasised that the pass-on defence must be analysed for each specific downstream market for which the pass-on has been alleged by the defendant and it is the defendant's obligation to submit plausible facts showing the likelihood of a pass-on for each relevant downstream market.

Standard of Proof

Regarding the standard of proof, the court has to be convinced that the facts as presented by the plaintiff are true. However, conviction in this regard does not require absolute certainty. Rather, a high level of plausibility is sufficient (ie, beyond reasonable doubt).

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The standard of proof is significantly reduced with regard to the amount of damages suffered by the plaintiff. The court can rule on this issue at its discretion and conviction, based on its evaluation of all the circumstances (Section 33a (3), ARC; Section 287, CCP).

In its second railway cartel decision in 2020, the FCJ further elaborated on the various standards of proof in a follow-on action for damages and indicated that the reduced standard of proof of Section 287 of the CCP might have a wider scope of application than it had previously.

2.5 Direct and Indirect Purchasers

Claims can be brought by direct and indirect purchasers. According to Sections 33 (1), (3) and 33a (1) of the ARC, “the person affected” has the right of action. Section 33 (3) of the ARC defines affected persons as competitors or other market participants impaired by the infringement. This means that anyone who was overcharged somewhere along the distribution chain can pursue their claim in court. As a consequence, cartel members are not only exposed to the risk of damages claims being brought by their direct customers but also by indirect purchasers. The legal basis of any such claim is the same.

As already outlined (see **2.4 Burden and Standard of Proof**), there is a rebuttable presumption that a hard-core cartel has caused harm at the direct customer level. Under certain circumstances, a rebuttable presumption also exists in favour of the indirect purchaser. According to Section 33c (2) of the ARC, there is a presumption in the indirect purchaser’s favour that the overcharge was passed on, if an infringement resulted in an overcharge for the direct purchaser and the indirect purchaser paid for goods or services that were:

- the object of the infringement;
- derived from goods or services that were the object of the infringement; or
- contained goods or services that were the object of the infringement.

In many cases, this facilitates the assertion of damages claims for indirect purchasers.

On the other hand, the defendant can raise the pass-on defence vis-à-vis the direct purchaser (see **2.4 Burden and Standard of Proof**). According to Section 33c(1) of the ARC, the pass-on defence does not exclude the occurrence of harm, but the harm incurred by the purchaser is deemed to be remedied to the extent that the purchaser has passed on the overcharge resulting from an infringement to its customers.

2.6 Timetable

It is difficult to indicate the typical duration of court proceedings. The duration from issuing a claim until judgment is reached depends, to a large extent, on the complexity of the case and the workload of the competent court. In simple cases, proceedings in the first instance might take approximately one to two years. However, in very complex matters, the duration of the proceedings may be significantly longer (four to seven years), for several reasons.

- If the court needs to obtain the opinion of a court-appointed economic expert, this can cause significant delays of one to two years on average.
- Further delays can be caused if the court refers questions related to European competition law to the European Court of Justice (ECJ) resulting in a stay of the proceedings.
- The implementation of a confidentiality regime in the case of a data exchange between the parties can further delay the proceedings.

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The timeframe for an appeal is also usually one to two years. The same applies for a further appeal on a question of law to the FCJ.

Stay of Proceedings

The court can stay proceedings, ex officio, in accordance with Section 148 of the CCP if the decision in the lawsuit is dependent on a preliminary question that is the subject matter of another pending legal action or is yet to be determined by an administrative authority. For example, if the NCA is conducting further or parallel investigations that are also of relevance to the pending lawsuit, the court proceedings may be stayed. The parties can only propose such a stay. The final decision will be made by the court ex officio at its reasonable discretion.

3. Class/Collective Actions

3.1 Availability

In Germany, US-style class actions in which a representative requests a remedy on behalf of an anonymous group of individuals are not formally provided for breaches of antitrust law.

Representative Actions by Consumer Organisations

As an exception to this general rule, representative actions regarding injunctive relief against infringements of antitrust law are admissible by business or consumer associations under Section 33 (4) of the ARC. So far, this option has, however, been of hardly any practical relevance.

However, in autumn 2023, Germany will implement the new Representative Action Directive (EU) 2020/1828 (RAD) into German law, which will allow consumers and small entities (with fewer than ten employees or an annual revenue of less than EUR2 million) to claim infringements

of antitrust law by consumer associations under Section 33 (4) of the ARC. As currently most private antitrust law related claims are brought before the courts by larger companies, it remains to be seen whether the new rules will increase the number of private damage claims. The fact that court fees for these actions are capped (value in dispute capped at EUR300,000) and thus can be significantly lower than for usual antitrust damage claims, might, however, increase the number of representative actions in the future.

Claims Assigned to Litigation Vehicles

With regard to actions for damages, it is highly controversial whether a means of collective redress can be created by assigning the claims of various injured parties to a litigation vehicle, backed by a litigation financier. Early attempts by litigation vehicles to bring bundled claims were dismissed (see **10.1 Litigation Funding**). More recently, the model of creating a means of collective redress has been widely used in the trucks case, but was deemed to be inadmissible in early 2020 by the Regional Court of Munich due to an infringement of the RGD and a conflict of interest between the assignors and the litigation financier. This ruling is currently under review by the Higher Regional Court of Munich. Also, the Regional Court of Hanover in two cases dismissed the claims of non-affiliated supermarket chain companies and a litigation vehicle against participants in the sugar cartel for similar reasons. In January 2022 the Regional Court of Stuttgart and in October 2022 the Regional Court of Mainz held in two decisions concerning the round timber cartel that collective redress violates the RGD. The courts in particular expressed doubts as to whether a legal service provider could handle complex and extensive antitrust law issues, and emphasised that antitrust damages disputes tend to lead to conflicts of interest between the different groups

of plaintiffs, which is expressly disapproved by the RGD. Also, in January and April 2022, two different chambers of the Regional Court of Stuttgart dismissed claims in the trucks case as unfounded due to an infringement of the RGD. These cases are also on appeal.

Ultimately, the FCJ or the ECJ will have to decide whether such a model of collective redress is admissible in Germany. In July 2021 and June 2022 respectively, the FCJ found that a collective redress of claims against the bankrupt airline Air Berlin and against Volkswagen in the Diesel cases are in line with the RGD. In October 2022, the FCJ confirmed its decision in two other judgments in the Diesel case. While these cases differ from the current antitrust damages cases, plaintiffs might still use them as a general indication for the admissibility of certain collective redress models.

The ECJ might also decide on the question in the near future as, in March 2023, the Regional Court of Dortmund referred this question to the ECJ for a preliminary ruling under Article 267 TFEU in a round timber cartel case.

Consolidation of Claims

Apart from that, Section 60 of the CCP allows claimants to sue jointly, if similar claims or obligations form the subject matter in dispute and if such claims are based on an essentially similar factual and legal cause. This gives victims of anti-competitive conduct an opportunity to consolidate their actions. However, according to Section 61 of the CCP, joined parties shall deal with their opponent as individuals in such a way that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage, unless stipulated otherwise by civil law or the CCP.

Unless the assignment of claims to a litigation vehicle is deemed admissible by the FCJ, the means for collective redress in Germany are thus rather limited.

3.2 Procedure

Class actions are not available for breaches of antitrust law in Germany (see 3.1 Availability).

3.3 Settlement

Class actions are not available for breaches of antitrust law in Germany. However, out-of-court settlements of de facto bundled claims are viable, but much less likely than out-of-court settlements of individual claims. This is particularly true for cases where the circle of assigners and the type of procurements are heterogeneous in many respects, resulting in different interests and different chances of success of the individual claims (see 3.1 Availability).

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

There are no equivalents in Germany for the English strike-out rules or summary judgment to challenge a claim at an early stage. However, a court may reject an action as being inadmissible if, for example, the jurisdiction or other requirements for the admissibility of a lawsuit are not fulfilled.

4.2 Jurisdiction/Applicable Law Jurisdiction

Antitrust law cases are frequently multi-jurisdictional. Cartel arrangements often cover various countries and the parties involved in private antitrust litigation are, in many cases, domiciled in different countries. However, in order to establish the jurisdiction of German courts there must

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be a link between the antitrust law infringement and Germany.

German courts must have jurisdiction to hear the claims against foreign defendants. Establishing jurisdiction for the relevant claims is often a major pillar for determining the case prospects.

- For claims against defendants that are domiciled in an EU member state, the EU law on international jurisdiction, namely the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) is applicable.
- For claims against defendants that are not domiciled in an EU member state, international jurisdiction is determined according to the principles laid down in the CCP.

Claims Against Defendants Domiciled in an EU Member State

Under the Recast Brussels Regulation, the default position is that any defendant may be sued before the court of their:

- domicile or “seat”;
- central administration – ie, where the company policy is determined, which is usually where the managing board is located; or
- principal place of business – ie, where material resources and human resources are concentrated.

However, given the tortious character of antitrust infringements, the victim is also entitled to bring such an action in a jurisdiction where the harmful event (tort) occurred. This can be the place of the event giving rise to the damage or the place where the damage occurred. The plaintiff

can sue the defendant in the courts of either of those places. In a judgment of the ECJ (decision dated 15 July 2021, C-30/20, Volvo and Others), it found that if the infringement giving rise to the alleged damage covers the entire EEA market (as in the trucks case), the place where the damage occurred can be in every member state. The plaintiff may bring an action before the court in the district in which they purchased the goods affected by the collusive arrangement. If the purchases have been made in several places, the plaintiff may bring an action before the court where it has its registered office.

Pursuant to the Recast Brussels Regulation and in line with the ECJ’s decision in the Hydrogen Peroxide case (decision dated 21 May 2015, C-352/13, CDC Hydrogen Peroxide SA), German courts have jurisdiction to hear claims against defendants domiciled within the EU but outside of Germany if each of the claims is directed against at least one anchor defendant (*Ankerbeklagter*) domiciled in Germany.

However, claimants should also take into account that it might not be possible to establish jurisdiction in Germany if the relevant transaction documents (eg, a purchase or lease agreement) contain choice of forum clauses (*Gerichtsstandsklausel*) for damages claims, which explicitly establish jurisdiction in a country or jurisdiction other than Germany. If the choice of forum clause is broadly formulated and does not explicitly refer to cartel damage claims, it is disputed whether the clause can establish exclusive jurisdiction (due to the non-contractual character of cartel infringements).

Claims against Defendants Not Domiciled in an EU Member State

The principles for determining international jurisdiction under the CCP are broadly similar

to those that apply under the Recast Brussels Regulation.

Pursuant to Section 17 of the CCP, the general place of jurisdiction of legal persons is determined by their domicile (ie, the location of their registered office).

According to Section 32 of the CCP, for complaints arising from tort, the court in the jurisdiction where the tortious act was committed has jurisdiction. This can also be the place of the event giving rise to the tort (*Handlungsort*) or the place where the harm resulted (*Erfolgsort*).

Applicable Law

To the extent that claims may relate to transactions made outside of Germany, the question becomes relevant whether the German courts can apply German substantive law.

Since damages claims usually result from anti-competitive, ie, tortious and non-contractual behaviour, the question of the applicable law is governed by the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation).

For claims that arose after 11 January 2009, the applicable law is determined pursuant to Article 6 of the Rome II Regulation. According to Article 6 (3) (a) of the Rome II Regulation, the applicable law shall in principle be the law of the country where the market is – or is likely to be – affected.

This “effects principle” also applies if the plaintiff sues more than one defendant. Thus, according to this principle, German law applies if the effects of the restriction of competition are, or are likely to be, felt in Germany. In cases affecting the markets of more than one country, the Rome II Regulation provides that a plaintiff who

sues in the defendant’s country of domicile “may instead choose to base their claim on the law of the court seised, provided that the court of the member state is amongst those directly and significantly affected by the restriction of competition” (Article 6 (3) (b), Rome II Regulation). In such a situation, claimants can choose to base their claims on the respective national law of the anchor defendant if a number of conditions are met, namely:

- the German courts must have international jurisdiction for each of the claims of foreign claimants against domestic and/or foreign defendants;
- the defendants have not filed a claim for a negative declaratory judgment (negative *Feststellungsklage*) at the claimants’ respective places of general jurisdiction before the claimants’ claims are brought (so-called “torpedo”, Article 29 of the Recast Brussels Regulation); and
- the anti-competitive behaviour of all the defendants has directly and substantially affected the German market.

However, uncertainties can result in cases where the infringement affected different transactions by different claimants in different jurisdictions. In such cases, it may well be that the right to choose the applicable law under Article 6 (3) (b) of the Rome II Regulation must be assessed individually and separately for different claims, transactions or claimants/assignors.

4.3 Limitation Periods Five Years

Following the Ninth Amendment to the ARC, the regular limitation period for private antitrust damages claims has been extended from three to five years (Section 33h, ARC). The new rules

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apply to all claims which were not already time-barred as of 27 December 2016.

The five-year limitation period begins at the end of the year in which:

- the claim arose;
- the claimant learned of the circumstances substantiating the claim to an infringement, and of the identity of the infringer, or should have learnt of them had the claimant not acted grossly negligently (*grob fahrlässig*); or
- the infringement on which the claim is based has ceased.

While it is often the case that knowledge of the relevant circumstances may already occur when inspections by a competition authority at the premises of the cartel participant are announced (at least, in cases of press releases by the competition authority and comprehensive media reports), German courts tend to require the publication of the decision by a competition authority to start the limitation period.

Other Limitation Periods

A second (absolute) limitation period of ten years (regardless of any knowledge of the claim) starts when the claim arises and the infringement on which the claim is based has come to an end.

The maximum limitation period, however, is 30 years after the date on which the act causing the injury was committed (Section 33h (4), ARC).

In principle, the shorter limitation period precedes the longer limitation period.

Suspension

The limitation period is suspended during the investigation by the EC or an NCA (Section 33h (6), ARC). The claims will expire no earlier than

one year after the final and binding (*rechtskräftig*) decision of the respective authority or court.

It has been disputed whether the suspension of the statute of limitations only starts upon the issuance of a formal decision to initiate cartel proceedings or has already begun when unannounced inspections (dawn raids) occur. In its trucks decisions, the FCJ clarified that the suspension is already triggered by the unannounced inspection.

In addition, the FCJ clarified in its second trucks decision that the interruption of the running of the limitation period by the Commission's investigation does not end at the time the Commission's decision has been issued but at the time the deadline for an appeal against that decision has ended.

Other popular tools often used by plaintiffs to suspend the limitation period without being required to prepare and submit a (costly and burdensome) lawsuit are applications to start mediation proceedings or limitation waiver agreements with potential defendants.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Following the implementation of the Ninth Amendment to the ARC, a limited disclosure procedure in connection with antitrust damages claims has been established. While there were (and still are) general procedural rules which allow specific documents to be disclosed, these rules have very rarely been applied in antitrust cases (since they require the defendant to identify specific documents).

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Section 33g of the ARC, introduced in June 2017, includes a new (substantive) right for access to information required to seek damages. According to a 2018 ruling by the Higher Regional Court of Düsseldorf, this right to access to information only applies to claims that originated after 26 December 2016. In reaction, the legislature of the Tenth Amendment to the ARC explicitly clarified that Section 33g of the ARC also applies to claims that originated before 26 December 2016 (as long as the action was filed after 26 December 2016; see Section 186 (4), ARC).

Access to Information From Defendants or Other Third Parties

In order to claim (pretrial) access to information from either the potential defendant or another third party, a plaintiff has to demonstrate probable cause that they have a right to seek damages and indicate the information they require as specifically as possible. This right is not limited to the plaintiff. The defendant can also claim the right to access to information from either the plaintiff or a third party, if an action for damages is already pending (ie, not pretrial). In particular, a defendant could request access to data and documents in order to be able to quantify a pass-on by the plaintiff.

In general, a disclosure is excluded if and to the extent that it is disproportionate, taking into account and balancing the interests of the party claiming access to information and the interests of the party that is in (alleged) possession of such information. Factors to be taken into account in this context include:

- the relevance and value of the information;
- the extent to which the available information has been exhausted;
- the effort and cost involved to provide the requested information;

- the confidential nature of the requested information; and
- the effectiveness of public competition law enforcement.

In order to protect the defendant's business secrets the court may commission a publicly appointed expert to provide an expert opinion on the necessary scope of the protection required to protect these (Section 89b (7), sentence 2, ARC).

Many procedural aspects, including the protection of business secrets or the reimbursement of costs associated with the disclosure, are unclear since precedents and an established decision practice do not yet exist.

Access to Records

In addition to requests brought against third parties, the plaintiff can request access to the records of the FCO or other relevant competition authorities under Section 89c of the ARC. However, pursuant to Section 89c (1), sentence 1, No 1 of the ARC, access to the records of competition authorities is only granted if the requested information cannot be obtained with reasonable effort from another party.

Possible Effects of Access to Information

Whether the extended rules on access to information will actually facilitate or hamper damages claims, remains to be seen. Enforcing (pretrial) disclosure will likely result in significant delays and may therefore not always be attractive. This is especially true as Section 89b (3) and (4) of the ARC provide for the possibility of a stay of proceedings and an interlocutory judgment regarding access to information. Furthermore, the implementation of confidentiality protection for business secrets and other confidential information can further delay the proceedings. While

the ARC acknowledges such protection, and the EC's notice on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law might give some guidance, it is not clear how to actually ensure the protection of such information (eg, through redaction of the relevant documents or a confidentiality ring similar to what is current practice in English proceedings).

5.2 Legal Professional Privilege

Unlike other jurisdictions, the concept of legal privilege does not exist in Germany. However, under the new Section 33g (6) of the ARC, documents can be withheld from inspection if they are in the possession of an external lawyer. Whether this also applies to documents in the possession of a client remains unclear.

In general, both (potential) claimants and defendants can request access to information in the possession of others. Restrictions only apply to leniency statements and acknowledgements in connection with settlement discussions with competition authorities.

The same applies to access to the records of a competition authority. Communications between the defendant and its in-house counsel or external lawyers can be found in the FCO's file because the concept of legal privilege does not exist in the event that the FCO conducts cartel investigations and seizes documents. The FCO is entitled to seize all the documents in the possession of the in-house counsel unless they concern "defence correspondence". This is correspondence that is prepared with awareness of, and relating directly to, the actual defence in quasi-criminal cartel investigations or other anti-trust proceedings that could lead to the imposition of a fine.

Documents in the possession of the defendant's external lawyer are protected by attorney privilege and cannot be seized. This is confirmed by Section 33g (6) of the ARC.

Trade secrets and other confidential information are generally not privileged under German civil procedural law. However, confidentiality aspects have to be considered in relation to a request for disclosure of information pursuant to Section 33g of the ARC. If access to the information is granted, the court has to ensure that trade or business secrets will be protected, although there is no established practice in this regard as yet (see 5.1 Disclosure/Discovery Procedure).

5.3 Leniency Materials/Settlement Agreements

Both the right of access against defendants and third parties, as well as against a competition authority (Section 89c, ARC), does not grant access to leniency statements and acknowledgements in connection with settlement discussions with competition authorities. Such documents are explicitly exempted from the right of access to information. However, information in the possession of leniency applicants, other than leniency statements, can be accessed.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Under German civil procedural law, the following types of evidence are admissible:

- evidence taken by visual inspection (Section 371 et seq, CCP);
- witness evidence (Section 373 et seq, CCP);
- expert evidence (Section 402 et seq, CCP);
- documentary evidence (Section 415 et seq, CCP); and

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- evidence by questioning of a party (Section 445 et seq, CCP).

Witnesses of Fact

Evidence gathered by hearing witness testimony (Section 373, CCP) is admissible in private antitrust damages proceedings. The party that wishes to submit the evidence must apply to the court for the witness to be heard. The witness is questioned by the court. Cross-examination does not take place. The legal counsel of the parties are, however, permitted to put questions directly to the witness. If a witness invited to testify before the court fails to appear, they may be fined or – in rare cases – even imprisoned.

In antitrust damages actions, which very often relate to events in the distant past, evidence gathered by hearing witness testimony on individual specific transactions within an undertaking (eg, on specific procurements) often plays a secondary role, due to the long amount of time that has passed.

6.2 Expert Evidence

In procedural terms, it is necessary to differentiate between expert witnesses commissioned by the parties, and expert witnesses appointed by the court.

Expert Witnesses Commissioned by the Parties

In antitrust damages proceedings, it is common practice for the plaintiff to submit an economic expert opinion on the question of whether, and to what extent, harm has occurred; this practice is not obligatory, however. The defendant then usually submits a countering economic expert opinion, which serves to describe the weaknesses in the plaintiff's expert opinion and/or to undertake its own damages analysis. Expert opinions submitted by the parties are part of the

parties' pleadings. Economic experts commissioned by the parties are usually expert witnesses (Section 414, CCP), and the rules governing witness testimony are applicable here as well.

Quantification of Damages

In previous years, there have been very few cases in Germany in which damages had to be quantified, which explains why at present there is only limited experience of the expert assessment of damages resulting from violations of antitrust law. The reason for this is that the vast majority of courts hear claims for damages in the form of actions for performance by way of a basic judgment (*Grundurteil*). For a basic judgment, the court only has to determine whether it is at least likely that the claim exists in any amount. Thus, at this stage of the proceedings, the court does not need to involve an economic expert. The court only has to decide on the exact amount of damages in the subsequent quantifications procedure.

In the past few years in Germany, a number of damages claims have been granted, but the subsequent quantification proceedings have only taken place in a few cases.

In 2020, the Regional Court of Dortmund estimated, in a railway track case, the amount of damages (15% of the net price) based on its free conviction without any help from a court-appointed expert witness. In June 2023, the same court dismissed a claim in the sugar cartel without the help of an expert witness; the decision was based in particular on the specifics of the sugar market. In August 2021, the Higher Regional Court of Celle independently determined the amount of damages (12%) in a case concerning the chipboard cartel, by comparing the average prices before and after the infringement period with the average prices during the

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infringement period. In June 2023, the Regional Court of Berlin estimated the amount of damages (5% of the net price) in a trucks case without the help of a court expert witness but by referring to the plaintiff's expert opinion (which calculated damages between 5%-14% of the net price). The case is on appeal.

In contrast, the Higher Regional Court of Stuttgart, the Regional Court of Munich and several other German courts rejected such a free estimate without consulting a court-appointed expert in the trucks cases.

Expert Witnesses Appointed by the Court

In practice, it is evident that those courts which are already dealing with the quantification of damages – in particular, those courts which do not choose the described two-stage procedure but conclusively decide on the claims in a single procedure – do regularly appoint an economic expert witness. The expert witness is selected by the court. The court also gathers the questions to be addressed to the court-appointed expert. The court-appointed expert witness is not cross-examined, but the parties' legal counsel may ask them questions. The opinion of the court-appointed expert is not binding on the court, but usually the court will follow its opinion.

In October 2020, the Regional Court of Cologne dismissed a claim in the sugar cartel because it followed the court-appointed expert witness who came to the conclusion that in an oligopolistic market (such as the German sugar market with only three market players) even in the absence of a cartel infringement the prices would not be lower and, thus, no actual damage could be demonstrated.

Several regional courts appointed expert witnesses to calculate potential damages in various trucks cases.

7. Damages

7.1 Assessment of Damages

Damages are awarded based on the principle of natural restitution – compensatory damages, under Section 249 of the GCC. The harm caused to a plaintiff by an antitrust law infringement is calculated by comparing the current situation in which the plaintiff finds itself, given the infringement, and the hypothetical situation in which the plaintiff would have been, but for the infringement, also known as the “counterfactual scenario”.

Potential losses also include lost profits (Section 252, GCC). Exemplary or punitive damages are not available.

According to Section 33a (3) of the ARC, the amount of profit procured by the infringement may be taken into account in determining the amount of damage caused. The plaintiff may demand disclosure of the defendant's profits under Section 33g (1), (10) of the ARC or Section 242 of the CCP.

There is no standing case law yet on the methods to be applied for the quantification of cartel damages. In most cases, expert opinions submitted by the parties adopt a comparison-over-time approach. Section 33a (3) of the ARC allows for reasonable estimates by the court, under Section 287 of the CCP.

Umbrella Effects

The damages may also include the after-effects of the cartel and the price increases of outsid-

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ers caused by the cartel (umbrella pricing), as stressed by the FCJ in its fourth railway cartel decision. There is, however, no automatic assumption that a cartel caused umbrella damages, but rather a comprehensive assessment of the circumstances of the individual case is needed. The likelihood of umbrella effects increases with the market coverage and the duration of the infringement. The extent of an umbrella damage depends on several factors, such as the supply elasticity of the cartel outsiders, the market transparency, the degree of interchangeability of the goods offered, buyer power, etc. Due to the economic complexity of these factors, the FCJ has ruled out *prima facie* evidence for umbrella damages.

No Rule to Estimate the Amount of Damages

Previously, the legislature had shown no intention of introducing a provision that presumed the amount of damages, but left it to the judge to assess the amount of damages due under Section 287 of the CCP, mostly with the help of economic experts.

However, in 2020, 2021 and 2023, three German courts estimated the amount of damages (5%, 15% and 12% of the net price) based on their free conviction without the help of an expert witness (see 6. Witness and Expert Evidence).

Lump-Sum Damage Clauses

Provisions in terms and conditions that suppliers who took part in a cartel have to pay a certain sum (eg, 10% of the purchase price) have been considered by the FCJ in its second railway cartel decision to merely modify the burden of proof rather than to determine the amount of damage. In its sixth railway cartel decision in February 2021, the FCJ stated that such a lump-sum damage clause in the amount of up to 15% of the purchase price is not unreasonably

high because it is in line with economic studies on cartel overcharges (such as the 2009 Oxera Study prepared for the European Commission) and because it will increase the enforceability of private damage claims.

7.2 “Passing-On” Defences

The pass-on defence is available to defendants in Germany (see 2.4 Burden and Standard of Proof).

Section 33c (1), sentence 2 of the ARC regulates the pass-on defence for claims arising after 26 December 2016. According to this provision, any harm that occurred to the purchaser is compensated to the extent that the purchaser passed on that cartel-induced price overcharge to its own customers (*Schadensabwälzung*). With regard to claims arising on or prior to 26 December 2016, under the previous legal situation, the pass-on defence was permissible in terms of the adjustment of benefits, but German courts tended to apply this general principle rather restrictively.

The burden of proof regarding passing-on lies with the party that caused the harm – ie, the infringer must demonstrate and prove that its customers passed on any overcharge to the next market level, and to what degree. If, however, an indirect customer claims a cartel-caused damage, Section 33c (2) of the ARC assumes (under certain conditions) that the overcharge was passed on to the indirect customer (see 2.5 Direct and Indirect Purchasers).

7.3 Interest

Interest is payable on damages. Interest includes pre-judgment interest, which is awarded from the time the damages occurred. In the case of cartel damages brought by a customer, the damages typically occur at the time the customer orders/buys the product at the price affected by

the infringement – ie, interest is in principle payable from the time the product was ordered by the customer.

The statutory interest rate is five percentage points above the base rate per annum, as published by the German Central Bank, for damages that occurred on or after 1 July 2005 (Section 33a (4) of the ARC, in conjunction with Section 288 (1) 2 of the GCC). While the base rate was negative in the last decade resulting in an interest rate of 4.12% in the years 2017-2022, the current base rate amounts to 3.12% resulting in an interest rate of 8.12%. For damages that occurred before 1 July 2005, the FCJ holds that interest is payable in the amount of 4% per annum.

Depending on the duration of a trial, in practice, interest payments may in many cases match the amount of the actual damage compensation payment.

8. Liability and Contribution

8.1 Joint and Several Liability

The participants in a cartel are jointly and severally liable for the entirety of the harm that was caused by that cartel (Section 33d, ARC). In its third railway cartel decision, the FCJ stressed that all cartel participants are jointly liable for all damages that result from a basic cartel agreement irrespective of their specific involvement in each of the individual agreements that serve to implement the basic cartel agreement.

Defendants may assert claims for all damages in one single action against one or more cartel members. Alternatively, they can bring a number of separate actions asserting the entire sum of damages against various cartel members; if they

are successful, however, they can only enforce the damages sum to which they are entitled once.

The internal settlement between joint and several debtors depends on the circumstances of the specific case and, in particular, on the extent to which they caused the damage (Section 33d, ARC); other than this, the general rules for total debt equalisation apply (Section 421 et seq, GCC).

Exceptions

Exceptions to these principles apply to claims which have arisen since 26 December 2016 with respect to leniency applicants, which received full immunity under the applicable leniency programme. Leniency applicants are only liable for compensation for the loss suffered by their direct and indirect customers or suppliers resulting from the infringement (Section 33e, ARC), and the same applies to the internal equalisation between joint and several debtors. Under certain conditions, with regard to claims arising after 26 December 2016, small and medium-sized enterprises may also only be obliged to compensate for the damages suffered by their direct and indirect customers or suppliers (Section 33d, ARC).

8.2 Contribution

Contribution claims against other infringers can only be brought in separate proceedings that are subsequent to the main proceedings – ie, the initial action for damages. A jointly liable infringer may also bring an indemnification claim against the other infringers, prior to making payment to the successful claimant.

Against this background, it is common practice for the defendants in German antitrust damages actions to issue third-party notices to the other cartel members, asking for those other cartel

members to join the proceedings. As a result of these third-party notices, the outcome of the litigation in the main proceedings will be binding for the recipients of the third-party notices in a potential subsequent contribution litigation. Even if the third party decides not to join the proceedings, it has to accept the factual and legal findings of the court and cannot refute them in any subsequent litigation.

9. Other Remedies

9.1 Injunctions

Injunctive relief is principally available and usually based on Section 33 of the ARC (typically aimed at getting a supply from a dominant supplier).

German procedural law provides for different interim measures pursuant to Sections 935 and 940 of the CCP. In the event of an immediate risk that the financial situation of the defendant will deteriorate, the plaintiff can request that the court seizes assets of the defendant. Furthermore, courts can issue interim measures ordering the defendant to perform a certain action, such as supplying the plaintiff with certain goods, if the plaintiff would otherwise lose important customers. The standard of proof is lower than for the principal claim on the merits. An applicant for interim relief must provide prima facie evidence that they have a claim, and that the realisation of such claim is impossible or severely jeopardised without the interim remedy (urgency). As a general rule, an interim remedy shall not result in the fulfilment of the final remedy.

Access to information and documents can also be pursued by seeking an interim measure.

9.2 Alternative Dispute Resolution

In principle, arbitration proceedings are available under German law but are not mandatory before trial. However, such proceedings are only admissible if an arbitration clause in relation to antitrust damages has been validly agreed between the parties.

In practice, however, it is very common that cartel members and their respective customers will reach confidential out-of-court settlement agreements in order to prevent court proceedings or arbitration proceedings.

10. Funding and Costs

10.1 Litigation Funding

In Germany, external funding of private antitrust cases is legally permissible. While in previous years litigation finance providers usually came from the insurance sector and often made the funding of antitrust cases dependent on the outcome of extremely thorough analyses of the prospects for success, the range of funding models has noticeably increased more recently. A growing number of litigation finance providers from the private equity sector have entered the German market in recent years, often displaying a greater level of risk tolerance than many traditional litigation finance providers when making funding commitments. Thus, the litigation funding market is also rapidly evolving.

However, it still constitutes a major problem to bundle various claims into one action for damages in a legally viable way. A major action for damages backed by the Belgian Cartel Damage Claims (CDC) in the cement case was lost in 2015 on formal grounds and an improved model backed by a British-American litigation financier in the trucks case may face a similar fate after a

ruling by the Regional Court of Munich in early 2020. A claim by the CDC in the sugar cartel has also been dismissed by the Regional Court of Hanover. Appeals are currently pending (see 3. **Class/Collective Actions**).

10.2 Costs

The costs of private antitrust litigation comprise the court fees, the attorneys' fees and the (court-appointed) expert fees. The court fees generally depend on the value of the claim and whether the case ends after the first instance or after an appeal.

Adjusting the Value of the Matter

In order to somewhat attenuate the cost risks involved in bringing private damages claims to court, the German legislature has introduced Section 89a of the ARC, which provides for the possibility of adjusting the value of the matter if certain conditions are met. If a party substantiates that its economic situation would be seriously jeopardised if it had to bear the costs of a litigation calculated on the basis of the full value in dispute, the court may, at the party's request, order that the obligation of this party to pay the court fees be assessed on the basis of a reduced value in dispute.

Who Bears the Costs?

As a general rule, the legal costs for private antitrust litigation have to be borne by the losing party. In the case of a partial success, both parties must pay their share of the costs in accordance with their success rate. It should also be noted that there is a statutory limitation as regards the amount of attorneys' fees that are recoverable. Such fees can only be recovered within the limits of the German Lawyers' Fees Act. If the actual fees charged by the attorney of the winning party exceed the statutory fee (which will typically be the case, especially because law firms specialised in antitrust law tend to charge by hours and not by value of dispute), the excess amount must be borne by the winning party itself.

11. Appeals

11.1 Basis of Appeal

Appeals against the decisions of the regional courts are made before the competent higher regional court on the facts and on the law. The higher regional courts, which are designated to be competent by the respective German federal states, have specialised antitrust law panels (see 2.2 **Specialist Courts**). Decisions of the higher regional courts may be appealed on points of law before the FCJ, which has also established a special antitrust law panel.

ISRAEL



Law and Practice

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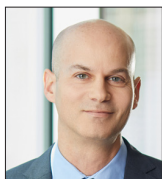
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Goldfarb Gross Seligman & Co is one of Israel's largest law firms, and delivers top-tier legal services to international standards. The firm provides legal counsel in various fields of antitrust, competition and regulatory law to companies and corporations, from the swift resolution of specific issues to long-term regulatory strategies. Goldfarb Gross Seligman also advises on antitrust and competition aspects arising from transactions, and represents local and international clients in such matters. The firm's antitrust and competition department

provides comprehensive strategic advice in the fields of antitrust and competition, as well as in the regulatory field. The attorneys' deep understanding and broad knowledge of the field, partially derived from long years of public service in senior regulatory positions, alongside their close working relations with various regulatory authorities, enables the team to provide top-tier legal and strategic counsel to clients in relation to complex antitrust, competition and regulation matters.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Israel is truly evolving, with use of arguments from the realm of competition law in civil litigation constantly increasing.

Excessive Pricing Charged by a Monopoly

In July 2022, the Supreme Court of Israel (the Supreme Court) rejected the District Court's decision to certify a class action on the grounds of excessive pricing against Coca-Cola. For the first time, the Israeli Supreme Court ruled on the excessive pricing cause of action and determined its existence in Israeli Competition Law.

According to the Supreme Court's ruling, the provision of Section 29a(b)(1) of the Economic Competition Law, which prohibits a monopolist from setting an unfair price for a product or service, includes (besides a prohibition on predatory pricing) a prohibition on excessive pricing. It was also determined that it is possible to enforce this prohibition by way of conducting a class action. The Supreme Court adopted the Israeli Competition Authority's (ICA) and the Attorney General's past positions, according to which

a cautious and restrained approach should be taken in determining that an excessive price has been charged by a monopoly, even though the Competition Law prohibits excessive pricing.

Based on the ICA's and the Attorney General's past positions, the Supreme Court stated that the test for assessing the existence of excessive pricing is twofold:

- first, it has to be determined whether the price is significantly higher than the price that would have been set in a competitive market; and
- if so, whether the price is unfair (ie, what the circumstances are that led to this price).

However, the Supreme Court determined that, while in relation to the first test the burden of proof rests with the plaintiff, in relation to the unfairness test the burden of proof rests with the defendant. Namely, if the plaintiff proves that the monopoly has charged an excessive price, the monopoly will have to prove that the price is fair.

The Supreme Court also rejected the legal thesis of the District Court regarding discovery of documents, according to which the extent of

the defendant's discovery must be linked to the plaintiff's burden of proof at the stage of the approval request. Namely, if the defendant refrains from disclosing information, the plaintiff's burden of proof will be reduced, and vice versa. The Supreme Court stated that the burden is on the plaintiff to establish a sufficient legal evidentiary foundation at the motion certification stage, regardless of the scope of the defendant's disclosure. If necessary, the plaintiff has the right to request discovery of documents in accordance with the Class Actions Law, 5766-2006 (the "Class Actions Law"). The plaintiff's request will be examined on its merits by the court, in accordance with the relevant legislation and ruling. Based on the above, the Supreme Court annulled the District Court's decision to certify the class action, and returned the case to the District Court to discuss the discovery process and to then examine the certification request based on the Supreme Court's ruling.

In a more recent case from March 2023, in which the plaintiff argued that Tnuva cottage cheese was excessively priced, the two-step test established by the Coca-Cola ruling was applied. For the first test, it was ruled that the factual infrastructure did not lead to the conclusion that Tnuva charged an excessive price, which is significantly higher than the competitive price. It was determined that the application of the auxiliary tests had not proven a significant gap in the specific market and its circumstances; therefore, the analysis was not within the framework of the extreme and exceptional cases in which the excessive price is clear and glaring. This new ruling has reduced the excessive price cause of action dramatically by applying the restraint approach as mentioned in the Coca-Cola case above.

In July 2023, a ruling regarding a request for a class action against various movie theatres in Israel was held by the District Court. One claim raised by the plaintiff was that the fresh popcorn sold by the respondents was sold at an excessive price. The ruling rejected the request since it was not proven that the respondents were each a monopoly. The hot and fresh popcorn was found to be an additional product to the movie, an "add-on good", which would not be purchased on its own. Therefore, an examination of the monopoly question in relation to this product as a separate market was not accepted. The legal analysis of the two-step test was not applied because the monopoly threshold condition was not proven.

In another important development, in December 2022, the ICA and the Director General that heads the ICA (the "Director General") notified MBI Pharma Ltd (MBI) that the price set by MBI for a product named "Lidiant" – a life-saving drug for patients with the genetic disease CTX, was a high and unfair price, which constitutes an abuse of power by a monopoly. This was the first time that administrative fines were imposed for infringing the prohibition of setting an excessive and unfair price in Israel. MBI was given an administrative fine of NIS8 million, and two MBI officials were given an administrative fine of NIS614,000 each.

Parallel Imports Restrictions on Competition

In July 2022, the Supreme Court determined, in the framework of the Schweppes case, that the parallel import of a brand would not be protected if the import infringes a trade mark registered in Israel. The Supreme Court annulled the District Court judgment and declared that the parallel importer was not allowed to import Schweppes products made in Ukraine under the trade mark "Schweppes" without obtaining the permission

of Jafora-Tabori, the owner of the Israeli trade mark.

The Supreme Court stated that trade marks are limited to the borders of each country and its laws. Based on this principle of territorial protection of trade marks, the Supreme Court stated that when the imported products are under an Israeli trade mark, the importation is only possible if the owner of the trade mark in the origin country also holds the Israeli trade mark, or if the imported products were originally purchased from the owner of the Israeli trade mark and imported to Israel for resale purposes. Parallel importation that violates the rights of the trade mark owner in their country is not legitimate or allowed.

Although the Supreme Court's ruling is based on intellectual property laws rather than on competition law, it significantly affects parallel importers' ability to use competition-related arguments in the case of a violation of a local trade mark. Prior to the Schweppes case, a parallel importer could raise competition-related arguments against the official distributor or importer. Post-Schweppes, competition-related arguments might be irrelevant when the official importer is the owner of the brand trade mark in Israel.

It is possible that this decision will be challenged to a "re-discussion" before the Supreme Court.

Remedy by Using the Law of Unjust Enrichment

In July 2021, the Supreme Court ruled that, in certain circumstances, a person who enjoyed an unjust enrichment as a result of a breach of competition rules would be forced to return their profits, which could exceed the damage suffered by the plaintiff. This ruling is significant as it deviates from recent case law, which has granted

the plaintiff financial remedies on the grounds of violating competition law only for the damages it suffered.

The Supreme Court discussed an appeal against the District Court's decision in favour of Unipharm (a generic pharmaceutical company) after ruling that Sanofi (an ethical pharmaceutical company) knowingly and intentionally misled the Israel Patent Office and thus extended the patent application process. It was determined that the deception allowed Sanofi to continue to enjoy – illegally and for 15 months – de facto exclusive rights over the drug Plavix (for the treatment and prevention of heart attacks and strokes in high-risk patients).

The main question discussed by the Supreme Court was whether the deception of the patent registrar constitutes an abuse of monopoly power, and whether it may establish a remedy using the law of unjust enrichment. The Supreme Court rejected the appeal, examining the cause of unjust enrichment under three different paradigms, and ruled that it can also be applied to the Competition Law. The Supreme Court ruled that the obligation to return the enrichment stems from the need to deter competitors from violating the competition rules, and that the violation was harmful to the public.

1.2 Other Developments

The new Civil Procedure Regulations 5778-2021 (CPR or the "New CPR") came into force on 1 January 2021, bringing many changes, both technical and substantial. Some of the changes will be noted in subsequent sections, but it is still important to draw attention to further changes.

According to the New CPR, the court's permission is required in order to serve a statement of claim on a foreign entity that is not located in

Israel. The court can allow this only if one of the alternatives in Regulation 166 of the New CPR or in Regulation 500 of the Old Civil Procedure Regulations (the “Old CPR”) applies to the case at hand.

Recently, another alternative was added in both the Old and New CPR, stating that the court can permit the service of a statement of claim on a foreign entity if the claim is based on the damage that the plaintiff suffered in Israel from a product, service or conduct of the defendant, so long as the defendant could have anticipated that the damage would be incurred in Israel and that the defendant or a related person deals in international commerce or services on a significant scale.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Every plaintiff (whether a natural person or a corporation) can avail itself of civil remedies for breach of the Competition Law. These remedies stem from the provisions of Section 50 of the Competition Law, which provides that the breach of any of the provisions of the Law shall be tantamount to a tort.

The Law does not define the elements of the tort and does not prescribe any provisions regarding the remedy that is to be granted for the breach of any of the provisions that amount to a tort. For the purpose of giving the tort substance, Section 50 of the Law refers to the Civil Wrongs Ordinance (CWO) and to all of the general principles that are set out therein and in case law.

One of the elements of the tort is proof of damage – a breach of the Law that does not cause

damage will not entitle the injured party to compensation.

A not inconsiderable portion of the claims that are submitted in the context of competition law are follow-on claims, which are submitted after the ICA has taken enforcement steps. The existence of the enforcement process by the Competition Commissioner enables plaintiffs to rely on the ICA's proceedings and, after those enforcement proceedings, there is a higher chance that civil claims will be submitted for the same actions.

2.2 Specialist Courts

In Israel, there is a designated tribunal for competition issues, but it does not deal with civil claims. The function of the tribunal is to constitute an instance for judicial review of the decisions made by the Director General of the ICA, such as the decision to approve a merger, but there is no expert court in civil matters on the grounds of competition law.

There are proceedings in place for the transfer of matters between courts, but these do not arise as incidental to the question of expertise in competition matters.

2.3 Decisions of National Competition Authorities

The decision of the ICA does not bind the court, but it is of considerable weight. Section 43(e) of the Competition Law provides that a ruling of the ICA constitutes prima facie evidence of its content in any legal proceedings. The Supreme Court has held that the ruling is prima facie evidence of significant weight.

With respect to the decisions of a foreign competition authority, there is no evidentiary force to findings made in foreign proceedings or in a

foreign legal system. This is the case in general and, in particular, when taking into account the clear provisions set out in Section 43(e) of the Law.

The ICA does not directly intervene in civil proceedings, but there might be cases in which the court requires the ICA to appear in court in order to express its position on various issues. In addition, the Prosecutor General can join any claim in court in order to set out the position of the State. These are exceptional proceedings, and if they take place in a tort claim on the grounds of breach of competition law, it might be expected that the Prosecutor General's position will accord with that of the ICA.

2.4 Burden and Standard of Proof

The burden of proof falls on the plaintiff, with the prescribed standard being the “balance of probabilities” (ie, that the court is persuaded that the plaintiff's version is the more reasonable one).

There are defence arguments that transfer the burden of proof from the plaintiff to the defendant. Thus, for instance, the argument of the “passing on of damage” transfers the burden of proof from the plaintiff to the party claiming that the plaintiff has passed the damage onwards.

2.5 Direct and Indirect Purchasers

As noted in 2.1 **Legal Basis for a Claim**, a breach of the provisions of the Competition Law will be deemed to be a tort by virtue of Section 50 of the Law. Therefore, the general doctrines in the CWO apply.

The doctrine of compensation is set out in Section 76(1) of the CWO and provides that a plaintiff will be entitled to compensation “only for such damage that might naturally flow in the ordinary course of affairs, and that comes directly

from the defendant's tort”. The causal link doctrine prescribes that there must be a causal link between a person's act or omission – an act or omission that amounts to a tort – and the damage caused to the plaintiff, in respect of which they are claiming compensation. Section 64(2) of the CWO explains that this link is severed where another person was the decisive cause of the damage.

Regarding class actions pursuant to the Competition Law, the tendency that appears to be forming supports the possibility of indirect consumers submitting motions, as decided in the Supreme Court's recent ruling in the Coca-Cola case.

In the Coca-Cola ruling, the District Court recognised the right of indirect consumers to submit class actions on the grounds of excessive pricing. Coca-Cola did not sell the product directly to consumers, but rather through retailers such as retail chains and supermarkets. Therefore, the price that was paid for the product also included a retail margin. Hence, the group of consumers, all plaintiffs in this case, were not direct consumers of the company; still, the court found there was no economic or moral justification for the compensation regarding charging an excessive price to be given specifically to retailers – after all, they passed on their losses to their customers anyway.

It is important to emphasise that since Coca-Cola did not accommodate this claim in the request for permission to appeal, the Supreme Court did not address this issue in its recent ruling.

Nevertheless, since the “indirect consumer” doctrine (according to which an indirect consumer of a supplier's product cannot sue the supplier

directly due to Competition Law infringements) has not yet been applied or rejected by the Supreme Court, and given the District Court's recurring position, an indirect consumer may file a class action within the grounds of the Competition Law.

2.6 Timetable

The Old CPR prescribe that cases are to commence 30 days after the date of submission of the last statement of claim if the court does not intend to set pre-trial proceedings. However, in most cases, pre-trial proceedings do take place, and these take several months after the submission of the final pleadings. Nevertheless, Regulation 34 in the New CPR requires pre-trial proceedings that start with "Preliminary Discussion", within 30 days after the date of submission of the last statement of claim. Furthermore, the start of the case could also be delayed for some time after the date of commencement of the proceedings, because of court overload. Moreover, it is possible that a number of years might pass between the commencement of proceedings and the handing down of a final judgment.

Civil proceedings can continue at the same time as public enforcement. The ICA does not have the legal option of suspending civil proceedings that are taking place at the same time as enforcement proceedings, but it can submit its position to the court that is hearing the civil proceedings and recommend the suspension thereof.

Furthermore, a party to the civil proceedings can request that the court suspends the civil proceedings during the course of the public enforcement proceedings, but such a verdict is subject to the exclusive discretion of the court.

3. Class/Collective Actions

3.1 Availability

Class actions exist in the Israeli legal system and are very common, particularly for breaches of the Competition Law. The causes of action in respect of which a class action may be submitted are set out in the Second Schedule to the Class Actions Law, one of which is a cause of action pursuant to the Competition Law.

According to the Third Schedule to the Class Actions Law, a class action on a cause of action under the Competition Law shall be an opt-out claim. Therefore, every person who is part of the class of plaintiffs defined by the court at the time of certification shall be deemed to have consented to the submission of the class action on their behalf. According to Section 11 of the Class Actions Law, a member of the class who does not wish to be included in it must give notice of this within 45 days of the date of publication of the verdict of the court regarding certification, or at a later date if so prescribed by the court.

The question of whether a class action for a cause of action pursuant to the Competition Law can be submitted by indirect consumers has not yet been directly ruled upon by the Supreme Court. This is discussed in more detail in **2.5 Direct and Indirect Purchasers**.

3.2 Procedure

Who Can Bring a Class Action?

Section 4(a) of the Class Actions Law sets out the persons who are entitled to submit a motion to certify a class action and who will be the plaintiffs in the proceedings on behalf of all the members of the class.

A person with a personal cause of action that gives rise to substantial questions (of fact or law)

that are common to all the members of the class to which they belong may submit a class action.

In addition, a public authority may submit a motion to certify a class action so long as the subject of the claim is one of its public purposes. The definition of a public authority in the Law sets out three authorities:

- the Commission for Equal Rights for Persons with Disabilities;
- the Israel Nature and Parks Authority; and
- the Commission for Equal Opportunities in the Workplace.

Therefore, a public authority cannot submit a cause of action pursuant to the Competition Law, since the cause of action would not be one of its public purposes.

A class action can be submitted by any plaintiff for any personal cause of action, and by an organisation where there is a difficulty in finding a lead plaintiff with a personal cause of action. The Israeli Consumer Council may also submit a motion to certify a class action, even if there is no difficulty in locating a plaintiff with a personal cause of action; it does this quite often.

Certification

When a class action is submitted, proceedings take place in which the court examines whether to certify submission of the claim as a class action. In the framework of these proceedings, the lead plaintiff must prove the conditions that are set out below.

Firstly, the plaintiff must comply with the threshold conditions and show that they have a personal cause of action. In addition, when one of the elements of the cause of action is damage,

the plaintiff must show that they have suffered prima facie damage.

Other conditions that the plaintiff must prove for the purpose of certification of the motion are set out in Section 8(a) of the Class Actions Law, as follows:

- the class action must give rise to substantial questions (of fact or law) that are common to all the members of the class;
- there is a reasonable chance that it will be ruled upon in favour of the class of plaintiffs;
- a class action is the fairest and most efficient method of ruling on the proceedings – where clarification of the claim requires a separate factual and legal hearing for the individual members of the class of plaintiffs, there is no room for certification of the motion; and
- there are reasonable grounds for presuming that the interests of the members of the class will be represented and managed in a suitable manner and in good faith.

If this final condition is not proved but the rest of the conditions (including the threshold conditions) are met, the court may order the addition of a lead plaintiff or lead counsel, or the replacement of the lead plaintiff or lead counsel.

The burden of proof with which the lead plaintiff is required to comply at the stage of certification of the motion is relatively low: they must set out the basic infrastructure of their case. The applicant is not required to set out direct evidence and may make do with circumstantial evidence. As noted above, it is sufficient to prove that prima facie damage has been caused.

3.3 Settlement

Pursuant to Section 18(a) of the Class Actions Law, a settlement must be certified in court.

Pursuant to Section 19(a) of the Law, the court shall certify a settlement if it believes that the settlement is appropriate, fair and reasonable, taking into account the interests of the members of the class.

In cases where the motion to certify a settlement is submitted prior to certification of the class action, the court will only certify the settlement if the action is in compliance with the conditions for certification of it as a class action, and where a settlement is the fairest and most efficient method.

The law provides that, prior to certifying a settlement, the court will obtain the position of the Attorney General or a person acting on their behalf. However, in practice, the courts often certify settlements despite the opposition of the representative of the Attorney General.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Under Israeli law, claims can be set aside in limine in two ways: strike out and dismissal. Dismissals give rise to a *res judicata* so that the plaintiff is not entitled to submit any other claim for an identical or similar cause of action. Strike out does not constitute a *res judicata*. A claim may be struck out or dismissed in limine at any stage of the proceedings. Under the CPR, claims can be set aside in limine in strike out or dismissal in five different ways, as follows.

Strike Out

Regulation 41 of the CPR sets out the circumstances in which it is possible to set aside a claim in limine by way of strike out:

- where the statement of claim does not demonstrate a cause of action, so that the plaintiff will not be entitled to the requested remedy even if it proves the facts in the statement of claim;
- where the claim is vexatious or bothersome;
- where the plaintiff persists, in an unsatisfactory manner, in refraining from complying with a provision of these regulations or refraining from complying with a decision or order of the court; and
- where the court has jurisdiction to strike out a claim for any other reasons it believes are appropriate and right.

The court may make the strike out conditional on, among other things, ordering that a hearing of a new claim be continued from the stage at which the present claim was struck out.

Strike Out – Legal Proceedings Abuse

Regulation 42 of the CPR sets out that if the court held that a litigant has abused legal proceedings, said litigant may, for this reason alone, strike out all or part of their statement of claim.

Strike Out – Plaintiff Request

Regulation 44 of the CPR sets out that the court may, at the request of a plaintiff, strike out all or part of their statement of claim.

Administrative Strike Out From Inaction

Regulation 45 of the CPR confers administrative authority on the court secretariat if no action is taken in the claim by the parties for six months without reason. The court secretariat will give at least 20 days' notice before a strike out is effected. If the plaintiff has not given reason in time, the proceeding will be struck out. If the court orders that a plaintiff or applicant seeks to do something within a certain period, and the plaintiff or applicant failed to do so, the relevant

statement of claim might be struck out without a judicial decision. A party may submit a request for the cancellation of the administrative strike out to the court within 14 days.

Dismissal

Regulation 43 of the CPR sets out the special circumstances in which it is possible to set aside a claim in limine by way of dismissal:

- where the cause of action or a factual dispute has been heard in the past and ruled upon in essence;
- due to statute of prescription; or
- for another reason according to which the court believes that the claim must be dismissed, such as the plaintiff or the defendant not being fit to sue (for instance, if legally incompetent) or for want of privity between the parties.

4.2 Jurisdiction/Applicable Law

In Israel, there is one set of laws that applies to the entire country. The Competition Law is a territorial law that applies to the Israeli territory.

That said, the District Court has recognised the possibility of adopting the “effect doctrine” and applying the Israeli Competition Law to international cases if they have effect in Israel. According to the Court, in cases in which the illegal conduct has a substantial, direct and deliberate impact on competition in Israel, the effect doctrine could be used to bring action in Israel.

The Court recently refused to apply the effect doctrine because the effect on competition in Israel was negligible, and the plaintiff did not meet the necessary burden of proof.

In 2020, the Attorney General submitted a position regarding the “effect doctrine”, which further

elaborated the conditions required for applying the Israeli Competition Law to the behaviour of foreigners, even in cases where transactions were made outside the borders of the country. The submission was part of a case discussed in the Supreme Court regarding the discovery of documents that was rejected by the District Court, as part of a motion to approve a class action against foreign companies engaged in the production of trucks imported and marketed in Israel (MAN Truck & Bus AG), on the grounds of committing a restrictive arrangement abroad and a request for compensation for the claimed damage.

According to the position, a cause in question must show that the behaviour of the subject of the lawsuit has a direct (causality between the act and the result), significant (damage must be proven) and reasonably foreseeable effect on competition in Israel. For the foreseeable impact condition, the objective expectancy of impact is sufficient, and therefore no purpose or intention to influence the competition in Israel is required.

In this case, the Supreme Court ruled that the question of the application of the effects doctrine, in particular regarding the applicability of the Competition Law to cartels conducted outside the country’s borders, has not yet been decided, since the discovery was rejected on a different ground.

The decisions of the ICA have also discussed this issue in the context of the application of Israeli antitrust laws to international restrictive arrangements.

Thus, in a ruling regarding a restrictive arrangement pursuant to Section 43 of the Competition Law, it was held that the purpose of the Law is to protect competition in business in Israel,

and for the purposes of achieving this, to also cover actions that were not taken in Israel but that cause harm to competition there. Furthermore, it has been held that Israeli law must be interpreted in the spirit of the effect doctrine, according to which it is possible to apply the Competition Law to actions that harm competition in Israel, even if these actions were taken outside the boundaries of the State.

In a later verdict, the Director General of the ICA addressed the effect doctrine and the question of when Israeli law can be applied to actions that are taken outside the boundaries of the State. The Director General held that it is necessary to prove a clear relationship between the actions taken overseas and the Israeli market for the purpose of the application of Israeli antitrust laws.

Alongside the substantive test, which relates to the question of when the Law must be applied to actions taken outside Israel, there is a procedural aspect that relates to the ability and method of service of process outside the boundaries of the State on foreign defendants.

4.3 Limitation Periods

The relevant statute on the prescription period in civil claims for antitrust matters is the Prescription Law, 5718-1958 (the "Prescription Law"), Section 5 of which states that the prescription period for a civil claim is seven years.

The prescription period commences on the date on which the cause of action comes into being – i.e., the date on which the act or omission grounding the claim occurs. Where the cause of action is damage, the prescription period starts on the date of the occurrence of the damage.

However, if the damage is discovered late, the prescription period will commence on the date on which the damage is discovered, so long as no more than ten years have passed since the date on which the act or omission took place.

Pursuant to Section 3 of the Prescription Law, the defendant must raise the claim of prescription at the first opportunity. "First opportunity" has been interpreted in case law to mean the first opportunity the defendant had to make its arguments, which could even be prior to the submission date of the defence statement. In addition, pursuant to Section 27 of the Prescription Law, the court can dismiss a claim for laches even if the prescription period has not yet passed.

Class Actions

A specific arrangement applies to class actions. Pursuant to Section 26 of the Class Actions Law, when the court certifies a claim as a class action, the prescription period for the members of the relevant class will commence on the date of submission of the claim. If the court dismisses the motion to certify the claim, the prescription period will not end until one year has passed from the date on which the verdict becomes absolute.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Discovery takes place during the preliminary stage of the proceedings. The starting point in civil proceedings is maximum discovery, and the parties operate with an "open hand" in a manner that allows for full evidentiary infrastructure, providing an opportunity to adequately address the arguments of the opposing party; although there are exceptions and restrictions to this rule, which are recognised in case law and statute. Furthermore, the court limits the document discovery

stage to a fixed period, so that a late motion for discovery of a document might be dismissed.

While the Old CPR gave the court the power to order the discovery of documentation at the request of a litigant, the New CPR require it from the parties. Regulation 57 of the CPR orders that, 30 days after the last statement of claim is filed, or within a different period ordered by the court, the litigants will exchange affidavits listing all documents relating to the disputed matters that are or were in their possession or control and have been located by them, following due investigation and inquiry.

30 days after the litigants have exchanged affidavits of document disclosure, or within a different period ordered by the court, the litigants shall complete the document discovery proceedings and allow each litigant to copy the documents or scan them, at the expense of the litigant.

Specific discovery relates to a situation in which a litigant is aware of a document that is in the possession of the other party, and it requires the discovery thereof in addition to general discovery. A request for a specific discovery should be included in the list of litigant requests according to Regulation 49(c) of the CPR, and up to 20 days before the first pre-trial.

Breach of an order of discovery might give rise to a financial charge against the infringing party, and the court might strike out the pleadings of an infringing party that acts with disdain or intentionally does not perform the provisions of the order. Furthermore, a party cannot submit a document as evidence if it has not declared it during discovery, unless it has a reasonable justification for its omission.

In a class action, before that action has been certified, the right of perusal is relatively limited.

Data Requirements

The Competition Commissioner, by virtue of Section 46(b) of the Competition Law, has the authority to request information from any person. This includes documents, notebooks and other certificates that, in the Commissioner's opinion, could ensure or facilitate the execution of the Competition Law.

The Competition Commissioner's scope of authority is wide, and the courts tend to avoid interfering with the Competition Commissioner's requests for information.

Recently, the High Court of Justice rejected a petition submitted by 10bis (a Just Eat subsidiary) regarding the scope of a request for information issued by the Israeli Competition Authority to 10bis and Just Eat. The petitioner, 10bis, argued that parts of the request for information were issued without authority, including requests for information concerning Just Eat (which is a foreign entity) and WhatsApp correspondences, especially since 10bis was a third party and the reason for the request for information was an examination of whether to take enforcement actions against another company.

The High Court of Justice rejected 10bis' petition and stated that the Competition Commissioner is the authorised entity to hear such requests, with unique professional expertise to apply Section 46 of the Competition Law. This section gives the Competition Commissioner the authority to request information that is meant to ensure the implementation of the Competition Law. The authority to issue requests for information is an essential tool that helps the Competition Commissioner collect data and materials in order

to make informed decisions based on relevant information.

In connection with the Competition Commissioner's request to receive the board protocols of Just Eat, 10bis' foreign parent company, the Supreme Court stated that, without determining the Competition Commissioner's authority to request information from a foreign company, the lack of 10bis' board protocols did not grant an immunity from collecting information if it could be obtained by reasonable means that concern the parent company. The Supreme Court emphasised that, although Just Eat's interests might be harmed, it was necessary to balance its interests and the public interest, in order to maintain free competition in the economy and enforce competition laws.

The ICA recently published a draft opinion, number 2/22, regarding data requirements and the perusal of information by other parties. This document sets out a uniform and public policy for the method by which parties should provide the information required by the ICA. Due to the ICA's need to learn of the markets under consideration, the policy expands the disclosure requirement by, inter alia, restricting the blanks of information that is not directly relevant to the requirement.

5.2 Legal Professional Privilege

Privilege is split into statutory privilege and common law privilege. Some privilege is absolute, and the mere classification of evidence under a category of absolute privilege denies the possibility of discovery of the document. Conversely, some privilege is relative, and in respect of such privilege the court may allow partial disclosure or the disclosure of the substance of a document.

There are only a few kinds of absolute privilege, including for documents exchanged between attorneys and their clients for the purposes of legal proceedings, and the privilege of religious officiants. There are also several relative privileges, including:

- privilege for the purpose of state security;
- privilege covering confidential commercial information;
- medical privilege;
- privilege over the relationship between a psychologist and their client;
- privilege between a social worker and their client;
- privilege for the benefit of the public; and
- journalistic privilege.

According to the CPR, the court has jurisdiction to peruse a document in respect of which privilege is alleged, in order to determine the status of that privilege, balancing the protected interests of the party requesting privilege against the harm that will be caused to the opposing party if the documents are not disclosed. Furthermore, the court will examine whether there is alternative evidence and whether a requested document helps prove the allegations.

As a rule, the courts tend to take a cautious approach with respect to allegations of privilege (certainly in the case of relative privilege) and their tendency is to allow discovery of a document or at least part of one, though they may require the litigant receiving the document to not use the document for purposes other than the legal proceedings.

5.3 Leniency Materials/Settlement Agreements

In June 2005, a leniency programme was issued for violations of the Competition Law. Since its

publication, only a few cartel cases have been registered under the programme, despite several attempts by the ICA to encourage it. One possible reason for this is that the programme does not provide any immunity or protection in civil proceedings, and parties fear exposing themselves to private damages claims.

The leniency programme is similar to turning State's evidence in criminal law, and is based on the same rules. As part of the agreement, the witness agrees that the State will disclose to the other defendants every detail concerning them and their actions, in so far as the prosecution's approach is an investigative one, for which there is a duty of disclosure.

Recently, the ICA published a new leniency programme, which is relevant only to cartel cases. Under this new programme, leniency will be given only to the first involved person that approaches the ICA and only when the other terms of the programme are met. These other terms include the following:

- the leniency applicant providing the ICA with all the information in their possession;
- no overt investigation having been opened concerning the matter;
- the applicant approaching the ICA independently; and
- termination of the applicant's participation in the cartel.

The leniency is conditional on full and continuous co-operation with the ICA.

However, a cartel's leader, a person who was formerly convicted in a cartel offence, or a person who has already received leniency from the ICA in the past cannot receive leniency under the programme.

With regard to settlements, the ICA can reach a consent decree with a party that committed an offence under the Competition Law, and request the court to give effect to that order, which may also be without admission of liability on the part of the infringing party, and may include, inter alia, a charge of a sum of money to the State Treasury and a charge to take action in the future, or to refrain from doing so.

The request for a consent decree is submitted to the court, accompanied by reasons for granting it and details of the alternative solutions considered instead of the agreement. At the same time, a public notice is submitted on behalf of the ICA calling on any party who may be harmed by the order to submit their claims to the Director General.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

The Israeli legal system is adversarial in nature. Evidence is submitted through the testimony of witnesses, and the allegations of the litigants are proven in civil proceedings. The testimony of witnesses takes place during the evidence stage of the case and is effected by submitting an affidavit of evidence-in-chief, which replaces examination-in-chief. The New CPR give the court discretion to decide whether the witness will also testify orally in evidence, on matters to be determined by the court, although to this day the customary practice is to submit an affidavit of evidence. Under Regulation 67 of the New CPR, the court will give priority to oral evidence, with the exception of claims for financial relief in the district courts and suits for compensation for bodily injuries or road accidents, in which it will continue to give priority to affidavits of evidence.

At the start of the evidence proceedings, the affidavits of the witnesses for the plaintiff are submitted, after which the affidavits of the witnesses for the defendant are submitted. The court is authorised to order the submission of affidavits at the same time or in some other order that it deems correct.

A litigant who does not adduce the affidavit of its witness will not be able to adduce the testimony of that witness, unless it sought to summon the witness without an affidavit, for justifiable reasons. In such a case, the witness will first give evidence-in-chief, which will replace the affidavit of evidence-in-chief, and thereafter will be cross-examined.

After the evidence-in-chief, the opposing party may conduct cross-examination, which will be oral. The court may also pose any question that it wishes to the witness, and may summon a witness who has already testified to give additional testimony.

Where a witness is summoned to appear but does not, the court may issue a habeas corpus order requiring them to appear and may impose a fine upon them. If the witness is summoned once again and does not appear, the court may impose a penalty.

6.2 Expert Evidence

In civil claims that are based on breaches of competition law, a party seeking to prove a matter of expertise must support its arguments with an expert opinion. As a rule, an allegation that is economically complex, including the definition of a relevant market, is a matter of expertise. There is usually no need to obtain the leave of the court for the submission of an expert opinion. Pursuant to the CPR, an opinion must be submitted by the date of submission of the affi-

davit of evidence-in-chief by the relevant party, unless the court rules otherwise. If no verdict is handed down regarding the submission of affidavits of evidence, the opinion can be submitted up to 90 days prior to the date of the first evidence session. Upon the submission of an expert opinion, the opposing party has the right to submit a counter-opinion, prior to the date of the submission of its own affidavits; in the absence of a decision regarding such a date, it must submit an opinion up to 30 days prior to the date of the first evidence session. The submission of opinions after the dates set out above requires the leave of the court.

However, in claims based on breaches of competition law, opinions are submitted together with the pleadings. Furthermore, pursuant to the opinion of the opposing party, it is possible to submit a supplementary opinion that addresses the opinion of the opposing party and, in any event, each party has the right to cross-examine the expert of the other party.

The court is authorised to appoint an expert or a team of experts acting on its own behalf.

7. Damages

7.1 Assessment of Damages

During the first stage, the damage is estimated by the parties via opinions that are drafted by an economic expert who is familiar with the field of competition. The opinions are usually submitted to the court together with submission of the pleadings, and are usually updated after discovery and perusal proceedings. Sometimes, another opinion is submitted by an objective economic expert who is appointed by the court.

In practice, there are very few tort cases based on causes of action in competition law that have reached the stage of damage quantification by the courts, since most cases end in settlement. It is consequently not possible to point to a particular method in which the damage caused to an injured party is quantified. In general, the plaintiff makes two main arguments with respect to compensation:

- overcharging; and
- loss of profits that would have been obtained but for the breach.

What these arguments have in common is an attempt to create an alternative reality in which the breach of the Competition Law did not take place. The plaintiff's damage is the difference between what it would have had, in that alternative reality, and the price that it paid, or the profits that it in fact made, in reality.

It should be noted that, even though the overarching principle in tort law in Israel is *restitutio ad integrum*, it is possible for there to also be an opening to sue, in addition, for the damage caused to the plaintiff by the enrichment derived by the tortfeasor due to breach of the Competition Law, via the Unjust Enrichment Law, 5739-1979. The ability to sue for compensation for unjust enrichment has not yet been ruled upon by the Supreme Court, and the rulings of the district courts in this regard are not uniform. However, as mentioned in **1.1 Recent Developments in Antitrust Litigation**, the recent Sanofi case of the Supreme Court provided the plaintiff with the ability to claim not only the direct damages it suffered but also the profit generated by the defendant as a result of violating the law, which in many cases can exceed the damage suffered by the plaintiff.

If the courts are required to assess damages in the future, they will probably employ methods of calculation such as “before-during-after”, which compare the plaintiff's condition in the market before, during and after the perpetration of the tort, or by using criteria through which a comparison may be drawn between different markets in which there was no tort, in order to estimate the damage.

It is a fundamental rule in Israeli tort law that a person does not owe compensation other than for the damage that they cause, with the basis in awarding compensation being restitution of the injured party to the situation in which they would have been but for the breach. Therefore, although the case law recognises the power of the courts to award punitive or deterrent damages, these will only be awarded in exceptional cases, in circumstances in which the tortfeasor's conduct is particularly outrageous, nefarious, intentional and not merely negligent, and where punitive sanctions cannot be imposed in criminal or disciplinary law. To date, punitive damages have never been awarded with respect to tortious claims on the grounds of competition law.

7.2 “Passing-On” Defences

The courts in Israel have not yet ruled directly regarding the pass-on defence. *Prima facie*, there is an opening for this defence in cases in which the tortious plaintiff is directly injured by the breach. It is a fundamental rule in tort law that a tortfeasor is not required to pay more than the damage caused or more than is necessary for restitution of the situation to its prior state; this means that, *prima facie*, a person injured by a breach of the Competition Law may sue the party breaching the Law for their share only, and not for the portion that was passed on to another party. However, it is important to remember the option that has just been added (as mentioned

in 1.1 Recent Developments in Antitrust Litigation) to sue for unjust enrichment.

Alongside this, as set out in 2.5 Direct and Indirect Purchasers, even though the question of the indirect consumer has not yet been ruled upon by the Supreme Court in Israel, the tendency in the District Court in tort claims based on competition causes of action has been that the indirect consumer also has a right to sue. The existence of the pass-on defence depends, to a considerable extent, on the existence of an independent right to sue that obtains to the indirect consumer. If an indirect customer has this right and the pass-on defence is not employed, the tortfeasor might have to pay full damages to both the direct plaintiff and the indirect plaintiff. There is, consequently, a significant opening for the application of the pass-on defence in the future.

7.3 Interest

In Israel, interest is regulated by law. The Adjudication of Interest and Linkage Law, 5721-1961 provides that a court awarding a sum of money to a litigant may, at its discretion, also award interest on such sum or part thereof. According to the Adjudication of Interest and Linkage Law, the interest period commences on the date of submission of the claim, and ends on the date on which the judgment is handed down or on the date prescribed for payment of the sum awarded in the judgment, whichever is later. Accordingly, there have been judgments in which the court has awarded compensation from the date of submission of the claim, and judgments in which compensation has been awarded for the entire period in which the tort has been in place (subject to prescription).

The interest rate is prescribed in accordance with the provisions of the Adjudication of Inter-

est and Linkage Law and the regulations made thereunder, and it varies in accordance with the parameters that are set out in that law.

8. Liability and Contribution

8.1 Joint and Several Liability

Section 11 of the CWO provides that, if more than two persons are liable for a tort, they will be jointly liable for the action, and it will be possible to sue them jointly and severally. The class of joint tortfeasors can be divided into three categories:

- joint tortfeasors;
- separate tortfeasors who cause one single indivisible damage; and
- separate tortfeasors who cause separate damages.

With respect to the first two, joint and several liability will be set for the entire damage, while in the third, each tortfeasor will be held separately liable for the damage that they caused.

The division of liability between the tortfeasors is not relevant to the injured party itself, but influences the internal division between the tortfeasors themselves, and this is a finding that is made by the court. Furthermore, the burden of proving that the damage can be divided and separated falls on the tortfeasors, and a tortfeasor who wishes to say that some of the damage was not caused by it must prove this.

In the case of a difficulty in obtaining compensation from one of the tortfeasors, Israeli law has, in principle, recognised that it is better that the other tortfeasors bear the damage than that the plaintiff has to bear the tortfeasor's inability.

8.2 Contribution

As previously discussed, breach of the Competition Law constitutes a tort. Pursuant to the CWO, a defendant may submit a third-party notice in order to transfer the liability, in whole or in part, for the claim submitted against it, to a third party. A third-party notice is in fact a conditional claim, because if no liability is imposed on the defendant, the third party will be exempt from indemnifying it. The third-party notice is based on the primary cause of action, while liability towards the third party only arises via the judgment that is handed down against the defendant.

A third-party notice can also be submitted against one of the defendants in the principal claim and, in the absence of a third-party notice, it is possible to deduce that the defendant has no claim for indemnity against any of the other defendants. However, in most cases, and in the case of a tort claim, there is no need for a third-party notice between two defendants who are both liable for the tort, since the court will in any event determine the level of participation of each defendant in payment for the damage. If one of the defendants is struck out of the claim (for instance, if the plaintiff asks to strike them out), the defendant has the right to join the struck-out defendant as a third party.

The proceedings against the third party take place in the framework of the principal claim, so that all of the litigation might be co-ordinated, saving considerable costs for the parties and the legal system.

9. Other Remedies

9.1 Injunctions

In Israeli law, the court may issue injunctions and mandamus orders, either as a final remedy in a claim or as an interlocutory remedy.

Conditions for Granting Injunctive Relief

With respect to an interlocutory injunction or mandamus order, the law sets out the considerations that guide the court in awarding an interlocutory order. Firstly, the applicant must prove the cause of action on the basis of prima facie reliable evidence. Additional considerations that the court will take into account include:

- the damage that will be caused to the applicant if the interlocutory remedy is not granted and its claim is upheld, as opposed to the damage that will be caused to the respondent if the interlocutory remedy is granted and the claim is dismissed (known as the balance of convenience);
- whether the motion was submitted in good faith;
- whether grant of the remedy is just and proper in the circumstances of the case (for instance, submission of a motion with laches might point to the fact that it is not just and proper); and
- whether the interlocutory remedy is proportionate.

A technical condition for the award of an interlocutory remedy is the provision of a guarantee and an independent undertaking. In addition to these, the court may order the deposit of a guarantee.

Injunctive Relief Procedure

In general, an interlocutory remedy will be granted in the presence of both parties. The court

can award an interlocutory remedy at any time, but relief in the granting of interlocutory remedies varies in accordance with the timing of the motion. Thus, when a motion is submitted for granting of an interlocutory remedy prior to submission of the claim itself, the interlocutory remedy will only be awarded if the court is persuaded that doing so is justified. This kind of order will expire within seven days unless the court sets some other date, in special circumstances.

Pursuant to Regulation 97(a) of the CPR, the court may grant an ex parte order if it is persuaded, on the basis of prima facie reliable evidence, that there is a reasonable concern that a hearing in the presence of both parties will give rise to frustration of the award of the order or will cause serious damage to the applicant. However, there are three classes of interlocutory remedies in respect of which the default is an ex parte hearing, but which are not, in general, suitable for proceedings relating to competition claims:

- interlocutory attachment order;
- injunction restricting the use of an asset; or
- order for the seizure of assets.

Pursuant to Regulation 97(e) of the CPR, when an ex parte order is awarded, the court will conduct a hearing in the presence of both parties no later than 14 days after the date of granting of the order (except for a motion for an interlocutory attachment order).

Injunctive Relief and Antitrust

Pursuant to the case law handed down by the Supreme Court, interlocutory remedies will not be granted for causes of action in antitrust cases. The rationale behind this rule is that claims on the grounds of competition law require in-

depth factual analysis of matters such as the definition of the market, the quantification and estimation of the market share or market power, and an examination of the probable outcome of the arrangement for competition or for the public – and they are not, by their nature, suited to interlocutory remedies.

The exception to this rule is when there is a ruling by the Commissioner that states that the arrangement is a prohibited restrictive arrangement. The Commissioner's ruling, which constitutes prima facie evidence in civil proceedings, is based on an in-depth analysis of the arrangement as well as on an analysis of the market and its competitive impacts. Given this state of affairs, the court will give weight to the ruling and will not itself resort to engaging in a complex factual clarification.

9.2 Alternative Dispute Resolution

There are three types of alternative proceedings for dispute resolution:

- arbitration;
- mediation; and
- settlement.

These proceedings are not obligatory, and parties to legal proceedings can be referred to them by consent. The New CPR require a Preliminary Discussion outside of the court, within 30 days of the date of issuance of the last statement of claim. The purposes of the Preliminary Discussion are first to delineate and focus the dispute, and secondly to examine the possibility of resolving the dispute through alternative dispute resolution proceedings. As a rule, the courts in Israel quite often refer parties to alternative proceedings and can be aggressive in terms of the pressure that they impose on the parties to resolve their disputes out of court.

Referral to arbitration proceedings can be effected in three ways:

- by virtue of an arbitration agreement between the parties (Section 1 of the Arbitration Law, 5728-1968);
- by virtue of a motion for a stay of proceedings where a party to an arbitration agreement resorts to legal proceedings despite the existence of the arbitration agreement (Section 5 of the Arbitration Law); and
- by virtue of the parties' consent during the course of the legal proceedings (Section 79B of the Courts Law (Consolidated Version), 5744-1984).

Pursuant to Section 79C(b) of the Courts Law, the courts may, with the consent of the parties, transfer the proceedings in a claim to mediation. In addition, in certain claims pre-mediation proceedings take place, the purpose of which are to verify the possibility of resolving the dispute by way of mediation prior to the conducting of a hearing on the essence of the claim before the court.

Pursuant to Section 79A of the Courts Law, a court hearing a civil matter may, with the consent of the litigants, rule on the matter before it by way of a settlement with the consent of the parties. The court may propose a settlement to the parties or may give the force of a judgment to a settlement that the parties have reached.

10. Funding and Costs

10.1 Litigation Funding

In Israel, external funding of civil proceedings by third parties is evolving and an increasing number of external financiers are emerging. There are private and public funds, which may be used for

the funding of both private claims and of class actions.

There is a designated fund for class actions in cases of social and public significance. With respect to claims on issues of competition, a representative of the ICA sits on the advisory committee of the public fund and has, to date, funded a number of class actions on competition-related causes of action. Since the inception of the fund in 2011, numerous applications for the funding of class actions in the field of competition law have been submitted (5% of the total applications). In 2020, funding was given for two claims in the field of competition law, and for four claims in 2021. The applicant might be an organisation or a private individual, and they must comply with the conditions that are set out in the CPR.

10.2 Costs

The starting point is that the party that loses the legal proceedings will bear the costs of the other party. While the Old CPR gave the Israeli courts the discretion to oblige a litigant to pay the costs and attorneys' fees, the New CPR require the court to rule on reasonable and fair costs recovery in any hearing by default, except in cases where special reasons are found to not oblige any litigant. The amount of costs is determined by the court, after considering the value of the disputed remedy and the final remedy that was ruled by the court. In addition, the court may consider how the parties conducted the legal proceedings. The New CPR require the parties to make an explicit claim regarding the costs and to attach references; they also require the court to detail the considerations that guided it in determining the expenses.

The costs that are awarded do not cover actual costs and, in many cases, do not cover even a small portion of the costs.

Regulation 157(a) of the CPR provides that “the court or the registrar may, if they see fit, order a plaintiff to give a guarantee for payment of all of the defendant’s costs”. In most cases in the trial court, the plaintiff is not required to deposit a guarantee for the assurance of the defendant’s costs, other than in exceptional cases, and the court is required to make cautious and sparing use of the power granted to it by Regulation 157.

Requiring a plaintiff to submit a guarantee for costs, which is subject to the discretion of the court, is designed (according to case law) to prevent empty claims and to ensure payment of the defendant’s costs if the claim fails. This requirement might, however, impede plaintiffs and might even restrict or prevent access to the courts by plaintiffs without means. The Regulation does not set out the considerations that the court must take into account when hearing a motion to require a plaintiff to deposit a guarantee, and it leaves the court with broad discretion in this regard.

Therefore, the law that has been set out in the rulings of the Supreme Court is that this matter must be dealt with in moderation, and that the plaintiff must not be required to deposit a guarantee for costs other than in exceptional cases where the chances of success of the claim are weak, and where there is a real concern that if the claim is dismissed the defendant will have difficulty collecting the costs that might be awarded in its favour from the plaintiff. Thus, when balancing the plaintiff’s right of access to the courts and the defendant’s right to not be out of pocket, the plaintiff’s right prevails. Case law has further held that the poverty of a plaintiff is

not, in and of itself, sufficient grounds for requiring it to deposit a guarantee for costs.

11. Appeals

11.1 Basis of Appeal

As a rule, there is a right to appeal every judgment, once, to a higher court. Thus, for instance, if a judgment is handed down in the Magistrate’s Court, a right is granted to submit an appeal against the judgment to a District Court. Furthermore, if a judgment is handed down in a District Court, a right is granted to submit an appeal against the judgment to the Supreme Court.

After the verdict is handed down in the appellate court, there is no vested right to appeal it as well. Where the appellate court is a District Court, leave may be sought from the Supreme Court to submit an additional appeal against the judgment of the appellate court. The Supreme Court is the highest court, so there is no technical possibility of appealing its judgment. However, it is possible to request a further hearing of a judgment handed down by the Supreme Court, but such proceedings take place sparingly and only in very exceptional circumstances.

The vested right to appeal only applies after the final judgment has been obtained, but it is impossible to appeal on interlocutory proceedings by right so long as the proceedings are taking place in the court. The court may order various steps to be taken during the course of proceedings, before the final verdict is handed down, but the litigants have no vested right to appeal those. Therefore, if a litigant feels that some injustice has been caused to it in interlocutory proceedings, it must wait for the final judgment and then appeal against it.

However, a litigant may request a leave of the court to appeal a verdict in interlocutory proceedings. If the court gives the litigant leave to do so, it may submit an appeal against the interlocutory proceedings that are in dispute, immediately.

In general, the appellate court does not discuss the findings of facts made by the trial court, and the New CPR further limit the exceptional circumstances in which new findings of facts will be discussed in the appellate court. The function of the appellate court is therefore to examine the legal rulings of the trial court, based on the factual findings of the trial court.



Law and Practice

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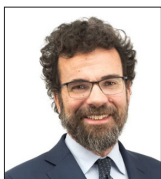
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ADVANT Nctm was founded in 2000, and is an independent law-firm and one of the leading law-firms in Italy. It advises companies, banks and financial institutions, multi-national corporations, and public entities on all areas of business law. In 2021, Nctm, with the law firms Beiten (Germany) and Altana (France), founded the association **ADVANT**, which is among the largest European legal advisors with a team of more than 600 professionals, including more than 140 partners, in 13 offices located in Europe (Berlin, Brussels, Dusseldorf, Frankfurt, Freiburg,

Genoa, Hamburg, London, Milan, Munich, Moscow, Paris, and Rome) and two located outside the continent (Beijing and Shanghai). **ADVANT Nctm**'s areas of expertise include antitrust and competition, banking and finance, capital markets, corporate and commercial, dispute resolution, employment and industrial relations, energy and infrastructure, intellectual property, IT and data, mergers and acquisitions, public law and procurement, real estate, restructuring and insolvency, tax and white-collar crime, and compliance.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation has developed gradually in Italy. Following the adoption of the Italian Law No 287/1990 (hereinafter, the “Competition Act”), the private enforcement proceedings brought before civil courts were limited; in the following years, litigation has steadily grown, driven, firstly, by Court of Justice rulings and, secondly, by the introduction of the Directive 2014/104/EU (hereinafter, the “Damages Directive”). The latter, implemented by Legislative Decree No 3 of 2017 (hereinafter, the “Decree”), certainly played an important role in increasing the number of lawsuits in Italy; through the Directive and the implementing Decree, the legal subject matter has been clarified and victims of antitrust infringement have been made more aware of their rights to compensation for damages.

As of today, there are several ongoing court cases, most of which are follow-on actions. There are at least four infringement decisions, each having given rise to a conspicuous group of follow-on actions: trucks cartel (AT.39824), cement cartel (I793), corrugated cardboard (I805), and

elevators and escalators (AT.38823). It is worth mentioning that a considerable portion of cartel damages cases have been settled.

A study conducted by the University of Milan in 2019, assuming as observation period the years from 2013 to 2018, estimated that more than one hundred judgments were issued by the first and second instance Courts in Milan (of which 3/4 of the cases were follow-on actions and the remaining 1/4 were standalone actions). The first-instance judgments saw the substantial acceptance of the claim in 49% of cases; with regard to the rejections, a very large majority of them were issued for insufficient evidence (91% of cases), while the remaining rejection decisions were determined by procedural aspects. Among the second-instance judgments, it is worth noting that the appeal was upheld in 33% of the cases. Interestingly, 1/3 of the first instance cases concerned restrictive agreements and 2/3 were about abuse of dominant position.

1.2 Other Developments

The introduction of the Decree in 2017 which includes both substantial and procedural provisions, offered a comprehensive legal framework for actions commenced by a victim of compe-

tition law. To provide more detail, the Decree introduced rules with reference to the burden of proof, access to evidence, standing, and definition of damages. Implementing the Directive, the Italian legislator chose to ensure the consistent application of the rules, by reducing the number of competent courts that now number just three – Milan, Rome, and Naples.

Additionally, in 2019, a new class-action framework was introduced, which should further boost private enforcement cases in Italy. Indeed, this novel class-action system extends its reach to not just consumers but also businesses, either individually or through an association.

Another development to be monitored is represented by the bundling of claims. Italian law has always allowed claims to be bundled from different claimants in one lawsuit provided that these claims have the same *causa petendi* (ie, the cause of the claims). This is normally the case with cartel damages claims, which stem from a single unlawful behaviour. Where the *causa petendi* is the same, it is possible to file either a joint action under Article 103 of the Italian Code of Civil Procedure or a class action under the recently introduced Article 840-bis of the Italian Code of Civil Procedure. Both the uncertainty of the new statute and the specific difficulties of a collective claim are expected to result in a parallel stream of the two kinds of damages actions brought by groupings of plaintiffs, in cartel cases especially, in the years to come.

In connection with the harsh acceleration seen in recent years, litigation funds are entering the market, making private enforcement proceedings, including class actions, more appealing (see **10.1 Litigation Funding**).

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The legal basis for private enforcement actions is established by statute in Italy and the legal framework includes:

- general civil law principles concerning tort liability and ordinary tort actions as set forth in Article 2043 of the Italian Civil Code, and pursuant to the general procedural rules laid down in the Italian Code of Civil Procedure;
- Article 33(2) of the Competition Act, which provides that claims for damages owing to infringements of competition rules can be brought before civil courts; and
- the Decree, which implemented the Damages Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the EU and provides specific rules concerning claims for damages for infringements of EU and national competition law.

Private actions are available in relation to any breach of the EU or national competition law (ie, cartels or abuses of dominant positions), regardless of the existence of a prior decision by a competition authority ascertaining the relevant infringement. Therefore, both follow-on and standalone claims are available under Italian law and in the latter case, the claims are mainly constructed as a tort action pursuant to Article 2043 of the Italian Civil Code.

2.2 Specialist Courts

Pursuant to Article 18 of the Decree, the competence to decide claims for damages for breach of competition law belongs to the corporate-specialised (ie, “*Sezione Imprese*”) sections of the Tribunals of Milan, Rome, and Naples, for

first-instance proceedings, and to the relevant courts of appeal (ie, Milan, Rome, and Naples), for second-instance proceedings. More in detail:

- the Milan courts have jurisdiction over judicial districts of Brescia, Milan, Genoa, Turin, Trieste, Venice, Trento, and Bolzano;
- the Rome courts have jurisdiction over judicial districts of Ancona, Firenze, L'Aquila, Perugia, Rome, Cagliari, and Sassari; and
- the Napoli courts have jurisdiction over judicial districts of Campobasso, Naples, Salerno, Bari, Lecce, Taranto, Potenza, Caltanissetta, Catania, Catanzaro, Messina, Palermo, and Reggio Calabria.

All cases are mandatorily allocated among these specialised sections, therefore, as a general rule, if the claim has not been proposed before the tribunal that has territorial jurisdiction, both the judge (*ex officio*) and the defendant may plead the lack of territorial jurisdiction. In such a case, the proceedings are to be terminated and the parties shall resume the proceedings before the competent court within a prescribed term.

2.3 Decisions of National Competition Authorities

Under Article 7(1) of the Decree, the decisions of the Italian Competition Authority (ICA) are binding for the national courts provided that the decision finding a competition law infringement is final, meaning that the decision can no longer be appealed or challenged before a court (ie, before *Tribunale Regionale Amministrativo* (TAR), in first instance, and Council of State, in appeal).

The binding effects cover the factual analysis of the infringement, the nature of the violation, and its substantive, personal, temporal, and territorial scope.

Differently from the ICA and EC's decisions, the decisions of national competition authorities (NCAs) in other EU member states are not binding on the Italian national courts (see Article 7(2) of the Decree) and may only be considered as evidence that an infringement has occurred and may be assessed, during the course of the proceedings, together with other evidence adduced by the parties.

The ICA may also play a role within the damages action. Pursuant to Article 4(7) of the Decree, the ICA may intervene in the judicial proceedings when it intends to submit observations to the court on the proportionality of the disclosure request. Additionally, under Article 14(3) of the same Decree, the court may ask the assistance of the ICA in determining the amount of the damages to be awarded to the victims of the infringement.

2.4 Burden and Standard of Proof

The general rule under Article 2697 of the Italian Civil Code provides that the claimant must prove the facts alleged as the grounds of the actioned rights, while the defendant has the burden to prove the facts alleged as the grounds for contesting the claimant's allegations or for its defence. Additionally, as a general rule, claimants seeking damages arising from tort should prove the conduct (ie, unlawful act), the harm, and the causal link between the conduct and the harm.

In quite simplistic terms, the standard of proof applicable may be said to be the preponderance of evidence, although courts' decisions on the matter are referred to proof of causation only and the general principle set forth by the law is that the judge assesses evidence (unless specific rules, eg, presumptions, are applicable) based

on his or her “prudent assessment” (free conviction principle).

However, with reference to the antitrust private enforcement proceedings, the Decree sets forth certain provisions that derogate from the above-mentioned general rules. Article 7(1) of the Decree provides that the ICA’s final decisions ascertaining the infringement, which can no longer be challenged before the competent Italian courts, are binding for the judge with reference to the existence of the infringement as well as to its material, temporal, and territorial scope. This means that the existence of the infringement is deemed as proven and cannot be challenged in the civil proceedings whereas the existence of the harm and the causation are not given as proved and must be assessed during the civil proceedings. Only the existence of the harm caused by a cartel is presumed unless the infringer proves otherwise (see Article 14(2)); therefore, in the case of a private enforcement proceeding arising from a cartel, the claimant shall prove the extent of the damage.

The Decree also includes provisions with reference to the burden of proof for a “pass-on defence”.

- Article 11(1) provides that defendants who invoke the fact that the claimant has transferred all or part of the overcharge resulting from the violation of the competition law must prove that the overcharge was passed-on.
- Article 12(2) provides a rebuttable presumption concerning the passing on of the overcharge to indirect purchasers, providing that they can prove that:
 - (a) the defendant committed an infringement of competition law;
 - (b) the competition law infringement has resulted in an overcharge for the direct

- purchaser; and
- (c) the indirect purchaser has acquired the goods or the services that were the objects of the infringement or has purchased goods or services derived from or containing them.

2.5 Direct and Indirect Purchasers

As set forth in Article 10 of the Decree, a damage claim for infringement of competition law may be sought by anyone who has been harmed by the infringement, regardless of whether the claimant is a direct or indirect purchaser of the infringer. The indirect purchaser can claim compensation for damages to the extent that the same has been passed on by the direct purchaser.

2.6 Timetable

The overall duration of a proceeding is strongly affected by the degree of complexity of the evidentiary phase dedicated to the quantification of damages (whereby one or more independent experts are appointed by the judge and proceed jointly with the economic experts appointed by the parties, to assess the amount of damages).

A first-instance proceeding generally needs three to four years to come to the final decision. However, several factors may impact the length of the trial (eg, disputes on the scope of leniency applications and related documents, and on the scope and modality of protection of confidentiality) and no official data is available on the duration of antitrust damages actions.

The Decree does not provide for an automatic suspension system in case a parallel proceeding is opened by the ICA.

However, as a general rule, the parties may request the judge to suspend the judgment for

justified reasons (see Article 296 of the Italian Code of Civil Procedure).

Additionally, according to Article 4(8) of the Decree, the judge may suspend the judgment until the ICA's final decision is released. Moreover, pursuant to Article 15(2) of the Decree, the suspension may follow the parties' request in the event that the disputing parties are attempting a conciliation. This suspension may last up to two years and if the attempt at conciliation is unsuccessful, the proceedings must be resumed within 30 days from the failure of the attempt.

3. Class/Collective Actions

3.1 Availability

Article 1 of the Decree expressly states that it also applies to class-action proceedings. In this respect, it is worth noting, as far as private antitrust damage proceedings are concerned, that the current Italian legal framework with reference to class actions includes the following provisions.

- Article 140-bis of the Italian Consumer Code, applicable to class action proceedings for violations that occurred before the entry into force of Law No 31/2019, ie, before 19 May 2021:

- (a) This class action has been scarcely used – it is a remedy actionable only by consumers, through an opt-in mechanism. Only two antitrust class actions were brought pursuant to this framework, both being follow-on cases – the first against some ferry companies for an alleged cartel on passenger routes between Northern Italy and Sardinia (*Altroconsumo v Moby et al*), and the second against some financial companies of the major

automobile groups for an alleged cartel in the market for the sale of automobiles through financing (*Altroconsumo v Volkswagen Bank et al*). Both actions were dropped following the final annulment of the AGCM's (ie, the Italian Competition Authority) decisions finding the violation.

- Articles 840-bis – 840-sexiesdecies of the Italian Code of Civil Procedure introduced by Law No 31/2019 and applicable for violations occurred as of 19 May 2021, ie, after the entrance into force of Law No 31/2019:

- (a) This class action is general in scope and, in comparison with the previous discipline:
 - (i) can be brought not only in the interest of consumers, but also in the interest of any other victim of an antitrust violation;
 - (ii) in addition to early opt-in, adherence is allowed even after the judgment finding the violation and ordering the respondent company to pay damages; and
 - (iii) provides that the court shall also order the defendant to pay directly to the common representative of the adherents, by way of compensation, an amount determined in accordance with the number of members of the class on a progressive basis.

The proceeding includes, in addition to the two stages related, respectively, to the admissibility and the merits of the case, a third stage devoted to the examination of the positions of individual members.

It is worth emphasising that the new class action (see Article 840-bis et seq of the Italian Code of Civil Procedure) can be brought by “anyone” who has suffered damage as a result of

an infringement of competition law (consumers, businesses, professionals, and public bodies).

3.2 Procedure

A class action pursuant to Article 140-bis of the Italian Consumer Code can be brought exclusively by one or more consumers, also through a mandate to an association or committee. The new class action pursuant to Article 840-bis et seq of the Italian Code of Civil Procedure can be brought personally by each component of the class (ie, any victim, not any more limited to consumers) or by a non-profit organisation or association representing the interests of the victims of the violation. Such organisation must be registered in the public list established at the Ministry of Justice.

A class action brought pursuant to both regimes might be declared inadmissible under the following circumstances:

- when it is manifestly unfounded;
- when there is a conflict of interest between the plaintiff and the defendant;
- when the rights asserted by the plaintiff are not homogeneous with the rights of the other class members; or
- when the plaintiff does not appear to be able to adequately represent and pursue the interests of the class.

Otherwise, in both regimes, if the action is declared admissible, the court defines the class, identifying the characteristics of the individual rights and specifying the criteria whereby the individuals are or are not included in the class. The judge then fixes a mandatory term of not less than 60 days and not more than 150 days to join the action. As said, in addition to this, the new class action allows any victim of the violation to join the action even after the publi-

cation of the judgment granting the claimant's application.

3.3 Settlement

In general, in accordance with Article 185 of the Italian Code of Civil Procedure, the court may schedule a hearing, at which the parties have to personally appear, in an effort to settle the dispute. Upon a specific and joint request of the parties, the court is obliged to fix such a hearing.

A specific provision is also provided for in Article 840-bis of the Italian Code of Civil Procedure, for the case for which, as a consequence of settlement agreements amongst the parties, there remains no claimant in the proceedings – the court shall then assign a term of between 60 and 90 days to the adherents to resume the case. The resumption must be made by at least one adherent; otherwise, the proceedings are declared extinct.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

The Italian framework does not provide for strike-out and/or summary judgments. Nevertheless, the defendant may raise a preliminary issue, such as a lack of jurisdiction or lack of standing aimed at asking the court to decide on the preliminary issues only, without evaluation of the merits.

When the latter request is granted, a decision may be obtained in a much shorter timeframe.

4.2 Jurisdiction/Applicable Law

As mentioned above, Article 18 provides rules on jurisdiction for antitrust damages claims.

Additionally, as a general rule, the Italian jurisdiction exists when the defendant is domiciled or resident in Italy as well as in the concurrent fora set out at an EU level by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters when the parties to the proceedings are domiciliated in different countries (so-called Regulation Bruxelles I-bis).

With reference to the applicable law, it should be noted that Article 6(2) of Regulation (CE) No 864/2007 on the law applicable to non-contractual obligations (so-called Regulation Rome II) provides, with reference to unfair competition and acts restricting free competition, that:

- in case of non-contractual obligations arising out of a restriction of competition, the applicable law shall be the law of the country where the market is affected;
- in case the market is affected in more than one country, the claimant may base the claim on the law of the competent court for the domicile of the defendant; and
- if the claimant sues more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially also affects the market in the member state of that court.

4.3 Limitation Periods

The limitation period in relation to damages for violation of competition law is five years. The Decree specifies that the limitation period should not begin to run before the infringement ceases and before the claimant knows, or can reasonably be expected to know:

- the behaviour and the fact that such behaviour constitutes an infringement;
- the fact that such an infringement caused the claimant harm; and
- the identity of the infringer.

In this respect, the Tribunal of Milan ruled (Decision No 3914 of 15 May 2023) that in the case of a cartel, the victim is aware of the infringement from the day of the publication of the summary of the final decision, whereas in the case of abuse of dominant position, the victim could be aware of the relevant elements as early as the day of the opening of the investigation.

The limitation period may be interrupted if a lawsuit, a notice for performance, or an arbitration notice is served on the defendant (see Article 2943 of the Italian Civil Code) as well as by recognition of the claim by the debtor (see Article 2944 of the Italian Civil Code). If the limitation period is interrupted, the time that has run is not counted and the limitation period begins to run anew from the last day of the interruption (see Article 2945 of the Italian Civil Code).

However, the limitation period is suspended if the ICA opens an investigation in respect of an infringement to which the action for damages is related. The suspension continues for and until one year after the infringement decision has become final (ie, no longer challengeable) or after the proceedings are otherwise terminated (see Article 8(2) of the Decree).

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

The Decree introduces a disclosure procedure aimed at limiting the information asymmetry between the claimant and the infringer. In this

respect, Article 3(1) of the Decree provides that, upon a reasoned request by a party, the judge may order the counterparty or a third party to disclose evidence in their possession. The judge evaluates the proportionality of the request for disclosure of documents, taking into consideration:

- the extent to which the claim is supported by available facts and evidence justifying the request;
- the scope and cost of disclosure; and
- whether the evidence to be disclosed contains any confidential information.

The judge may adopt measures to protect the confidentiality of the documents, such as the possibility of redacting sensitive elements in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

Article 4 of the Decree provides that also documents included in the ICA's file may be the object of disclosure. In such case, the judge shall order the disclosure of evidence, provided that:

- the parties or third parties are not in a position to produce such evidence; and
- the request is proportional considering whether:
 - (a) it has been formulated specifically with regard to the subject, nature, and content of the document submitted to the ICA;
 - (b) the request refers to an action for damages; and
 - (c) there is need to safeguard the effectiveness of antitrust public enforcement.

It is worth noting that, according to Article 4(4) of the Decree, some categories of evidence, such as documents prepared by the ICA and addressed to the parties and settlement applications that have been withdrawn, can be disclosed only after the closure of the ICA's investigation.

The judge may impose a fine to the party or third party who refuses to comply with the order to produce evidence or destroys relevant evidence. The fine amounts to a minimum of EUR15,000 and a maximum of EUR150,000.

5.2 Legal Professional Privilege

Communications between lawyers of the parties and their clients can be withheld from disclosure (see Article 3.6 of the Decree). However, communications with in-house lawyers are not covered by the legal privilege (see *Consiglio di Stato*, 24 June 2010, No 4016; Court of Justice, 14 September 2010, Case C-550/07 P Akzo Nobel Chemicals Ltd v Commission).

5.3 Leniency Materials/Settlement Agreements

Pursuant to Article 4(5) of the Decree, the judge cannot order a party or a third party to disclose any evidence relating to leniency statements and/or settlement agreements. However, the claimant may submit a reasoned request that the judge may access such evidence for the sole purpose of ensuring that their content corresponds to the definitions of leniency and settlement agreements as provided for, correspondingly, in Article 2(1) (n) and (p) of the Decree.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

According to the general rules of Italian law, witnesses of fact are generally admissible, except for contracts. Witness evidence is possible upon a specific request to the judge; in such a request, the party shall indicate the name of the witness as well as the specific facts on which the witness will be questioned during the hearing. In turn, the other party shall request to appoint his/her own witness to provide contrary evidence. Questioning of witnesses is conducted by the judge; questions are generally limited to the specific lists submitted by the parties, or to requests for clarifications thereof. Cross examination is not allowed.

The witness is required to appear at a dedicated hearing; if he/she decides not to appear at the witness hearing, the judge may order a second notice to be served in order to oblige the witness to appear at the hearing. The witness evidence is usually given orally during the relevant hearing and minutes of the evidence are kept; in specific cases, as set forth in Article 257-bis of the Italian Code of Civil Procedure, the witness evidence may be given in writing provided that both parties agree.

6.2 Expert Evidence

In private enforcement proceedings, it is customary to rely on expert witnesses. Usually, the claimant submits, along with the writ of summons, written expert evidence in support of the quantification of the damage suffered, whereas the defendant shall submit rebuttal expert evidence to challenge the claimant's quantification of damages and in support of its pass-on defence.

Damages quantification is then based on the opinion of a court-appointed expert witness (Article 61 of the Italian Civil Code provides that the judge may appoint an expert witness; such an appointment may follow a specific request submitted by one or both of the parties or may be made ex officio by the judge). When a court expert witness is appointed, both parties are entitled to appoint their own expert witnesses. Usually, the court-appointed expert witness is requested to answer specific technical questions in writing. The expert then drafts a first report answering the technical questions, which is shared with the parties' expert witnesses who shall propose amendments to it. Upon the finalising of the draft, the court-appointed expert submits the report with the court. The final judgment is rendered taking into account the court-appointed expert's final report, which, however, is not binding upon the court.

7. Damages

7.1 Assessment of Damages

Article 14(1) of the Decree provides that damages are assessed according to the general provision of the Italian Civil Code under Articles 1223, 1226, and 1227 regulating the calculation of damages arising from civil liability.

As set out in Article 1 of the Decree, and according to general principles of Italian Civil Law, the compensation may include actual loss (*damnum emergens*), loss of profit (*lucrum cessans*), and interest, and "shall not determine over-compensations".

Italian law does not provide for the concept of exemplary or punitive damages. They have traditionally been considered, by courts and authors, as contrary to public policy. Punitive damages,

therefore, are not available in domestic antitrust litigation.

However, it should be noted that the Supreme Court has recently stated that punitive damages may be awarded in Italy in case of enforcement of a foreign judgment awarding punitive damages (Supreme Court, 5 July 2017, No 16601). According to the Supreme Court, in such a case, punitive damages may not be contrary to the Italian public order provided that the judgment is based on precisely legal provision establishing the cases in which such damages may be awarded, and the awardable amounts can be foreseeable.

According to the above principles, the Decree transposes the Directive's rule on passing-on of overcharges (by which is meant the difference between the price of what was actually paid and what would otherwise have been paid in the absence of the infringement) with a view to avoiding overcompensation. Article 10(2) of the Decree provides that the actual compensation awarded to a certain level of the supply chain shall not exceed the overcharge harm suffered at that level. However, the parties that have passed-on the overcharge are entitled to claim the loss of profit incurred by them as a consequence of having passed-on to their customers, either in whole or in part, the overcharge (ie, the net loss of profit determined by the decrease in the volume of sales connected to the increase of prices).

The quantification of harm implies a complex analysis and, as mentioned, parties and the courts appoint economic consultants as experts for such purpose.

Additionally, Article 14(3) of the Decree allows judges to ask ICA to assist the court in quantifying the damages.

7.2 "Passing-On" Defences

According to Article 11 of the Decree, which implemented Article 13 of the Directive, the defendant is entitled to invoke as a defence the circumstance that the claimant has passed on the whole or part of the overcharge resulting from the infringement of competition law and apparently suffered by the claimant. In such a case, the burden of proving that the overcharge was passed on is on the defendant.

7.3 Interest

According to Italian law, in the case of tort liability, interest on damages accrues from the date on which the harmful event occurred to the date on which payment is made. As far as private enforcement proceedings are concerned, this means that payable legal interest covers the period of infringement of competition law as well as the subsequent period in which the action for damages is brought. Therefore, the total interest includes both pre-judgment and post-judgment interests.

The legal rate of the interest, pursuant to Article 1284 of the Italian Civil Code, is determined on an annual basis by the Ministry of Economics and Finance taking into account the yields of the annual government bonds and on the inflation rate of the preceding year. Currently, as of 1 January 2023, the rate of interest is determined at 5% by Decree of the Ministry of Economics and Finance.

Claimants are, however, allowed to prove that interests at the legal rate do not represent full compensation. Interest assessment is generally included in the court-appointed expert's man-

date. Weighted average cost of capital (WACC) rates are normally considered in the assessment.

8. Liability and Contribution

8.1 Joint and Several Liability

As a general rule, according to Article 2055 of the Italian Civil Code, the parties which have jointly caused harm are held jointly liable; each of those parties is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until it has been fully compensated.

However, the Decree provides several derogations to the principle of full joint and several liability of the undertakings which took part in the infringement of the competition law.

- Pursuant to Article 9(1)(2) of the Decree, if the infringer is a small or medium-sized enterprise (so-called SME, as defined in Commission Recommendation 2003/361/EC), the infringer is liable only vis-à-vis its own direct and indirect purchasers, provided that (i) its market share in the relevant market was below 5% at any time during the infringement of competition law, and (ii) the application of the rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.
- Irrespective of the fulfilment of the above-mentioned conditions, SMEs are also jointly and severally liable towards the damaged parties, other than direct and indirect purchasers, when:
 - (a) the SME has led the infringement or coerced other undertakings to participate therein;
 - (b) the SME has previously been found to have committed other infringement of

competition law; and

- (c) the injured parties cannot obtain full damages from the other undertakings involved in the same infringement of competition law.

- Article 9(3) of the Decree provides that the beneficiaries of a leniency programme are jointly and severally liable towards their direct or indirect purchasers or suppliers and also towards other injured parties, only in the event that the latter cannot obtain full compensation for the damage from other undertakings involved in the same infringement of competition law.
- Article 16 of the Decree states that following a settlement, co-infringers who did not take part in the settlement are not permitted to recover contributions for the remaining claim from the settling co-infringer. Additionally, if a co-infringer who did not participate in the settlement is insolvent, the damaged party may seek damages from the co-infringers who participated in the settlement agreement unless the parties to the agreement expressly excluded such possibility.

8.2 Contribution

Article 2055(2) of the Italian Civil Code provides that a person who has compensated the damaged party has the right to recourse against each of the other co-debtors in proportion to the fault and to the consequences arising therefrom. Such a general principle also applies to damages awarded for infringements of competition law as set forth in Article 16(4) of the Decree which provides, in this respect, the sole exception of co-infringers who did not take part in a consensual settlement.

A contribution proceeding (see Article 1229 of the Italian Civil Code) may be brought against the jointly liable co-debtors either by suing them in

the same proceedings commenced by the damaged party or by suing them after the conclusion of the private enforcement proceedings upon the payment of the full damage or of a share of the damages that exceeds the proportion of liability.

In the first scenario, pursuant to Article 106 of the Italian Code of Civil Procedure, the defendant may request the court to be allowed to sue a third party involved in the infringement of competition law.

Such a request is generally awarded by courts, on the basis of principles of concentration of proceedings and avoidance of costly procedural duplications. Cartels' follow-on actions therefore typically consist of multi-party proceedings, with all the consequences in terms of longer duration and higher costs.

9. Other Remedies

9.1 Injunctions

First-instance decisions awarding damages are immediately enforceable, including pending appeal proceedings.

Under general rules, parties having been awarded damages may therefore seek to obtain coercive payment by means of obtaining an injunction measure, *inaudita altera parte*. Pursuant to Article 633 of the Italian Code of Civil Procedure, a creditor of a liquid sum of money or a specified quantity of fungible things, may apply to the competent court for an injunction, which shall be issued within thirty days. The injunction procedure is a special summary procedure for those who hold liquid, certain, and collectible claims, based on written proof, which is based solely on the allegations of the creditor. Indeed, the injunction is a summary and partial order,

and full knowledge is referred to the potential subsequent opposition phase.

Within forty days from the issuance of the injunction, the defendant may file an opposition. In this case, a second and different procedural phase will be opened, with full cognition, in which the plaintiff assumes the (formal) role of defendant, and the person subject to the injunction assumes the role of plaintiff. During this phase, the court evaluates the merits of the claim in relation to the validity of the credit. Otherwise, in the absence of opposition, enforcement will be carried out.

Italian Civil Procedure rules also provide for the possibility for a claimant to obtain interim measures provided it can be shown that the claim is (*prima facie*) valid (the so-called *fumus boni iuris*) and that there is a substantial risk of harm (the so-called *periculum in mora*). Injunctions can be granted, with or without notice to the other counterparties, in cases of proven urgency and based on a summary procedure.

When the interim measure request is based on antitrust infringement (eg, when the claimant seeks an order to resume supplies in case of allegedly abusive refusals to deal) courts normally deny the request *inaudita altera parte*, and schedule a hearing and possibly terms to the defendant for filing a defensive brief of appearance.

The decision is normally rendered after the hearing. In such cases the proceeding is generally concluded in some weeks from the filing of the request, although their duration may be longer when, eg, further terms for exchange of briefs are disposed, or technical matters require the appointment of an expert.

9.2 Alternative Dispute Resolution

Article 15(2) of the Decree expressly mentions alternative dispute resolution methods with reference to the suspension of the proceedings. In this respect, reference is made to the general provision of Italian law in relation to:

- arbitration;
- mediation; and
- assisted negotiation,

as set forth in Article 2(1) (s) of the Decree.

The Italian legal framework distinguishes between two types of arbitration proceedings.

- Ritual arbitration (ie, regular) – when the decision taken by the professional at the conclusion of the arbitration proceedings has the same effect of a judgment – ie, it will be directly enforceable (see Articles 806 et seq of the Italian Code of Civil Procedure).
- Irritual arbitration (ie, irregular) – when a decision has the same effect of a negotiation between the parties.

However, the arbitration proceedings are mandatory if the parties of the dispute have inserted an arbitration clause in the contract that originated the dispute. With reference to the private enforcement proceedings, it is worth noting that Article 16(5) of the Decree expressly provides that the same Article 16 on the effects of the settlement also applies to arbitration decisions. Case law in fact undisputedly allows arbitration in antitrust proceedings, also upholding the lack of jurisdiction in favour of arbitration chambers (eg, Tribunal of Milan, No 6374 [2021]).

Additionally, as noted, the Decree mentions the mediation procedure, as set forth in the Legislative Decree of 4 March 2010, No 28, and the

assisted negotiation procedure, regulated by Law Decree No 132/2014. Both provisions allow for a list of matters for which the mediation/negotiation attempt is mandatory before a case can be brought before a court. Neither of the two lists include matters related to tort liability, and, therefore, an attempt at mediation/negotiation is not mandatory prior to actions for damages for breach of competition law.

10. Funding and Costs

10.1 Litigation Funding

Italian law does not forbid the possibility of using third-party funding, but at the same time does not provide any specific rule on the matter. The only provision relating to funding is set out in Article 140-septies of the Italian Consumer Code, which establishes, with reference to class actions, that any financing by third parties must be indicated in the writ of summons to assess any conflicts with the defendant's position. Given the lack of provisions in relation to the third-party funding mechanism, contracts aimed at it will be governed by the general principles of Italian contract law.

In any case, litigation funding which is typical of common law systems, is also spreading within Italy. In general, financial systems can operate in one of the following ways:

- the fund finances the action of injured parties which take part in the action personally – only if damages are awarded will the fund retain a percentage of the amount awarded as compensation; and
- the fund acts personally, after having “purchased” the injured party's claim against the infringer.

10.2 Costs

Under Italian law, costs follow the outcome of the proceedings. Pursuant to Article 91 of the Italian Code of Civil Procedure, the losing party is ordered by the judge to refund the costs borne by the counterparty. There are, however, exceptions to this general principle – the judge may compensate the costs between the parties in the following cases:

- the costs are excessive or superfluous;
- the winning party has breached duties of loyalty and probity in the proceedings;
- both parties have partially lost the proceedings; and
- the questions of the case were exceptionally new or there was an over-ruling.

The costs include the costs incurred by the parties for the work of their lawyers, statutory fees (eg, VAT and court fees), and any costs related to the proceedings such as the costs of appointing a court expert witness. In the event of non-payment of costs, the other party is entitled to institute enforcement proceedings; however, costs may be challenged in the appeal proceedings.

11. Appeals

11.1 Basis of Appeal

Decisions at first instance rendered by the specialised Tribunals of Milan, Rome, and Naples may be appealed before the competent court of appeal (ie, Court of Appeal of Milan, Rome, or Naples), under the general provisions of the Italian Code of Civil Procedure. Two different deadlines apply to appeal a first-instance decision:

- a short deadline of 30 days in case the winning party has served the decision; and
- a long term of six months in case of publication of the ruling.

In appeal proceedings, the appellant may request a complete review of the first-instance proceedings, with reference to both factual and legal elements. In turn, the decisions of the Court of Appeal may be further challenged before the Supreme Court (*Corte di Cassazione*) within (i) a short term of 60 days from the date of service of the ruling, or (ii) a long term of six months from the publication of the ruling. In such a case, appeals are admissible only on points of law and the Supreme Court cannot revise the factual elements as found by the Court of Appeal in the second instance.

JAPAN

Law and Practice

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Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan. It has over 500 lawyers and is one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and associated local law firms in Jakarta and Beijing, with the firm's lawyers on site. The firm has extensive corporate and

litigation capabilities spanning key commercial areas, including antitrust and competition. The team has antitrust lawyers with in-depth expertise in, and highly specialised knowledge of, the antitrust and competition laws of Japan as well as overseas jurisdictions, with specialists capable of handling complex antitrust litigation, including follow-on damage claims and derivative suits against the management of defendant companies.

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NAGASHIMA OHNO & TSUNEMATSU

1. Overview

1.1 Recent Developments in Antitrust Litigation

Trend in Antitrust Litigation

In Japan, there is no US-style class action system and comprehensive discovery system in civil court proceedings. As a result, claimants have faced difficulties in bringing antitrust suits, and the number of antitrust suits has been relatively small over the years. In the early 2000s, damage suits were filed by residents representing local governments that had suffered damages due to bid riggings by entrepreneurs in violation of the prohibition of “unreasonable restraint of trade” under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the “Antimonopoly Act”). Following this, the recent trend shows that claims for compensation for damages arising from “unfair trade practice”, such as abuse of a superior bargaining position prohibited by the Antimonopoly Act, have been filed with the court more frequently than in the past. For instance, in June 2022, the Tokyo District Court rendered a judgment ordering the defendant (an operator of an online restaurant review and search platform) to make a compensation for damage in the amount of JPY38.4 million suffered by the plaintiff based on the reason that the defendant had abused its superior bargaining position in violation of the Antimonopoly Act by changing its restaurant rating algorithm in an improper manner which was disadvantageous to the plaintiff. In this case, the Japan Fair Trade Commission (JFTC) submitted an amicus brief in response to the court’s request and the court took into consideration the JFTC’s opinion on the application and interpretation of the Antimonopoly Act.

As a background to this trend, in 2009, the Japan Fair Trade Commission (JFTC) established a task

force to investigate the abuse of a superior bargaining position. It rendered a series of cease-and-desist orders and administrative surcharge payment orders, targeting abuses of superior bargaining positions from 2011-13, pursuant to the 2009 amendment to the Antimonopoly Act introducing an administrative surcharge payment order on certain types of unfair trade practices. The JFTC’s actions may have led to the trend in antitrust litigation mentioned here. However, most of the disputes involving potential antitrust claims in Japan appear to have been settled by negotiation between the parties prior to bringing the claims to court.

Other notable types of antitrust-related litigation include deliberative lawsuits filed by the shareholders of a company against the directors of the company, who engaged in conduct in violation of the Antimonopoly Act, seeking compensation for damages arising from the company’s payment of administrative surcharges due to such violation. For instance, in March 2022, the Tokyo District Court rendered a judgment ordering the defendant directors of an asphalt mixture manufacturing company to make a compensation for damage in the amount of more than JPY1.5 billion by holding that the defendant directors had been involved in or had recognised cartel activities in violation of the Antimonopoly Act, which constitutes a breach of the director’s duty of care, and shall be liable for the damage equivalent to the amount of administrative surcharge conceded and paid by the company. Corporate managers should pay particular attention to the risk of being sued by shareholders as a result of violation of the Antimonopoly Act.

2015 Amendment

On 1 April 2015, the amendment to the Antimonopoly Act, abolishing the administrative hearing procedures of the JFTC (the “2015

Amendment”), became effective. Under the new system, JFTC orders are subject to de novo review by judicial courts, without going through the administrative hearing proceedings of the JFTC where the JFTC itself first reviewed the validity of the orders. A defendant entrepreneur who has received the JFTC’s cease-and-desist orders or administrative surcharge payment orders is entitled to file a complaint directly with the Tokyo District Court to seek revocation of such JFTC orders. A panel of three or five judges of the Tokyo District Court will examine the JFTC orders, which will be revoked if the court finds that the orders are contrary to the laws.

The “substantial evidence rule” – applied to actions to rescind JFTC orders before the judicial court under the law before the 2015 Amendment – was abolished and the court is no longer bound by the JFTC’s fact findings. A defendant entrepreneur is therefore entitled to submit evidence to the court without such restrictions.

In general, the 2015 Amendment is considered to make the procedures for reviewing JFTC orders fairer and more neutral than the previous system, under which the JFTC reviewed the validity of JFTC orders rendered by itself. In terms of the effect on private antitrust enforcement, the 2015 Amendment has been expected to enhance judges’ expertise in the field of antitrust law and thereby facilitate private antitrust enforcement through court proceedings in Japan. In particular, the judges of the commercial affairs department of the Tokyo District Court seem to have accumulated extensive experience in handling antitrust litigation.

1.2 Other Developments

Commitment Procedure

On 30 December 2018, the commitment procedure, a system to resolve alleged violations

of the Antimonopoly Act voluntarily by consent, was introduced pursuant to a partial amendment to the Antimonopoly Act included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws. Under the commitment procedure, upon receipt of a notice from the JFTC regarding an alleged violation of the Antimonopoly Act, an entrepreneur may devise a plan to take the necessary measures to cease the conduct allegedly violating the Antimonopoly Act and file a petition for approval of such plan with the JFTC. The JFTC then determines whether to approve such plan and if approved, determines not to render a cease-and-desist order and administrative surcharge payment order against the entrepreneur.

A press release will then be issued by the JFTC with a summary of the entrepreneur’s conduct allegedly violating the Antimonopoly Act; however, the press release will also stipulate that it does not mean that the JFTC found actual violation of the Antimonopoly Act. Given the foregoing, private antitrust claimants would not be able to use the result of the commitment procedure as evidence for their claim against the entrepreneur.

2019 Amendment

On 25 December 2020, a further amendment to the Antimonopoly Act and the relevant JFTC rules (the “2019 Amendment”) became effective, introducing protection of attorney-client privilege to the JFTC’s administrative investigation procedures for unreasonable restraint of trade. However, such protection of attorney-client privilege shall apply to the administrative procedures of the JFTC only because it has been introduced in order to incentivise the potential leniency applicants to co-operate with the JFTC’s investigations. Under the amended leniency programme, the extent of immunity is determined according

to the extent of each applicant's co-operation with the JFTC's investigations. Accordingly, the protection of attorney-client privilege does not apply to antitrust litigation cases before the Japanese courts, even after the 2019 Amendment became effective. Nevertheless, it is expected that attorney-client privileged documents will not be submitted to the civil proceedings as evidence by the JFTC.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Damages Claims

As the legal basis for a claim for damages for breach of competition law in Japan, a claimant who has suffered damages by conduct that constitutes private monopolisation, unreasonable restraint of trade or unfair trade practice in violation of the Antimonopoly Act is entitled to bring a follow-on claim on the ground of strict liability under Article 25 of the Antimonopoly Act, or a standalone claim on the ground of general tort under Article 709 of the Civil Code.

Anti-competitive conduct includes cartels and bid riggings, which are typical examples of unreasonable restraint of trade prohibited under the Antimonopoly Act. Agreements on price fixing, production limitation, and market and customer allocation are typical examples of the behaviour of cartels. Unfair trade practice includes price discrimination, restrictions on resale pricing, below-cost sales, anti-competitive divisions of territories, concerted refusal of trade, and abuse of superior bargaining position.

Under Article 25 of the Antimonopoly Act, companies and business associations that have been engaged in, or party to, private monopolisation, unreasonable restriction of trade or other unfair

trade practices are liable for compensation for damages suffered by other entities due to such conduct. As a prerequisite of filing a claim under Article 25, the plaintiffs need to demonstrate that the JFTC rendered a cease-and-desist order and/or an administrative surcharge payment order and such orders have become irrevocable.

Under Article 709 of the Civil Code, any person who has engaged in conduct violating the rights or legally protected interests of another person must compensate them for the damages arising from such conduct, including anti-competitive conduct described above.

Other Remedies and Actions

Injunction

In addition to damages claims, a claimant whose interests are infringed, or are likely to be infringed, by certain unfair trade practice is entitled to file a petition for injunction under Article 24 of the Antimonopoly Act. Such unfair trade practice includes violation of Article 8, item 5 (ie, activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (ie, unfair trade practices by an entrepreneur) of the Antimonopoly Act.

Recovery of unjust enrichment

It may also be possible for a claimant to bring an action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code, depending on the circumstances.

Actions based on the invalidity of contracts violating the Antimonopoly Act

Under Japanese law, agreements or contracts between private parties may be declared void pursuant to Article 90 of the Civil Code if such agreements or contracts include a provision in violation of the Antimonopoly Act. Accordingly, a party to such agreement or contract may file

an action to recover the benefits provided to the other party as unjust enrichment, based on the ground that the agreement or contract is void, and restitution shall be made.

Derivative lawsuits under the Companies Act

In the event that the JFTC finds that a company has violated the Antimonopoly Act, qualified shareholders of the company may file a lawsuit against the directors of the company for their wilfulness or negligence in failing to perform their duty of care pursuant to Articles 423 and 847 of the Companies Act, if the company does not initiate a lawsuit against the directors within 60 days of receipt of the shareholders' request to file the lawsuit. In particular, if the JFTC renders an administrative surcharge payment order against the company or the company is found liable for damages under Article 25 of the Antimonopoly Act or Article 709 of the Civil Code, the shareholders may file a derivative lawsuit against the directors of the company seeking compensation for damage equivalent to the amount of administrative surcharge or damages paid by the company.

2.2 Specialist Courts

There are no specialist competition courts and competition judges in Japan. However, the Antimonopoly Act provides that the Tokyo District Court has exclusive jurisdiction in follow-on claims for compensation for damages under Article 25 of the Antimonopoly Act, and such claims are assigned to the Eighth Civil Affairs Department (the commercial affairs department) of the Tokyo District Court. The Antimonopoly Act also provides that an action for injunction under Article 24 can be brought in a local district court in a place where a high court is located; namely, Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu. If an action for injunction under Article 24 is brought

in other local district courts, the case may be transferred to one of the above-mentioned eight district courts. The Tokyo District Court also has exclusive jurisdiction as the court of first instance over a challenge to a cease-and-desist order or an administrative surcharge payment order rendered by the JFTC.

2.3 Decisions of National Competition Authorities

In the event that a plaintiff files a follow-on damages claim based on Article 25 of the Antimonopoly Act, which may be filed only after the JFTC's cease-and-desist order or an administrative surcharge payment order becomes irrevocable, the defendants are not allowed to deny their wilfulness or negligence for the violation of the Antimonopoly Act found by those JFTC orders.

In addition, it is generally considered that the findings of violation of the Antimonopoly Act set forth in the JFTC orders, which became irrevocable through administrative hearing procedures or civil court proceedings, create a rebuttable presumption that the Antimonopoly Act was violated.

As a matter of practice, even the decisions of national competition authorities in other jurisdictions could be taken into account, to some extent, by the court in charge of private antitrust cases in determining whether the Antimonopoly Act was violated, particularly when the facts and evidence are common to both cases.

There is no mechanism for the JFTC to intervene in damages actions in court.

2.4 Burden and Standard of Proof

Burden of Proof

Damages claims

In seeking compensation for damages through Japanese civil court proceedings, the plaintiff alleging the defendant's violation of the Antimonopoly Act bears the burden of proof to demonstrate:

- the illegal conduct of the defendant;
- damages;
- a causal relationship between the damages and the violation; and
- the negligence or wilfulness of the defendant.

In a damages action under Article 25 of the Antimonopoly Act, the plaintiff does not need to prove the defendant's negligence or wilfulness.

With regard to the "illegal conduct of the defendant", it is generally considered that findings of violation of the Antimonopoly Act by JFTC orders that have become irrevocable through administrative hearing procedures or civil court proceedings create a rebuttable presumption that the Antimonopoly Act was violated.

With regard to the defendant's "negligence or wilfulness", the burden of proof does not have a serious impact in practice, even on damages claims under Article 709 of the Civil Code, since the defendant's conduct in violation of the Antimonopoly Act normally demonstrates that the defendant was negligent in being involved in such conduct.

Injunction

In claims for injunction based on Article 24 of the Antimonopoly Act, a plaintiff must prove that:

- the defendant's conduct falls under certain types of unfair trade practices in violation of

Article 8, item 5, or Article 19 of the Antimonopoly Act;

- the plaintiff's interests are infringed or are likely to be infringed;
- the plaintiff suffered, or is likely to suffer, "material" damages by such conduct; and
- there is a causal relationship between the material damages and the defendant's conduct.

The plaintiff does not need to prove the defendant's negligence or wilfulness in engaging in the conduct at issue.

Recovery of unjust enrichment

For an action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code, the plaintiff must prove that the defendant received benefit without any legal cause and thereby caused loss to the plaintiff.

Actions based on the invalidity of contracts violating the Antimonopoly Act

For an action based on the invalidity of contracts violating the Antimonopoly Act, the plaintiff will need to prove the relevant facts indicating the invalidity of the contract under Article 90 of the Civil Code.

Derivative lawsuits under the Companies Act

In a derivative lawsuit under the Companies Act, the plaintiff shareholders need to prove the negligence or wilfulness of the defendant directors, the amount of damage and a causal relationship between the defendants' conduct and the damage.

Burden of Proof Regarding Pass-On Defence

When a defendant argues that the plaintiff's loss has been reduced by the plaintiff having passed on to its consumer any overcharge arising from the defendant's violation of the Antimonopoly

Act, the plaintiff (ie, a direct purchaser) will be required to prove the actual amount of damage by taking into account the passing-on value (ie, the amount that the direct purchaser has collected from indirect purchasers).

Standard of Proof

As to the standard of proof, the party with the burden of proof must show that the alleged facts are “highly probable” in order to obtain a court judgment in their favour through civil court proceedings.

2.5 Direct and Indirect Purchasers

Claims can be brought not only by direct purchasers but also by indirect purchasers, based on the defendant’s cartel conduct in violation of the Antimonopoly Act.

2.6 Timetable

Expediting Trials

The Law on Expediting Trials provides that a period of two years is a target period for the completion of the first instance of civil court proceedings. However, the duration of court proceedings may well depend on various circumstances, including the complexity of each case. Although it usually takes at least one year for the court to render a judgment for the first instance in typical civil cases, private antitrust litigation could last for more than two years because the judges, who are not necessarily familiar with the antitrust laws and regulations, need to examine relatively complicated issues, including the calculation of damages.

Parallel Investigations

The civil court proceedings involving private antitrust claims, such as damages claims based on general tort under the Civil Code or injunction claims, are not suspended during a parallel investigation by the JFTC. Parties are not

entitled to apply for an order to stay the civil court proceedings based on the ground that the JFTC’s parallel investigation is ongoing.

3. Class/Collective Actions

3.1 Availability

Class/collective actions are not available under Japanese law, although there were discussions as to whether the amendments to the Antimonopoly Act should include the introduction of collective actions for damages claims under Article 25, and actions for injunction under Article 24 of the Antimonopoly Act. However, such collective actions have not been included in the amendments to date. This is because consumers as prospective plaintiffs taking such collective actions would not be able to use the scheme effectively due to their burden of proof and, under the current civil court proceedings, multiple claimants are already entitled to bring claims as co-plaintiffs.

Code of Civil Procedure

Under the Code of Civil Procedure, two or more persons may file an action as co-plaintiffs if they have:

- common rights or obligations based on the same factual or statutory cause; or
- rights or obligations of the same kind, based on the same kind of factual or statutory causes, as the subject matter of the lawsuits.

In addition, the Code of Civil Procedure provides the appointed party system under which each plaintiff or defendant may appoint another plaintiff or defendant as a representative of each plaintiff/defendant. Multiple claimants may use these schemes in bringing competition law claims before civil court proceedings in Japan.

Consumer Contract Act

Plus, qualified consumer organisations are entitled to file an action for injunction for lawsuits under the Consumer Contract Act, as well as injunctions under Article 10 of the Act Against Unjustifiable Premiums and Misleading Representations. Furthermore, in 2016, the relevant law introduced a new system for consumer organisations qualified by the Japanese government to file a lawsuit seeking compensation for damages under consumer contracts. In such actions, the plaintiffs may assert the defendants' violation of the Antimonopoly Act.

3.2 Procedure

Class actions are not available under Japanese law. See 3.1 Availability.

3.3 Settlement

In general, Japanese courts tend to seek an opportunity for amicable settlement of disputes before the court (judicial settlement) during the course of civil court proceedings. Parties are asked by the court whether they are willing to seek a resolution of the dispute by judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations. In a lawsuit involving a number of plaintiffs as co-plaintiffs, the court is more inclined to recommend judicial settlement in order to resolve the dispute promptly and effectively, before moving on to time-consuming witness examinations where a number of plaintiffs may need to testify before the court and before preparing for a judgment.

In the judicial settlement procedure, the judge has discussions with plaintiffs and defendants respectively, trying to persuade the parties to make concessions to reach terms and conditions that are agreeable to the parties. An agreement between the parties is put into the court

record and the record has the same effect as a final and binding judgment.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Strikeout/summary judgment is not available in Japanese civil court proceedings.

In order to seek early resolution of a case, a defendant may, however, request the court to dismiss the claims due to reasons other than those of merit, such as lack of jurisdiction and lack of standing.

4.2 Jurisdiction/Applicable Law

Rules on Jurisdiction

The Code of Civil Procedure provides the basic jurisdictional rules for private antitrust litigation and damages actions. For instance, a local district court having jurisdiction over the location of a defendant's principal office/domicile has jurisdiction over claims brought against the defendant. A local district court having jurisdiction over the place of violation of the Antimonopoly Act also has jurisdiction over claims based on such violation. If more than one court has jurisdiction over the claim at issue, the claimant may, in principle, choose the court where the claims are to be heard.

As special jurisdictional rules for antitrust litigation, the Antimonopoly Act provides that the Tokyo District Court has exclusive jurisdiction over follow-on claims for compensation for damages under Article 25 of the Act, and exclusive jurisdiction over a challenge to a cease-and-desist order or an administrative surcharge payment order rendered by the JFTC. The Antimonopoly Act also provides that an action for

injunction under Article 24 of the Act can be filed with a local district court in the place where a high court is located; namely, Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu.

A defendant may request the court to dismiss the claims due to lack of jurisdiction. If a defendant wishes to request the court to dismiss the claims due to lack of jurisdiction, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits.

Rules on Applicable Law

Since private antitrust claims for damages are considered as tort claims under Japanese law, the choice-of-law rules on tort claims govern the applicable law for private antitrust claims. Under Japanese choice-of-law rules, the law governing tort claims is the law of the place where the result of the relevant tortious act has occurred. Accordingly, the law of the place where the result of the relevant violation of the Antimonopoly Act has occurred shall govern the relevant antitrust claims for damages.

In the event that foreign law governs the claims, but the facts to which the foreign law applies do not constitute a tort under Japanese law, no claim for damages or any other remedies under the foreign law will be accepted by the Japanese court. Even if the facts to which the foreign law applies constitute a tort under both the foreign law and Japanese law, the victim may only make a claim for damages or any other remedies permitted under Japanese law.

4.3 Limitation Periods

Claimants must initiate damages claims within whichever of the following two periods elapses earlier:

- 20 years from the date on which the alleged violation of the Antimonopoly Act first occurred; or
- three years from the date on which the claimant first became aware of the alleged violation.

Claimants must initiate damages claims under Article 25 of the Antimonopoly Act within three years from the date on which the relevant cease-and-desist order or administrative surcharge payment order rendered by the JFTC became irrevocable.

Under Article 166, paragraph 1 of the Civil Code, a claim for recovery of unjust enrichment pursuant to Articles 703 and 704 of the Civil Code must be brought within ten years of the date of the conduct at issue and within five years of the date on which the claimant first became aware of the alleged violation.

There is no limitation period for an injunction, pursuant to Article 24 of the Antimonopoly Act.

Under Japanese law, limitations are considered as part of substantive law. Even after the expiry of any of the limitation periods described above, the court may uphold the claims if the defendant does not bring the defence of limitation.

The running of the limitation period can be suspended on the following grounds, among others:

- filing of a lawsuit on the merits based on the subject claim with the court;
- filing of a petition for attachment, provisional seizure, or provisional disposition based on the subject claim with the court;
- entering into an agreement to engage in negotiations; or

- any acknowledgement of the subject claim by the defendant.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

There is no procedure for comprehensive disclosure of documents under Japanese law, nor is there a discovery procedure. However, the following disclosure schemes may be available for private antitrust claimants.

Court Order of Document Production under the Code of Civil Procedure

Under the Code of Civil Procedure, a party may request the court to order the other party or a third party to produce particular documents while the civil court proceedings are pending, with certain limitations. For instance, under the Code of Civil Procedure, there is no obligation to disclose the following:

- a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction;
- a document concerning a secret in relation to a public officer's duties that, if submitted, is likely to harm the public interest or substantially hinder the performance of public duties;
- a document containing any fact that certain professionals (eg, a doctor, an attorney at law, a registered foreign lawyer) have learnt in the course of their duties and that should be kept secret;
- a document containing matters relating to technical or professional secrets; or
- a document prepared exclusively for use by the holder.

To render an order of document production against a third party, the court must seek such third party's opinion in advance of rendering such order.

Access to the JFTC's Administrative Hearing Procedures

As victims of alleged violation of the Antimonopoly Act, plaintiffs may request reproduction and review of the documents submitted to the JFTC's administrative hearing procedures, where an entrepreneur disputes the validity of a cease-and-desist order and/or an administrative surcharge payment order. Such documents include legal briefs and evidentiary documents submitted to the hearing procedures by a JFTC administrative investigator as well as the entrepreneur, but do not include documents within the files of JFTC investigators that were obtained or created during the course of their investigations.

Access to the Case Record of Civil Court Proceedings

Any person is entitled to review the case record of civil court proceedings where the validity of the JFTC's cease-and-desist orders and administrative surcharge payment orders are challenged by entrepreneurs. Any person who has legal "interests" is entitled to obtain a copy of the case record, including briefs and evidence submitted by the JFTC, which may include documents the JFTC collected during its investigations. Plaintiffs or potential plaintiffs of private antitrust claims are likely to be included as a person who has legal "interests" and may have access to such documents.

While an entrepreneur, as a party to said civil court proceedings, is entitled to file a petition requesting the court not to disclose any documents to third parties, the scope of documents

subject to such petition is limited to personal information and trade secrets.

Court Request to the JFTC for Provision of Documents

In the event that a damages claim is filed with the court, the court may, upon petition by the claimant, request the JFTC to provide plaintiffs with access to certain documents collected by the JFTC, including those collected from third parties during their investigations, except for certain information such as trade secrets and privacy information.

Court Order of Preservation of Evidence under the Code of Civil Procedure

Under the Code of Civil Procedure, a potential plaintiff may file a petition for a court order of preservation of evidence prior to filing a lawsuit if there are circumstances where it will become difficult to use the evidence, unless such evidence is reviewed in advance. This order essentially serves as an order of pre-action disclosure of evidence.

Access to the Case Record of Criminal Court Proceedings

As the victim of a crime under the Antimonopoly Act, a plaintiff may have access to the documents submitted to the pending criminal proceedings if certain requirements are fulfilled. Any person may access the documents submitted to the criminal proceedings once the proceedings are finalised. However, a plaintiff does not have access to the documents within the files of public prosecutors obtained and created during the course of criminal investigations.

5.2 Legal Professional Privilege

Under civil court proceedings in Japan, documents cannot be withheld from disclosure on the basis that they are privileged. Unlike in common

law jurisdictions, there is no concept of attorney-client privilege or other privilege to protect attorney-client communication or attorney materials under the civil court proceedings. Attorneys have the right to refuse to give testimony concerning their communication with their client and they are not obliged to produce documents exchanged with their clients and regarded as “a document containing any fact which certain professionals have learnt in the course of their duties and which should be kept secret” or “a document containing matters regarding technical or professional secrets” under the Code of Civil Procedure. However, clients have no right to protect their communications with their attorneys on the basis that they are privileged in civil court proceedings.

It is noteworthy that the 2019 Amendment introduced the protection of attorney-client privilege to the JFTC’s administrative investigation procedures for unreasonable restraint of trade; however, such protection does not apply to antitrust litigation cases before the Japanese courts. Nevertheless, it is expected that attorney-client privileged documents will not be submitted to the civil proceedings as evidence by the JFTC.

5.3 Leniency Materials/Settlement Agreements

Regarding leniency materials, the JFTC has a policy under which it will not disclose information submitted by leniency applicants unless the applicant wishes to disclose such information. Such information may be excluded from the information subject to plaintiffs’ requests for reproduction and review of documents submitted to JFTC administrative hearing procedures and may also be excluded from the information subject to the court’s request for access to the documents collected through the JFTC investigations.

Under the newly introduced commitment procedure, the JFTC has a policy that it may use the materials submitted by the petitioner during the course of the commitment procedures for further investigations to be conducted by the JFTC when the JFTC disapproves of the petitioner's plan to take the necessary measures to cease the entrepreneur's conduct allegedly violating the Antimonopoly Act. The degree to which the materials submitted to the commitment procedures are protected from disclosure in future antitrust private litigation proceedings will be a significant issue in this field.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witnesses of fact are relied on in civil court proceedings in Japan. A party to a lawsuit may make a request to the court for the examination of a witness of fact and the court will determine whether such witness examination is necessary for the purpose of finding the relevant facts. Upon such request, a party is usually asked to submit a written statement of the witness to the court in order for the court to decide whether to call the witness. In general, witnesses of fact are subject to cross-examination in relation to the matters raised during direct examination. Judges may also ask the witnesses supplementary questions after examination by the parties.

In civil court proceedings in Japan, the court may order a subpoena of witnesses who do not voluntarily appear before the court, without justifiable reason, so that such witnesses can be forcibly taken before the court. Penalties may also be imposed on witnesses who have failed, or refused, to appear before the court, although such penalties are not severe. In practice, however, it is unusual in civil proceedings for the

court to order a subpoena or impose penalties even if a witness does not appear.

6.2 Expert Evidence

Depending on the nature of the issues involved in each case, the court will rely on expert witnesses. A party to the lawsuit may submit to the court, as documentary evidence, a report prepared by an expert appointed by such party. In order to examine the credibility of such report, the opposing party may request the court to conduct cross-examination of the expert. A party may request the court to appoint an independent expert to provide an expert opinion and the court then determines whether it is necessary to appoint such expert. Once an expert is appointed by the court, such expert is obliged to give their opinion in the relevant field in which they have expertise.

Under Japanese civil court proceedings, there are no particular rules regarding concurrent expert evidence, including whether experts are requested to produce joint statements indicating the areas in which they agree/disagree in advance, or whether to adopt alternative methods of hearing expert evidence.

7. Damages

7.1 Assessment of Damages

One of the main methods to calculate damages in cartel cases is to calculate the difference between:

- the price of the relevant product immediately before the alleged cartel activity; and
- the price of the relevant product actually applied in the transaction at issue.

Passing-on value – namely, the amount that direct purchasers have collected from indirect purchasers – may be taken into account when calculating the amount of damage suffered by the direct purchasers. In cases involving both direct and indirect purchasers, it tends to be practically difficult to prove the amount of damage, as well as any causal relationship between the violation at issue and the alleged damages.

The Supreme Court decision of 8 December 1989 held that the damages arising from cartel activity is the difference between the actual sales price and the sales price that would have been used if not for the cartel in question (expected sales price). This presumes that the sales price immediately before the cartel was formed is the expected sales price unless significant changes in economic conditions and market structures occurred, for example, between the time of the cartel's activity and the time when customers purchased the merchandise at issue. The Supreme Court decision also held that plaintiffs must prove that no such significant change in economic factors took place and if such proof is not possible, the presumption shall not be available and the plaintiffs (indirect purchasers) must prove the expected sales price based on factors of price formation. However, the court's decision was harshly criticised by scholars and practitioners, in that plaintiffs must bear the burden of almost impossible proof pursuant to the decision.

In calculating the amount of damages claimed based on Article 25 of the Antimonopoly Act, the court may seek the JFTC's opinion. In addition, Article 248 of the Code of Civil Procedure allows the court to determine a reasonable amount of damages if it is extremely difficult for the parties to prove the precise amount due to the nature of the damages. The court may determine the

amount of damages arising from the violation of the Antimonopoly Act with the assistance of these schemes.

Under Japanese law, collection of exemplary or punitive damages is not permitted in civil proceedings since such remedies are considered being contrary to public policy in this country.

In calculating the amount of damages sought by private antitrust claims, neither administrative surcharges imposed by the JFTC nor criminal fines imposed by the criminal court are taken into consideration by the court.

7.2 “Passing-On” Defences

A defendant may argue that the loss suffered by the plaintiff (ie, the direct purchaser) has been reduced by having passed on to its consumer any overcharge arising from the defendant's violation of the Antimonopoly Act. The plaintiff will then be required to prove the actual amount of damages by taking into account the passing-on value (ie, the amount that the direct purchaser has collected from indirect purchasers).

The “passing-on defence” under Japanese law is therefore discussed in the context of the scope of damages, as opposed to in the context of the standing. If a direct purchaser passed on the amount of loss to its customers, it would be difficult to prove that the direct purchaser suffered actual loss and, as a result, the amount of damages would be reduced accordingly.

7.3 Interest

Interest, or a delinquency charge, is payable on damages arising from a tortious act, including a violation of the Antimonopoly Act, at a rate of 5% per annum under the former Civil Code. Under the amended Civil Code effective as of 1 April 2020, the statutory rate has changed from 5%

per annum to 3% per annum, subject to possible change once in a three-year period. Until 31 March 2026, the statutory rate of 3% shall remain the same.

In court judgments, the interest or delinquency charge is usually imposed on damages until these are paid in full and thus includes both pre-judgment interest and post-judgment interest.

8. Liability and Contribution

8.1 Joint and Several Liability

Private claimants can bring a claim against multiple defendants who have committed, among other breaches, unfair restraint of trade or joint refusal to deal under the Antimonopoly Act (eg, cartel participants as joint tortfeasors), based on the theory of joint and several liability.

Since immunity applicants in the JFTC's administrative investigations or criminal investigations are not entitled to receive any beneficial treatment in follow-on private antitrust cases, there are no limitations on the plaintiff's antitrust claims against cartel participants, even if some of them are immunity applicants.

8.2 Contribution

A defendant can bring a claim for "contribution" against a third party who assumes joint and several liability. For instance, in the event that the court renders a judgment in favour of the plaintiff against the defendant who is one of the cartel participants through a civil court proceeding, the defendant may initiate another civil court proceeding to bring a claim for contribution against another cartel participant who should be jointly and severally liable as a joint tortfeasor.

It is possible, under the Code of Civil Procedure, for a defendant to give notice of a lawsuit to a third party who has a legal interest in the result of the lawsuit, in that the defendant could pass on liability to, or share its liability with, such third party. The third party receiving the notice may join the lawsuit as an assisting intervener. Once a third party receives notice of a lawsuit, such third party will not be able to dispute certain facts in a subsequent lawsuit with the defendant.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available under Article 24 of the Antimonopoly Act.

Petition for an Injunction Under Article 24

A claimant whose interests are infringed, or are likely to be infringed, by violation of Article 8, item 5 (ie, activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (ie, unfair trade practices by an entrepreneur) of the Antimonopoly Act is entitled to file a petition for injunction under Article 24. In such action, a claimant may demand suspension or prevention of infringement by an entrepreneur or a business association if that person has suffered, or is likely to suffer, material damages by such conduct. The action cannot be initiated based on unreasonable restriction of trade, which includes cartels and bid rigging, and private monopolisation, while some unfair trade practices overlap with unreasonable restriction of trade or private monopolisation. A claimant may file a lawsuit for formal injunction or a petition for preliminary injunction under Article 24 of the Antimonopoly Act.

The JFTC provides its opinion with respect to the application of the Antimonopoly Act and other necessary matters if an action for an injunction has been filed with a judicial court under Article 24 of the Antimonopoly Act.

Formal Injunction

In the case of a formal injunction, the procedure constitutes a formal lawsuit on the merits and the court must hold hearings attended by both parties, at which they need to submit briefs and evidence. Witness examinations may be held during the course of the proceedings. It generally takes more than a year to complete the proceedings. In order to avoid an abuse of right to injunction, the court may order the plaintiff to furnish an adequate security deposit at the request of the defendant.

Preliminary Injunction

When seeking a preliminary injunction, the court adopts expeditious procedures under the Civil Preservation Act. However, it is still necessary for the court to hold hearings where the other party may submit its opinion, in principle, and it may take several months to obtain a preliminary injunction order. A petitioner must demonstrate that there is a “necessity” for the preliminary injunction, in addition to the claims to be protected, based on prima facie evidence. A petitioner will also be required to furnish a security deposit before obtaining a preliminary injunction order. If a petitioner who obtained a preliminary injunction order fails in the subsequent formal lawsuit, the respondent/defendant may file a claim for compensation for damages arising from the illegal execution of the preliminary injunction order.

9.2 Alternative Dispute Resolution

Methods of alternative dispute resolution are available in Japan, but no mandated methods are applicable to private antitrust claims.

For instance, mediations, particularly civil mediation proceedings before the court, are frequently used as a method of alternative dispute resolution in Japan and could be used for antitrust claims as well. Mediation committee members, as opposed to professional judges, are in charge of handling civil mediation proceedings and facilitating settlement discussions between the parties. Both parties may terminate the proceedings at any time. Once the parties agree to the settlement terms, such terms have the same effect as a final and binding judgment rendered by a court through a formal lawsuit.

Under the Arbitration Act of Japan, a civil dispute that may be resolved by settlement between the parties is arbitrable. A private antitrust dispute is also arbitrable under such law. Japanese courts are expected to enforce an arbitration agreement even for an antitrust dispute. No legislation or court precedents have provided exceptions to such enforcement to date.

10. Funding and Costs

10.1 Litigation Funding

In Japan, there is no legislation prohibiting or specifically restricting litigation funding. Accordingly, a plaintiff may file a private antitrust claim with third-party funding. However, it may be considered as a violation of the Attorneys Act if, in providing litigation funding, a third party who is not qualified as a Japanese attorney (*bengoshi*) provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. The Attorneys Act also prohibits a person from acting

as an intermediary between clients and attorneys for the purpose of obtaining remuneration from matter referrals.

10.2 Costs

Costs are awarded on a limited basis in court judgments. In general, a prevailing party can recover the court costs, which include filing fees and travel expenses and/or a per diem paid to witnesses and interpreters. If it is difficult to determine which is the prevailing party, the court may order both parties to share the burden of the court costs based on certain ratios determined at its sole discretion.

As to attorneys' fees, Japanese courts do not, in principle, grant prevailing parties a right to recover their attorney's fee. However, in cases where a claimant is seeking compensation for damages based on a tortious act, the court is inclined to award approximately 10% of their attorney's fee as part of the damages.

Under Japanese civil proceedings, it is not possible for a party to apply to the court for an order granting security for its costs.

11. Appeals

11.1 Basis of Appeal

A claimant has the right to file an appeal against a district court judgment with a high court having jurisdiction over the case (*koso* appeal). It is also possible to file an appeal against a high court judgment with the Supreme Court (*jokoku* appeal). A *jokoku* appeal to the Supreme Court can be made on limited grounds as stipulated under the Code of Civil Procedure.

The Code of Civil Procedure provides no specific grounds for an appeal to a high court (*koso* appeal) but the grounds could include errors in fact-finding as well as in the application of the law in the judgment. An appeal to the Supreme Court (*jokoku* appeal) can be made on the ground that the high court judgment contains a violation of the Constitution, or on the ground that some of the procedures in the lower court were material illegalities as set forth in the Code of Civil Procedure.

In addition, parties may file a "petition for admission of a *jokoku* appeal" and the Supreme Court may accept the petition if it deems that the case involves an important issue.

Trends and Developments

Contributed by:

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Mori Hamada & Matsumoto (MHM) is one of the largest full-service international law firms headquartered in Tokyo. A significant portion of the firm's work is international in nature, representing clients in cross-border transactions, litigation and other dispute resolution proceedings. MHM has over 600 lawyers, including a number of highly respected practitioners and leaders in the Japanese and international legal community. MHM's antitrust and competition

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Introduction

Like other jurisdictions, there are three categories of antitrust litigations in Japan, namely:

- civil litigations;
- criminal litigations; and
- administrative litigation.

However, unlike other major jurisdictions (ie, the USA, EU and China), Japan traditionally does not have an active antitrust litigation culture. The number of civil antitrust litigations is particularly limited in Japan, most likely because Japan's legal system does not encourage parties to file civil antitrust lawsuits. To be specific, Japan does not have the concepts of class actions and punitive damages, nor does it have discovery procedures. Thus, most violations of the Antimonopoly Act (AMA) are discussed in relation to the administrative enforcement of the AMA by the Japan Fair Trade Commission (JFTC).

The trend, however, is gradually changing. For instance, some eye-opening court judgements in antitrust litigations were delivered in the past few years. Since the judgements attracted broad social attention, potential plaintiffs (ie, parties adversely affected by AMA violations) are now encouraged to use private antitrust litigation as a sound option to solve their concerns. This article will explore this trend in further detail.

Conversely, compared to civil antitrust litigation, criminal and administrative antitrust litigations remain scarce between 2022 and 2023 as well.

This article will provide brief overviews of the foregoing types of antitrust litigations and introduce some recent major cases.

Civil Litigation

Alleged abuse of superior bargaining position in relation to the change of evaluation algorithms

Overview

The first significant recent case the authors will discuss involves an abuse of the superior bargaining position which a major gourmet evaluation platform operator was said to enjoy over restaurant owners (evaluation platform users) when that operator changed its evaluation algorithm (Tokyo District Court judgment promulgated on 16 June 2022).

The defendant, one of the largest gourmet evaluation platform operators in Japan, changed its algorithm for calculating the evaluation score of restaurants. The plaintiff, a Korean-style barbecue chain restaurant owner, sued the defendant for alleged damages for the plaintiff's significant decrease in sales and other related losses resulting from the change to the algorithm. The Tokyo District Court found that the defendant's action of changing the algorithm violated the AMA by abusing its superior bargaining position and awarded more than JPY38 million as compensatory damages to the plaintiff.

Parties' positions and the court's opinion

The plaintiff alleged that the review scores of its chain restaurants were unfairly lowered as a result of the unreasonable change in the defendant's scoring algorithm. One important factor that might support the plaintiff's position was the JFTC's position to the relevant issue. The JFTC published the "Report on the Survey of Transactions on Food and Beverage Portal Websites" on 18 March 2020. According to this report, if a dominant restaurant review website operator arbitrarily sets and operates algorithms to indicate restaurant ranks, search results and review evaluations, and changes the algorithms

without any reasonable basis, and the changes lower a restaurant's ranking and evaluation, then the operator's actions would constitute an abuse of a superior bargaining position.

The court found for the plaintiff, ruling that the changes made to the algorithm were considered an abuse of a superior bargaining position. The court pointed out that the restaurants had no option but to accept disadvantageous requests from the gourmet site operator because the restaurants pay a fee to the defendant in order to continue using the defendant's website. Therefore, this case may be seen as being consistent with the JFTC's position in the 2020 report mentioned above. This court decision is significant because it is the first to find that changes made to algorithms constitute an abuse of a superior bargaining position.

After the judgment was issued, both the plaintiff and the defendant immediately announced that they had filed their respective appeal before the Tokyo High Court. The appeal is ongoing.

Key takeaways

This case is an important lesson for other digital platform operators such as net shopping services, hotel review websites and other platform operators with evaluation contents (ie, unilaterally changing a platformer's evaluation criteria and means of conducting the evaluation may be categorised as an unfair trade practice and, thus, a violation of the AMA under certain conditions). If evaluations are conducted arbitrarily, without reasonable parameters and standards to support the evaluations, the customer's trust in the fair and neutral reputation of businesses could be lost, especially given the social significance of these platforms. This is a concern for regulators when they review whether platform operators are violating the AMA.

On the other hand, platform operators often build their business around their algorithms. This explains the approach of regulators, including the JFTC, to often interfere with businesses if they find platformers to be in violation of the AMA. Speaking of regulators, another important point worth mentioning is that the JFTC submitted a "written opinion on this litigation" to the Tokyo District Court on 16 September 2021, which might result in the court asking the defendant to disclose its algorithm. Legal commentators have pointed out that the submission was a very rare move for the JFTC.

As one final observation, under the AMA, it is sufficient to establish an abuse of a superior bargaining position if one party has relative superiority over the other party. Further, the AMA does not identify the types of abuse. Thus, in reality, many cases hinge on whether or not there is an abuse of a superior bargaining position, and this issue is typically contested in civil litigation. The case described above may usher in an increase in cases where Japanese courts will focus on the existence of an abuse of a superior bargaining position.

Alleged interference with the competitor's transactions, etc, in relation to aftermarket (elimination of the interchangeability of ink cartridges)

Overview

The next significant recent cases the authors will highlight relate to AMA cases concerning the elimination of complementary products through design changes in the main products (Tokyo District Court judgment on 30 September 2021 and Osaka District Court judgment on 2 June 2023).

Tokyo District Court judgment on 30 September 2021

The plaintiffs in this case are manufacturers of interchangeable ink cartridges, while the defendant is a printer and cartridge manufacturer. The plaintiffs sought damages for violations of the AMA due to changes made by the defendant in the design (function) of its printers. The new design cannot detect cartridges manufactured by persons other than the defendant. The Tokyo District Court decided that the defendant's actions were made without justifiable grounds and were likely to impede fair competition and ordered the defendant to pay compensation of approximately JPY15 million.

Parties' positions and the court's opinion

The main issues in the case were:

- whether there was any justification for the design change;
- whether the concept of tie-in sales applies; and
- whether the design change would interfere with a competitor's trade.

The defendant argued that the reason why it changed the design was for the safety of the printer, but the court did not accept such argument based on its fact-finding. At the same time, the court mentioned the printer manufacturers' business model of making a profit mainly through selling cartridges.

When considering "unfair trade practice", actions with "unjust" impediment to fair competition would be a pertinent facet. In this case, the court found that the changes in the design (function) of the printer made it impossible to use interchangeable cartridges in new printers. The court argued that the changes were found to be "unjust" on the basis that the distributors

of interchangeable cartridges would be removed from the market as a result of the change and there exists no justifiable reason, such as a technical necessity, for the change of design (function).

The plaintiffs also filed a petition for injunction under Article 24 of the AMA, which the court dismissed on the ground that there was no risk of serious damage because the plaintiffs could in reality sell new interchangeable cartridges in response to the design (function) changes.

Osaka District Court judgment on 2 June 2023

The plaintiff in this case is a manufacturer of reused ink cartridges, while the defendant is a printer and cartridge manufacturer. The plaintiff sought damages for violations of the AMA due to a change made by the defendant in the design (function) of integrated circuit (IC) chips that ink cartridges will be equipped with. The details of the design (function) change included a specification change which will block the use of the remaining ink data recorded on the IC chips.

The Osaka District Court dismissed the claim that the defendant impeded fair competition by violating the AMA without justifiable grounds.

Parties' positions and the court's opinion

The main issues in the case involved the following:

- whether the concept of tie-in sales applies; and
- whether the design change would interfere with a competitor's trade.

The defendant alleged that users can still use its printers with the plaintiff's reused ink cartridges and the plaintiff can continue to manufacture and sell its reused cartridges. The defendant

also argued that the purpose of the functional change was to prevent cheating.

In conclusion, the court determined that the defendant's conduct does not fall under unfair trade practice under the AMA on the basis that the function of identifying the remaining volume of ink is not a substantial one.

The court also dismissed a petition for injunction under Article 24 of the AMA.

Key takeaways for the two cases

The Tokyo District Court case seems to be the first case which substantially discussed and approved technological tying in litigation.

Another important takeaway is that if a manufacturer produces a product (such as a printer) which requires complementary products (such as ink cartridges), and there exist, in any form, interchangeable products for the main product's complementary products, then the manufacturer of the main product should be conscious that any change to the design (function) or setting of the main product should be reasonable so as not to unjustifiably remove the manufacturers of the interchangeable products from the complementary product market.

The most notable difference between the foregoing two cases is that the court in the second case mainly considered whether the defendant's conduct falls within "making users purchase" its genuine cartridge in terms of tie-in sales and "interfering" with a users' purchase of the plaintiff's cartridges in terms of obstructing a competitor's trade, showing an unfair decision.

These cases are distinctive examples of cases which focused on aftermarket issues.

Administrative Litigation

Lawsuit to annul antitrust sanction of exclusionary private monopolisation

Overview

The case relates to a lawsuit seeking to annul antitrust sanctions imposed on Mainami Aviation Services Co., Ltd. (Mainami), a seller of aviation fuel, for exclusionary private monopolisation, which is an abuse-of-dominance-like conduct in other jurisdictions (Tokyo District Court decision on 10 February 2022).

The JFTC issued a cease and desist order in 2020 and a surcharge payment order in 2021 against Mainami for a violation of Article 3 of the AMA relating to exclusionary private monopolisation in its sale of aviation fuel at Yao Airport in Osaka, when a new entrant, SGC Saga Aviation Co., Ltd (SGC), became a competitor. Mainami notified its customers that:

- it would not bear responsibility for aircraft-related accidents caused by mixing its aviation fuel with that of SGC, making it a condition of sale that customers sign a document confirming they would not seek Mainami's liability for aircraft-related accidents caused by mixing its aviation fuel with that of SGC; and
- it would discontinue fueling their aircrafts if these were refueled by SGC.

The JFTC found that the foregoing actions of Mainami excluded SGC from the sale of aviation fuel business, thereby causing a substantial restraint of competition in the sale of aviation fuel at Yao Airport, contrary to public interest.

Mainami filed a lawsuit in January 2021 for the revocation of JFTC's orders. The Tokyo District Court dismissed the lawsuit.

Parties' positions and the court's opinion

In the lawsuit, Mainami argued that, among other things:

- the alleged conduct was rational and defensive behaviour justifiable as an effort to avoid risks such as civil and criminal liability and reputational damage that may affect Mainami in the case of an accident caused by fuel mixing and, therefore, did not have “artificiality”; and
- there was no exclusionary effect or substantial restraint of competition considering market conditions such as Mainami's market share.

The Tokyo District Court rejected Mainami's arguments. The court denied the justifiability of Mainami's conduct, stating that the avoidance of risks due to possible accidents by fuel mixing was only a pretext because Mainami previously tried to prevent SGC's procurement of aviation fuel from domestic oil distributors and did not have specific information about the quality of aviation fuel sold by SGC.

The court also found that, because of the difference in market share and supply capacity between Mainami and SGC, Mainami is an indispensable supplier for customers and has a competitive advantage over SGC, and the alleged conduct forced consumers to choose between Mainami and SGC. Based on these facts, the court concluded that Mainami's conduct was an exclusionary act with exclusionary effect and found a substantial restraint of competition.

Key takeaways

This lawsuit involved the first case where the JFTC issued a surcharge payment order against exclusionary private monopolisation since the JFTC introduced the system of surcharge pay-

ment orders against violations of the prohibition on exclusionary private monopolisation through the amendment of the AMA in 2009. In accordance with the current position, the court stated that a decision on whether an act constitutes an exclusionary act should be made based on whether or not the act is artificial such that it exceeds the scope of normal means of competition in terms of the creation, maintenance or reinforcement of market power, and has the effect of making it extremely difficult for a competitor to operate its business in the market. In the case of an exclusionary private monopolisation, where the boundaries between legitimate competition and illegal exclusion are not always clear, this criterion continues to be important.

Lawsuits to annul antitrust sanction of abuse of superior bargaining position

Sanyo Marunaka Case (Tokyo High Court decision on 11 December 2020)

In this case, the plaintiff is Sanyo Marunaka Co., Ltd. (Sanyo). The JFTC issued a cease and desist order and a surcharge payment order against Sanyo for the abuse of a superior bargaining position. The allegations covered various acts, such as requiring suppliers to dispatch their employees to Sanyo and to provide monetary contributions when opening new stores, by taking advantage of its position vis-à-vis the suppliers. Sanyo filed a lawsuit to revoke the orders.

The Tokyo High Court ordered the revocation of the orders due to non-compliance with procedure. According to the court, a written order should state in understandable terms what law was applied based on what facts in order to guarantee the order recipient's right to defend itself. The orders in this case did not specify the suppliers who were subject to Sanyo's abuse of superior bargaining position. Hence, the descrip-

tions of the orders were insufficient, leading to a procedural defect.

RALSE Case (Tokyo High Court decision on 3 March 2021)

In this case, the plaintiff is RALSE Company, Ltd (RALSE). The JFTC issued a cease and desist order and a surcharge payment order against RALSE for the abuse of a superior bargaining position. The alleged actions included requiring 88 suppliers to dispatch their employees to RALSE, provide monetary contributions when opening new stores, and purchase suits and business wear upon RALSE's request, by taking advantage of its position vis-à-vis the suppliers. RALSE filed a lawsuit to revoke the orders.

The main issue in this lawsuit was whether RALSE had a superior bargaining position vis-à-vis other suppliers. The Tokyo High Court dismissed the claim of RALSE, saying that RALSE was in a superior position because of the other suppliers' dependence on RALSE for business (more than 10% of total sales) and their transactions with RALSE continued for a period of time. The court also stated that where the violation is committed in relation to at least one counterparty, the violation is deemed to have started in relation to any counterparty, and is deemed to have continued until the violation ceased to be committed against all of the counterparties.

The abuse of a superior bargaining position is a regulation not widely used outside Japan. Although it sounds similar to abuse of dominant position, it is a totally different concept. It is generally considered to mean the imposition of unfair trading terms on weaker parties by those who hold a superior bargaining position. Market power is not necessary to establish a superior bargaining position. Consequently, various acts can constitute abuse of a superior bargaining

position, and the superiority of one's position or the impropriety of one's conduct tends to be contested in court.

Lawsuit seeking to annul antitrust sanctions against violation of Article 8(iii)

In this case (Tokyo High Court decision on 21 January 2021), the plaintiff is the Association of Kanagawa LP Gas (AoK). The JFTC issued a cease and desist order against AoK for violating Article 8(iii) (ie, limiting the present or future number of enterprises in any particular field of business). The JFTC order was based on the allegations that, although it was necessary for any company starting an LP gas business in the Kanagawa Prefecture to join AoK in order to take out a group insurance, AoK rejected applications for membership from companies whose activities include solicitation aiming to persuade customers of competitors to switch gas supplier to them and made such applicants unable to take out AoK's group insurance. AoK filed a lawsuit seeking the revocation of the order.

The Tokyo High Court dismissed the AoK's claim, stating that if a business cannot enter the LP gas market without joining AoK, then restricting the admission of applicants falls under Article 8(iii). In addition, the court found that the admission restrictions were unjustifiable because they were made in order to avoid competition among members.

The AMA mainly prohibits anti-competitive arrangements between entities. However, the AMA also regulates the activities of trade associations such as AoK, and this is a relatively rare case where the application of those regulations was challenged in court.

Lawsuit to annul antitrust sanction of unreasonable restraint of trade

Cardboard Case Price Cartel (Tokyo High Court decision on 16 September 2022)

In this case, the plaintiffs are Rengo Co., Ltd. and TOMOKU CO., LTD. (“Two Companies”), which are manufacturers of cardboard cases. The JFTC found that the Two Companies had agreed to raise the sales price or processing fees of cardboard containers in conspiracy with other three competing companies (together with the Two Companies, “Five Companies”), and ordered a cease and desist order and a surcharge payment order. The Two Companies filed a revocation action against the orders.

The Five Companies held meetings to exchange information on the implementation of price increases for cardboard containers. The issue was whether having these meetings was sufficient to find that the Five Companies had an “agreement” to raise prices. The Tokyo High Court held that the series of discussions among the Five Companies was not limited to the exchange of general information but was aimed at raising prices, and that the discussions were conducted in a way that all participants could share a common understanding, such as by listing the customers subject to the price increase, and that, as a result, negotiations of the price increase progressed after the meetings. It also held that the price increase was realised and the range of the price increase was so consistent with the discussions that it could not be considered coincidental. The court concluded that, given these factors, it could find that an agreement had been reached.

Criminal Sanctions

There were two bid-rigging convictions in 2021. One case involved bid rigging by several major general contractors in relation to the construc-

tion of stations for linear bullet trains, and the other case involved bid rigging by four major pharmaceutical wholesalers of pharmaceutical products. These two cases were pursued in line with the JFTC’s prior announcement that it would file a criminal complaint where:

- the violation is malicious and serious and has a widespread impact on people’s lives; or
- it seems difficult to accomplish the objectives of the AMA by simply imposing administrative penalties, such as in a case where an undertaking continuously infringes the AMA.

In February 2023, the JFTC filed a criminal complaint with the Prosecutor General alleging bid-rigging concerning the outsourcing contracts of planning testing and other events regarding the Olympic and Paralympic Games Tokyo 2020 by the Tokyo Organising Committee of the Olympic and Paralympic Games (the Organising Committee). The complaint was filed against six companies (including Dentsu Group Inc. which runs an advertising business and an event planning and management business), six individuals from these six companies who were involved in helping choose the winning bidders for the said contracts, and one individual in charge of ordering the foregoing outsourcing contracts as an operations executive of the Organising Committee. The JFTC found that, by having meetings at the Organising Committee’s office from around February to July 2018, the seven accused individuals, in conspiracy with other employees who were involved in choosing the winning contract bidders, predetermined the winners of the outsourcing contracts by essentially agreeing that basically only predetermined winners could place a bid. All the accused six companies and seven individuals have been indicted by the Prosecutor’s Office and are currently facing trial.

MEXICO



Law and Practice

Contributed by:

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Aziz & Kaye Business Law offers excellent advice and permanent attention to its partners. Its priority is to add value to companies and their executives, who require top-notch professionals with solid legal knowledge and business focus for decision-making. The firm is focused on strategic work that integrates experienced specialists in corporate, transactional, financial and antitrust law. Its expertise in each of the areas that make up the firm's practice allows it to accurately identify the obstacles and chal-

lenges in the legal and business environment of its clients, in order to generate a practical and efficient alternative that achieves success. The closeness with which it attends to its clients' calls has strengthened and consolidated the firm at a national and international level. Its strategic legal advice model is aimed at all those individuals, companies and/or associations seeking advice and solutions in corporate, transactional, financial and antitrust law.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Given that Mexico adopted the new Antitrust Law 2014, which replaced the previous iteration from 1992, there has been some development in the interpretation and application of the law, by judges and specialised courts.

It is noteworthy that, for the most part, judges and courts choose to grant deference to anti-trust authorities, not going into the merits of the cases, thereby harming the development of anti-trust law and the creation of precedents. In this sense, when there are resolutions favourable to individuals, these are only granted in respect of matters of form and not in terms of substance.

1.2 Other Developments

The authors do not perceive important developments in the Mexican jurisdiction, in part because of the deference that the specialised courts grant to the resolutions of the antitrust authorities. This ultimately stagnates judicial activity.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The legal basis for a claim for damages for breach of competition law is Article 134 of the Federal Economic Competition Law. In Mexico, only when legal remedies have been exhausted to combat the resolutions of the antitrust authorities, is it possible to approach the specialised antitrust courts to claim damages.

In this way, it is important to note that only when a resolution of the antitrust authorities is unappealable, is it possible to initiate a claim for

damages. This means that there are no private shares.

2.2 Specialist Courts

As mentioned in 2.1 **Legal Basis for a Claim**, there are specialised judges and courts and all cases are heard, without exception, by them.

In the event of recusal or excuse, cases are transferred to a different judge or court, but always one that is specialised in antitrust, through an expedited procedure. It is not possible, and therefore there is no procedure, for a non-specialised court or tribunal to hear a case in which the Anti-monopoly Law is applied.

2.3 Decisions of National Competition Authorities

Decisions of national competition authorities are not binding. The function of specialised judges and courts is to control legality and determine whether or not the decisions of the Mexican anti-trust authorities violate the fundamental rights of economic agents. For their part, the anti-trust authorities can intervene; in fact, they are allowed to file collective actions for damages.

2.4 Burden and Standard of Proof

In Mexico, the pass-on defence is regulated in the Federal Civil Code and in the Federal Code of Civil Procedure, which establish that the claimant for damages must prove:

- that the damage he alleges was caused to him;
- that there is a causal link between the wrongful act and the damage; and
- that the damage is directly attributable to the one who was held liable by the antitrust authority.

Thus, the burden of proof lies with the plaintiff and the standard of proof is high.

In Mexico, there have been few cases of claims for damages and, to date, these have not prospered, so no judgments have been issued for damages against those who have violated the antitrust law.

2.5 Direct and Indirect Purchasers

There are no antitrust damages judgments in Mexico. However, both directly and indirectly affected parties – ie, any other person – can file complaints with the antitrust authorities for anti-competitive practices and damages.

The basis for this is Article 134 of the Anti-monopoly Law, which establishes that persons who suffered damages or losses due to anti-competitive conduct may go before specialised courts to defend their rights, until the decisions of the antitrust authorities are final.

The reason why anyone can file complaints is because the legislature considered it important to expand the number of cases, so that, regardless of the influence of the offenders on directly or indirectly affected parties, illegal practices can be denounced, and these do not go uninvestigated.

2.6 Timetable

In the experience of the authors, the processing of a case before the Mexican antitrust authorities, from the filing of the complaint and issuance of the resolution, can take at least three-and-a-half years. A trial before a specialised judge could take an additional two years and the review by the superior specialised court, at least one more year. At least another year is added in a case where a Supreme Court review questions the constitutionality of the Antitrust Law.

In total, a case could take approximately seven-and-a-half years to conclusion. As noted above, Article 134 of the Antitrust Law states that claims for damages may be filed until the decisions of the antitrust authorities are final. It is clarified that the limitation period to claim damages is only two years, from the time the violation of the Anti-monopoly Law is committed; however, this period is suspended from the time the antitrust authorities initiate an investigation, and it resumes when the resolution is unappealable.

There is no possibility for the parties to request the antitrust authorities to suspend the proceedings. On the other hand, taking into account that trials for claims for damages are composed of two instances, one before the district courts and the specialised courts, as well as, where appropriate, the *amparo* lawsuit that is promoted against the judgment of the court, claims for damages may have a duration of at least three years.

3. Class/Collective Actions

3.1 Availability

Class actions are available in Mexico, and a mixed scheme has been chosen: from the outset, collective actions in the strict sense can be taken, as can actions by a homogenous group of individuals with diffuse rights.

On the other hand, class action lawsuits can be filed by any affected party, and if these are a series of direct or indirect buyers, there is no impediment for them to go to the specialised courts to claim the right they believe they have. However, when they are competitors of those responsible for anti-competitive conduct, in the authors' experience, they claim damages without resorting to class action.

3.2 Procedure

A collective action may be brought by a community, such as consumers, or by companies, “economic operators”, who were directly or indirectly affected, namely direct competitors or companies in the value chain.

The Anti-monopoly Law states that “Persons who have suffered damage or harm as a result of a monopolistic practice or an unlawful concentration may bring legal actions in defence of their rights before the specialised courts”.

In addition, the Federal Code of Civil Procedure states that the Federal Consumer Protection Office, the Federal Environmental Protection Office, the National Commission for the Protection and Defence of Users of Financial Services, the Federal Economic Competition Commission and the Federal Telecommunications Institute have standing to bring collective actions in matters of economic competition. The Code states that the person who exercises the common representation must be part of the collectivity made up of at least 30 people; as must the civil associations or their non-profit correlatives, legally constituted, at least one year prior to the time of filing the action, whose corporate purpose includes the promotion or defence of the rights and interests of the matter in question and that comply with the requirements established in the National Code; the Office of the Attorney General of the Republic; and the Federal Institute of Public Defender’s Office.

What must be demonstrated is the direct impact of the violation of the Antitrust Law.

For its part, according to the Federal Code of Civil Procedure, at the certification stage, the judge must determine that the claim complied with the requirements established in that norm

(for example, the precision of the diffuse, collective or homogeneous individual right that is considered affected and the considerations and facts that support the convenience of substantiation by collective means instead of individual action).

Also, during this stage, the judge must analyse whether or not certain legitimization requirements were met, for example: (i) that they are acts that have harmed the consumer due to the existence of anti-competitive conduct based on the resolution issued by the antitrust authorities; (ii) that there is a coincidence between the object of the action brought and the affectation suffered; and (iii) the action is not time-barred.

In the event that the judge considers that these requirements have not been met, he will dismiss the class action.

3.3 Settlement

Judicial participation consists of the processing of the trial and the issuance of a judgment in which, if appropriate, the amount to be paid for damages would be fixed. Likewise, the judicial authority must supervise that, during the procedure, the representation of the community is adequate; that is:

- they act with diligence, expertise and good faith;
- there is no conflict of interest;
- collective action is not promoted for profit, electoral purposes, proselytising, unfair competition or speculative; and
- they have not conducted themselves with incompetence, bad faith or negligence in previous class actions.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

There are no summary trials, although this is a special trial before specialised judges and courts. This trial is known as an *amparo* trial.

The relevant evidence consists of the resolution of the antitrust authority and those contained in the files that gave rise to the trials.

In the experience of the authors, judges, in granting deference to the regulator, often do not accept expert evidence, with which lawyers for economic agents sanctioned for violating the Antitrust Law seek to prove that the analysis of the antitrust authorities is not correct. However, in the second instance, the courts have ordered judges to admit expert evidence in order to analyse whether the decisions of the antitrust authorities are constitutional or not.

In most cases, specialised judges and courts usually confirm the merits of the decisions of the antitrust authorities, and only grant in favour of economic agents, reductions in considerations on the amount of damage caused, and fines.

4.2 Jurisdiction/Applicable Law

In Mexico, there is only one antitrust law, which addresses concentrations (M&A), anti-competitive practices (abuses of dominance and cartel activity), investigations to determine the existence of essential inputs and barriers to competition, as well as conditions of effective competition. Also, to issue opinions on cross-participation and to participate in public tenders.

According to the Mexican Constitution, the only means of defence against the Anti-monopoly Law and the acts of the antitrust authorities is

that provided for in the *amparo* law, through *amparo* proceedings before specialised judges and courts.

4.3 Limitation Periods

Antitrust authorities have ten years to initiate an investigation of an anti-competitive practice, counted from the date the practice was committed or ceased.

On the other hand, to initiate a claim for damages, there is a period of two years from when the damage was caused, or from when the affected party became aware of the existence of the damage.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In the Mexican Antitrust Law, there are no discovery procedures, however, in the experience of the authors, the competition authorities, informally, have initiated information requests with the characteristics of a discovery.

The attempts of the antitrust authorities to carry out discovery proceedings have not borne fruit, since the law firms of the economic agents have successfully exercised the defence that discovery does not exist in Mexican law.

5.2 Legal Professional Privilege

In Mexico, information on the human right to confidentiality of communications and the client-attorney privilege can be withheld. Both are provided for in Article 16 of the Mexican Constitution.

However, one of the two competition authorities, specifically the Federal Economic Competition Commission, has issued provisions that

seek to regulate this human right. These provisions establish a procedure through which it is determined whether certain documents that are requested, or that were obtained during a verification visit, are indeed protected by professional secrecy.

This regulation has not been challenged in the constitutional courts and it is pending that the Supreme Court of Justice of the Nation determine whether that authority has the power to issue the regulation.

5.3 Leniency Materials/Settlement Agreements

Leniency and/or settlement agreements are protected in the Antitrust Law and in the guidelines and regulations that the antitrust authorities have issued. However, in the experience of the authors, there have been situations, especially when other authorities such as prosecutors' offices are responsible for investigating the commission of crimes or those responsible for combating corruption, in which the identity of leniency agreements has been revealed. Therefore, antitrust authorities should be pressured to properly safeguard the information of those seeking immunity, when they provide information to other authorities.

However, the accreditation of crimes for violating the Antitrust Law, under Mexican law, requires a higher standard of proof than that required to prove a violation of the Antitrust Law.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

There are witness testimonies in Mexico which, except in the case of authorities, are oral. These testimonies are subject to cross-examination. If

someone refuses to testify, without reasonable cause, they may be fined or even subject to administrative arrest.

While there are certain parameters for factual witnesses to be considered reliable, it is generally necessary for testimony to be bolstered by the existence of other evidence in order for factual witnesses to support liability for antitrust violations.

6.2 Expert Evidence

In the experience of the authors, although the Antitrust Law allows the offering of expert evidence, in 99% of cases, the Mexican antitrust authorities do not validate expert testimony. These testimonies are submitted in writing and in response to questions from companies and antitrust authority prosecutors.

In court, experts only must prove that they are experts in the field, who present their testimonies separately and there are no alternative methods for expert evidence.

7. Damages

7.1 Assessment of Damages

In Mexico, there are no judgments for damages, either in individual actions or in class actions. In addition to the above, exemplary or punitive damages are not available in current Mexican laws.

However, in civil matters, there is at least one precedent in which the Supreme Court of Justice of the Nation condemned a company with the payment of punitive damages, so there is the possibility that in antitrust matters this criterion of the Supreme Court is applied as an excep-

tional measure in those cases that are considered particularly harmful.

7.2 “Passing-On” Defences

The pass-on defence is not available in Mexican law, nor is it known what the criteria of the courts are, since in Mexico, no judgments have been issued for damages derived from violations of the Antitrust Law.

7.3 Interest

Mexican laws do not provide for the payment of interest, nor is it known what the criteria of the courts are, since in Mexico, there have been no judgments for damages derived from violations of the Antitrust Law.

However, the authors believe that there is a possibility that the amounts for damages that have been generated must be updated due to the passage of time, in order to bring to present value the damages that the anti-competitive conduct has generated.

8. Liability and Contribution

8.1 Joint and Several Liability

Liability is not solidary. It is interesting to note that in the case of the liability of applicants for immunity, this is only reduced by the fine and criminal immunity, however, immunity does not prevent its applicants from being sued for damages, nor is any type of discount applied to this amount, on the grounds that the offender has been granted immunity.

8.2 Contribution

There is no procedure in Mexican law for bringing contribution proceedings against a third party, nor is it known what the criteria of the courts are,

since in Mexico there have been no judgments for damages for violations of the Antitrust Law.

9. Other Remedies

9.1 Injunctions

The Anti-monopoly and Regulation of One of the Anti-monopoly Authorities Act does provide for precautionary measures during the investigation.

In the judicial procedure for claiming damages, provision is made for precautionary attachment, the seizure of property and conditions necessary to preserve the cause of requesting and to ensure the effective execution of the judgment, provided that things remain in the state in which they are on the date of service of the order, the public order and interest or that of third parties are not affected, and rights are not constituted in favour of the applicant, equivalent to those that would be obtained, in the case of obtaining a favourable final judgment. This includes, in addition to the debtor, those who have the quality of partners and administrators of other people's assets.

9.2 Alternative Dispute Resolution

The authors are not aware of alternative methods to resolve disputes for damages, however, there are authors who point out the possibility of resorting to arbitration.

In no way will alternative methods of dispute resolution be considered as mandatory when deriving from a non-contractual liability, that is, for the violation of antitrust law.

10. Funding and Costs

10.1 Litigation Funding

There is no litigation funding in Mexican law. In any case, in certain cases, the payment of expenses and costs may be requested from the party who lost the trial for claim for damages.

10.2 Costs

Whether the payment of costs can be awarded will be determined in the respective judgment so that the need to guarantee expenses and costs is not foreseen. The amount of costs can be determined based on the fee established by law, or based on the fees that the prevailing party has paid to its attorneys during the trial of claim for damages.

11. Appeals

11.1 Basis of Appeal

In effect, the claim of the resolutions of the anti-trust authorities is made through the *amparo* trial before specialised judges and courts (appeal through review appeal).

On the other hand, appeals for damages are heard by appellate courts, which will only determine whether the respective judgment adequately analysed the existence of the damage, the causal link between the violation of the antitrust law and, if so, whether the amount of the sentence was properly determined. Subsequently, the parties have the possibility of challenging this decision via *amparo* proceedings, so that a higher court may analyse the constitutionality of the appeal resolution, an *amparo* trial that, under certain conditions, may be heard by the Supreme Court of Justice of the Nation.

Trends and Developments

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Galicia Abogados, S.C. is a firm with more than 29 years of experience. Renowned for its specialised knowledge in financial, energy and infrastructure, private equity, regulated industries, real estate and hospitality, and life sciences, it is the only Mexican leading firm able to provide its clients a unique service offering that includes strong transactional and regulatory expertise coupled with strategic capabilities in litigation

and ESG. Sustainability is at the top of Galicia Abogados's agenda when it comes to advising clients. Diversity, equity and inclusion (DEI) and pro bono work are part of Galicia's core values. The firm's DEI-driven culture has positioned +38% of women in leading positions (partner, counsel, executive and management) over the last five years.

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MEXICO TRENDS AND DEVELOPMENTS

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Introduction

Due to political conjuncture and several events in Mexico, antitrust litigation has been constantly on the rise, and this trend promises to continue in the near future. Although a number of events or factors may be responsible for the trend, two specific items seem to be the cornerstones of the situation.

First and foremost, the ruling party's majority in both Mexican federal and local congresses has resulted in a general, overall alignment in terms of public policy at the executive and legislative level, and to a certain extent, at the current leadership of the federal judiciary. Such majority has been favouring the return of state-owned monopolies, primarily in the energy sector, a centralisation of faculties and powers in state ministries, and a preference for national champions. In addition, and after years of impasses between the executive and such authorities, new Commissioners have been appointed by the current executive, which, considering their decisions thus far, seem keen on preserving the independence of the Commission, even if this may put them at odds with the Federal Executive's policies.

The second item of relevance is a thorough mistrust of (if not outright opposition to) the work made by constitutional autonomous bodies, including the Mexican Federal Telecommunications Institute (IFT), and currently, to a lesser extent, the Mexican Federal Economic Competition Commission (COFECE). The result of such distrust has had a dual effect.

First, the creation of strong incentives for both of these authorities to be perceived as tough and efficient, and therefore the rise of verification proceedings in merger control filings as well as a more thorough scrutiny in the overall spectre

of matters brought to their attention. Second, and due to lack of clarity as to the limits of powers and competences between each of these authorities, a constant, on-going battle at courts (with its corresponding collateral damage to filing parties) between COFECE and the IFT. This in order not only to ascertain their relevance in Mexico but also, to see which authority holds competence to review cases in several market segments, particularly, in the digital arena.

Other factors may account for the rise of litigation in antitrust matters, including (i) lack of transparency or clarity in the decisions from the agencies; and (ii) lack of judicial precedents that may orient parties and rein in broad interpretations of authorities under applicable laws.

With this in mind, what follows is a short summary of some of the most important developments in antitrust litigation.

Litigation in the Retail Market Segment

In 2015, the second- and third-largest grocery store chains in Mexico filed a merger control notice by means of which the second player would acquire 159 stores from the third one. Although such purchase would merely provide the second with sufficient volume to effectively compete against the first, COFECE conditioned the transaction and requested the divestment of 27 stores, after having analysed about 160 different local, geographical markets. About half of these 27 stores were excluded from the transaction, and the remaining stores were subject to one of the first, thorough divestment programmes (and perhaps the last one) of COFECE to date.

This divestment programme was divided into three stages, where the purchaser was allowed to carry out the divestment on its own during

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the first phase, and required the participation of a divestment trustee for the second and third stages. For the third stage, a fire sale was required. COFECE developed this programme primarily on its own and required that per each possible divestment, the parties to the relevant transaction submitted a merger control notice before being able to divest the relevant stores. Incidentally, such notices stopped the clock for the divestment of stores and the progression of the divestment programme. This, in addition to lack of clarity and content in later stages of the programme (particularly the third one) resulted in the administration of a divestment programme that lasted about six years to end, with the following figures:

- 21 interested parties;
- ten different merger control filings, where only two of them were approved;
- more than eight constitutional (*amparo*) claims were filed only by the divesting party before specialised competition courts, along with incidental/review processes; and
- six stores were materially impossible to divest, causing COFECE to issue its official acknowledgment of the impossibility for the divesting party to comply with requested remedies, even by means of a fire sale, and the ability for the divesting party to keep such stores.

Although many causes may have contributed to these results, litigation ensued due to this divestment programme left valuable lessons for the future of antitrust in Mexico. Key points from these claims are summarised below.

Concurrence of claimants

Specialised courts determined that it was not necessary for both parties to a merger control notice to be a party to a constitutional (*amp-*

aro) claim in order for it to be admissible. The courts acknowledged that parties to an antitrust proceeding might have different motivations and suffer distinct violations of their rights, so concurrence of involved parties in the relevant proceeding before antitrust authorities was not required for purposes of having access to a constitutional (*amparo*) claim.

Long-term leases

Specialised courts acknowledged that long-term leases might be considered forms of complying with divestment programmes insofar as COFECE did not expressly excluded them. Parties to such a proceeding claimed that since COFECE had historically analysed long-term lease agreements as subject to merger control filing analysis, it must follow that they were also a valid form of divestment. The point was particularly evident since the divestment programme included stores that were not owned by either the purchaser or the seller.

Informing risks associated with a transaction

Specialised courts had historically stated that due to jurisprudence issued in connection with Amparo Law, constitutional claims were not admissible against actions or notices from competition authorities that did not result in a final determination that would effectively endanger or affect the claimant. However, claims in the context of the divestment programme made it possible to consider that the nature of some acts of antitrust authorities, even though not final, were sufficiently determinant in nature to affect the entire process. One of those acts was precisely the need of antitrust authorities informing thoroughly on competition risks associated with their transaction, and on a written basis. Otherwise, the courts reasoned that the parties would have insufficient tools to address antitrust concerns and thus, affect the overall merger control pro-

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cess. This particular resolution seems to not only have opened the door for other potential claims in the near future, but also, changed the way in which COFECE at least has been informing parties of competition risks associated with their transaction.

Prevention of execution of resolutions

At one point in time, the divestment programme offered an interesting dilemma. Parties to at least one of the divestment transactions were involved in a constitutional claim against COFECE due to a challenge issued in respect of their transaction. In the meantime, the divestment trustee was reaching its limit for divesting pending stores under the second stage of the process, and required to start preparing for a fire sale. If the fire sale was carried out and the constitutional claim ended up being solved in favour of the parties, it would have been materially impossible for the parties to close their transaction, as other parties may have already acquired the stores during the fire sale. Therefore, the divesting party made another constitutional claim in order to prevent the divestment programme from advancing to the third phase until litigation had definitively concluded.

Article 28 of the Mexican Constitution prevents parties from requesting any kind of suspension under an *amparo* claim, but generally, does state that the execution of fines and sanctions is prevented until after *amparo* claims are ended. Considering such text, the parties made important efforts for specialised courts to confirm that the application of the fire sale, in light of existing litigation, would effectively undermine and prevent the parties from defending their rights, and thus, needed to prevent its execution.

Although the parties were not successful in preventing the fire sale at such point in time, some

of the magistrates in specialised courts did elaborate on their decision, stating that the referred prevention was requested on a pre-emptive basis, without any conclusive evidence that the fire sale would be executed before a decision pertaining the *amparo* claim had been reached. This effectively opened a door to future claims where the scope of the constitutional prohibition to prevent the execution of decisions of antitrust authorities might be questioned.

Unfortunately, several other items that were brought forward under constitutional claims by means of the divestment programme did not have a conclusive result. For instance, once the fire sale was in the process of being executed, the divesting party requested again the prevention of its execution, only to withdraw such claim later in the process after being informed by the divestment trustee that the fire sale did not have any interested participants registered in the upcoming process.

In the end, and as referenced, the divestment programme was recently acknowledged by COFECE as impossible to carry out, allowing the divesting party to keep the remaining stores. Notwithstanding, the effects of the original resolution and its market analysis have continued to cause ripples, sometimes contradictory in nature, in the competition analysis of the retail market segment, particularly where grocery chain stores are concerned.

For example, in 2019, COFECE blocked the merger between the alleged biggest market player in the grocery store segment in Mexico and a tech company that provides logistical services for at-home delivery of grocery store products. COFECE argued that the transaction was blocked because, among others, market power allegedly held by the grocery store player would

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cause the exit of other competitors from the digital application held by the tech company, create incentives for misuse of information from other competitors, or deny using other platforms from other tech companies for the provision of such delivery services.

Such result seems contradictory in nature from prior precedents involving the divestment programme. This, since COFECE resolved in many of its prior cases that online grocery shopping was minimal in Mexico, and construed a market analysis that prevented the consideration that all brick-and-mortar stores competed against each other, even in close proximity, due to a segmentation of the relevant market considering types of stores and specific, applicable geographical markets.

Although the tech company was eventually sold to another party where no further analysis was apparently required, the existence of such narrow (and contradictory), precedents and market analyses will no doubt give rise to ample opportunities for parties to continue to challenge resolutions that come (or are related) to the retail market segment. This in addition to the present challenges of the digital economy, as seen below.

Another example is a recent case related to sale of necessary goods and services, in this case, an alleged price fixing of such items, which seems to disregard the referenced precedents.

Indeed, and based on a recent case file, two supermarket chain stores were considered to have colluded with several tortilla distributors due to an alleged price-fixing scheme in a municipality in Mexico.

Arguments aside referring to whether the price-fixing scheme existed or not and whether it was encouraged or structured by local authorities due to political reasons, the fact of the matter is that COFECE considered that supermarket chains are considered competitors of local distributors and small shop owners, which was precisely one of the major points that was not acceptable in referenced prior precedents due to an established segmentation between types of businesses and stores.

COFECE's decision in this case is currently being challenged in specialised, federal courts due to this evident contradiction in its market analysis, as well as for other relevant arguments including the temporary disqualification of the stores' supervisors since they were considered accessories to the conspiracy. Disqualification of personnel of companies which have been considered a party to price-fixing schemes has also been on the rise, where the labour effects of such actions are not clear since disqualifications by antitrust authorities, even if only temporary, are not in principle considered valid grounds under Mexican labour laws to legitimately terminate employment.

The Fight for the Digital Economy

The struggle to determine the relevant competition authority to analyse antitrust matters in the digital economy continues.

During the last four years, judgements of specialised courts have been changing, favouring one agency or the other, making it extremely complicated to identify which will be the agency in charge of reviewing a particular transaction.

The most recent judgements of specialised courts seem to imply that the use of internet is the key element to settle the jurisdiction in favour

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of the IFT. However, it would seem that such element is not sufficient to properly classify a case under the scope of the telecoms or broadcasting segment, particularly if considering that in the near future, almost all businesses will have an online presence in one way or the other. Should this trend continue, it would be expected that COFECE will gradually diminish in its participation of antitrust matters in favour of the IFT.

In any event, practitioners and filing parties should continue to account for possible jurisdictional conflicts and burdensome filings considering that, in case of doubt, filings or processes before both COFECE and IFT will be required.

Litigation in the Power Sector

For more than two years, the Federal Government has issued several rules and regulations as well as amendments with the sole purpose of benefiting the state-owned companies, *Petróleos Mexicanos* (PEMEX) and *Comisión Federal de Electricidad* (CFE), in the oil and gas and electricity industries, respectively.

Although the content of such rules and regulations, as well as amendments, are varied, the constant element that these share is their outright disregard for competition matters and policy in Mexico. In light of this, dozens of *amparo* claims have been filed in specialised antitrust courts for purposes of avoiding private parties, from generators or producers, to industrial end-consumers, from being left out of the energy industry in Mexico, or otherwise, from being forced in one way or the other to accept PEMEX or CFE as their almost exclusive supplier.

The political rhetoric behind such actions is well known currently across the globe; ie, national security and sovereignty, unfair foreign investment, corruption, to name a few. However, such

arguments have not yet had the desired effect in specialised courts, where several *amparo* claims have been successful in seeking to stop such trend and where antitrust arguments have been one of the most important elements in convincing the courts of the inapplicability of such acts. Among such arguments, undue displacement of competitors, lack of access to better sources of power, discriminatory access to essential inputs and facilities, are commonly referred in all *amparo* claims.

Since the Federal Government has not shown any sign of stopping its efforts to reinstate the monopoly of state-owned enterprises in the energy sector, even after failing to obtain the necessary votes to amend the constitution for such purposes, it is to be expected that antitrust litigation in energy matters will continue to thrive.

In this regard, practitioners should note that both the United States of America and Canada have already started relevant proceedings under the United States-Mexico-Canada Agreement due to the Federal Government's alleged lack of compliance with such treaty in the energy sector. Since the treaty holds a specific article related to competition policy and its enforcement, it is also to be expected that competition matters in such proceedings will be analysed.

Other Relevant Matters

The aforementioned matters are not the only ones driving the agenda of litigation in antitrust in Mexico.

For example, and following trends in the labour sector, COFECE fined 17 football clubs and eight individuals for fixing caps for salaries of football players, which was also considered to broaden concerns about gender salary gaps. Furthermore, fines were also issued due to practices

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preventing the free trade of football players, and indirectly, labour rights of these in negotiating their salaries and permanence or change between football clubs. The arguments used in such case by COFECE may start a trend in reviewing non-solicitation covenants in the context of possible mergers, as well as in other processes, to ensure free-trade provisions in labour market segments. Furthermore, this may also start a trend in litigation matters, since a clash between labour non-compete clauses is expected. Although such provisions are acceptable in civil and commercial matters, competition laws in Mexico may, in essence, prohibit such covenants.

On this note, COFECE is also currently on a streak of sanctions against cartel participants which include the temporary disqualification of managers, supervisors and directors that they considered to have participated in the cartel from their appointments or offices. This has resulted in several litigation cases that question the constitutional grounds of such sanctions, including labour laws and principles. At the date of this publication, there has only been one single precedent where a judge has granted a permanent suspension against any such disqualification until the entire case under litigation is solved, and which is expected to be revisited in a second-tier review by an appellate body of magistrates.

In other matters, and as referenced, COFECE struggled with the lack of ratification of missing Commissioners to solve relevant cases and ensuing litigation. In 2018, COFECE started an investigation due to possible barriers to competition and/or essential inputs in card payment systems (clearinghouses). Although COFECE's Investigative Authority has already concluded that there are barriers to competition in such market segment, and trial-like proceedings have already occurred, the Board of Commissioners of COFECE had been prevented from solving the case due to lack of quorum.

To address this, COFECE made a claim against the Federal Executive for lack of designation of missing members of the Board, but also, issued a general suspension notice, which prevented parties to such case from receiving a final resolution. The parties involved sought for specialised courts to declare the illegality of such general suspension and force COFECE to declare its closing, since the statute of limitations for issuing its resolution had already elapsed. Even though the missing Commissioners have been appointed and the case has been finally solved, such claims are still under analysis by specialised courts.

NORWAY

Law and Practice

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1. Overview

1.1 Recent Developments in Antitrust Litigation

In line with international developments, the awareness of and willingness to pursue potential damages claims has also clearly increased in Norway, although the number of cases is still limited. Following competition investigations, potential claimants are regularly approached by Norwegian and international law firms eager to take on the case. However, the EU Antitrust Damages Directive (2014/104) is not implemented in Norway. Although Norwegian courts are placing considerable weight on EU and European Economic Area (EEA) law, Norway's national law on damages still seems to prevail in the field of antitrust follow-on claims, firmly placing the burden of proof for any loss on the claimant.

Although most of the follow-on claims against the so-called truck cartel following the European Commission's (EC) decision(s) seem to be before courts in the usual major jurisdictions and in Spain, a couple of major truck purchasers have decided to try their luck before Norwegian courts. The judgment in the case brought by the Norwegian postal service and group companies ("Posten") against Volvo Group, DAF Trucks, Daimler AG, Iveco and MAN Truck & Bus is the first of its kind and, as such, is the leading case

in Norwegian antitrust litigation. The original equipment manufacturers (OEMs) were acquitted of all claims in the first instance in February 2023. The case is now under appeal, and the court of appeal is expected to render its decision by the end of 2024 or in early 2025.

During 2023, the Supreme Court has also ruled on the ability to fund class actions through external funding (in a case relating to alarm services). The Supreme Court confirmed that the Dispute Act does not allow for the costs of external litigation funding – in an opt-out lawsuit – to be (indirectly) covered by the class members through a reduction in any compensation awarded.

1.2 Other Developments

There are a couple of follow-on litigation cases related to airfreight and trucks that are currently stayed before the district court in Norway, pending outcome in the ongoing infringement proceedings before the ECJ.

In 2020, the Norwegian Competition Authority (NCA) issued a statement of objections to the three grocery chains in Norway (NorgesGruppen, Coop Norge and Rema 1000), notifying that it is considering imposing fines totalling NOK21 billion. The NCA believe that the three grocery chains have co-operated illegally by using so-called price-hunting practices, allowing

each other's employees to access stores with a view to scan shelf prices. The NCA's decision is expected during 2023. In the event that the NCA concludes and issues an infringement decision, it is probable that several entities will carefully assess the potential for damages claims. Depending on its outcome, the case may generate considerable interest for stakeholders in pursuing follow-on claims against the grocery chains.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The EU Antitrust Damages Directive (2014/104) is not implemented in Norway, and the Norwegian Competition Act does not contain provisions regulating the legal basis for a claim. Therefore, any claim due to a breach of competition rules must be based on non-statutory general tort principles (ie, culpa and dolus).

2.2 Specialist Courts

The courts in Norway are generalist courts that hear all types of cases, both civil and criminal. There are no specialist competition courts or specialist competition judges within the generalist courts.

The Norwegian courts are organised in a three-tier system. The initial level comprises 23 district courts. Decisions from the district courts can be appealed to one of the six appeal courts. Judgments from the appeal courts can be appealed to the Supreme Court.

Any claim for damages due to an antitrust infringement must be filed to the competent district court (or, under certain circumstances, the local conciliation board). Unless a competent district court can be derived directly from the

Dispute Act, Oslo District Court is the competent court in international damages cases.

2.3 Decisions of National Competition Authorities

Decisions from the NCA are not formally binding on the court. The same applies to decisions of the national competition authorities in other jurisdictions.

There is no general principle that decisions from governmental bodies or authorities are binding upon Norwegian courts, and, as mentioned in 2.1 **Legal Basis for a Claim**, the EU Antitrust Damages Directive does not apply in Norway.

However, a final decision by a competent governmental body will normally be considered strong evidence. Further, the principle of harmonisation within the EU legal system implies that Norwegian courts shall assume that decisions from EU courts are correct unless they are dismissed due to ordre public (public policy), etc.

2.4 Burden and Standard of Proof

Under general Norwegian tort principles, the burden of proof is on the claimant. Oslo District Court recently stated (trucks cartel case) that in antitrust follow-on damages cases as well, the burden of proof rests firmly on the claimant. As mentioned, the case is under appeal and the extent of the claimant's burden of proof is one of the legal questions under appeal.

As the EU Antitrust Damages Directive (2014/104) is not implemented in Norway, the question of pass-on defence is not governed by any statutory provisions, and no case law from Norwegian courts has dealt with this question specifically in relation to antitrust litigation yet.

2.5 Direct and Indirect Purchasers

Claims can be brought both by direct and indirect purchasers. The basis for a claim is the same as mentioned in **2.1 Legal Basis for a Claim**; ie, general tort principles (*culpa*). The claimant must thus substantiate an economic loss.

2.6 Timetable

Duration of Proceedings

In principle, the main hearing in civil cases shall be scheduled no more than six months after receipt of the statement of claim, unless special circumstances necessitate this. However, high-value and complex factual/legal disputes often exceed this timeframe.

As there are few antitrust cases of significance so far in Norway, and each of them have progressed over varying timeframes, it is difficult to give a general timeframe for antitrust proceedings. The status of select current antitrust cases are as follows:

- the air cargo case – the statement of claim was filed in 2012 and proceedings are currently stayed, pending an appeal to the ECJ;
- *Posten v OEMs* (trucks cartel) – after the statement of claim was filed in 2017, the case saw a decision from first instance at district court and is now pending appeal proceedings in 2024; and
- *Tine v OEMs* (trucks cartel) – the statement of claim was filed in 2019 and proceedings are currently stayed, pending an appeal to the ECJ.

Stay

Parties can apply for an order to stay proceedings. The preparatory judge can also hand down a stay order *ex officio*.

According to the Dispute Act, the court has wide discretionary power to stay proceedings. Relevant factors in this assessment are the legal costs involved and the consideration to avoid contradictory decisions from different courts (eg, different judgments in national courts compared to EU courts).

3. Class/Collective Actions

3.1 Availability

The possibility of class actions was introduced in Norway in 2008 through Chapter 35 of the Dispute Act. The conditions for class actions are that:

- several legal entities have a claim or obligation based on the same or substantially the same factual and legal basis;
- the claims can be decided by the court according to the same procedural rules;
- the class action is the most suitable way of handling the case; and
- it is possible to designate a group representative according to regulations in the Dispute Act Section 35-9, whereby the group representative will be responsible for case costs.

There is the possibility for both opt-in and opt-out variations of a class action. Although the possibility for class actions has existed for 15 years now, there have not been many class action cases in Norway.

A class action can be brought on behalf of both indirect and direct purchasers.

3.2 Procedure

The group representative can bring a class action. After receipt of the statement of claim, the court will initiate a certification process to

make sure that the class action fulfills the criteria as mentioned in **3.1 Availability**. If the claimant (group representative) fails to demonstrate that the criteria is fulfilled, the case will be dismissed by the court (an example of this is the recent case related to alarm services that is referred to in **1.1 Recent Developments in Antitrust Litigation**).

3.3 Settlement

There is no judicial oversight or involvement in the settlement of collective actions.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Strike-out judgments are not available in Norway. Summary judgments can only be granted at the district court stage if the claim or the defence is clearly unfounded in all respects. This is a high threshold and thus summary judgments are rare.

4.2 Jurisdiction/Applicable Law

Norway is not a member state of the EU but has adopted the 2007 Lugano Convention, which regulates whether a Norwegian court has jurisdiction in a private competition case involving persons or entities domiciled in the EU/EEA. The Lugano Convention mirrors the Brussels regime in the EEA.

Outside the scope of the Lugano Convention, disputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway. Whether a strong connection can be established is evaluated on a case-by-case basis.

The starting point is initiating legal action in the state where the defendant resides or has its seat. Thus, claims against persons or entities domiciled in Norway can be brought before Norwegian courts unless, for example, the parties have agreed in writing to another legal venue or the claim is subject to arbitration.

Foreign claimants (domiciled outside of the EU/EEA) may, if requested by the defendant, be compelled to provide security for the defendants' legal costs before the case preparation can proceed (eg, by deposit or bank guarantee). If the claimant fails to provide security, the case will be dismissed.

Under Norwegian private law, choice of law is assessed on the basis of the so-called Irma Mignon formula, established by case law of the Supreme Court in 1923 and onwards. According to the formula, choice of law shall be determined on the basis of which jurisdiction the dispute has the strongest connection to.

The Rome I Regulation on choice of law within the EU/EEA is not implemented in Norway, but the Supreme Court has, in recent cases, put significant weight on the regulation due to the desire for uniform practice and predictability within the EEA.

4.3 Limitation Periods

According to the Norwegian Limitation Act, as a starting point, claims are time-barred three years after the infringement ceased.

However, a separate deadline of one year applies from the time the injured party gains sufficient knowledge of the damage occurred and can pursue the claim via legal action. As an example, claims based on an infringement which ceased January 2015 will, according to the main rule, be

time-barred as of January 2018. However, if the claimant first gains sufficient knowledge of the claim in January 2020, the additional/extended limitation period will commence, meaning that legal action must be initiated within one year from the time of knowledge (ie, by January 2021).

The Norwegian Competition Act also prescribes a special limitation period for competition law infringements, independent of the general rules in the Limitation Act. According to Article 34 of the Competition Act, an additional extension of the limitation period is granted for within one year of a final decision from a competition authority or court, even if the claim is already time-barred.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Disclosure During Proceedings

The parties shall, as a main rule, provide such accounts and present such evidence as are necessary to fulfil their duties according to the Dispute Act. They also have a duty to give testimony and access to evidence. A party shall also disclose the existence of important evidence that is not in the party's possession and of which the party has no reason to believe that the opposite party is aware.

Under Norwegian law, a petition for access to evidence must fulfil requirements of relevance, specification and proportionality; ie, the requested documents must be relevant to the case at hand, the petition must sufficiently specify the documents/information requested, and the petition must not require documents/information to an extent that is disproportionate to the documents/information that comply with the request. Norwegian law does not open for wider informa-

tion requests like the US/UK rules on discovery/disclosure.

Normally, petitions for access to evidence are made by informal "provocations" set forth in pleadings by either party. If the counterparty does not comply, the court shall state by formal decision whether the party must present the requested evidence.

Seizure of Potential Evidence Before a Lawsuit is Filed (Pre-action)

Chapter 28 of the Norwegian Dispute Act provides the possibility for the legal questioning of parties/witnesses and seizure of evidence prior to a potential court case.

Seizure of evidence can take place when the evidence may be important in a dispute where the person presenting the petition may become a party (and/or party assistant) and there is a risk that the evidence may be lost or significantly weakened, or if, for other reasons, it is particularly important to get access to the evidence before proceedings are instituted.

The main rule is that the opposing party must initially be given the opportunity to make a statement before the court makes its decision on the securing of evidence. Also, the defendant has the right to be present during the execution of the seizure order.

However, if there is reason to fear that notification to the other party may prevent the evidence from being secured, the court may allow evidence to be secured before the other party is notified (dawn raid).

5.2 Legal Professional Privilege

Communication between lawyers and their clients is subject to legal privilege. This also

extends to in-house counsel and foreign lawyers.

According to the Norwegian Supreme Court's practice, everything a lawyer obtains or gains access to on behalf of a client as part of a client relationship is subject to legal privilege. This also covers the existence of a client relationship, the client's identity and other information that can directly or indirectly provide the basis for conclusions about the contact a lawyer has or has had with a client and others in connection with the assignment.

Communication with expert witnesses (ie, economic experts) engaged by legal counsel in the context of litigation is also protected by legal privilege.

5.3 Leniency Materials/Settlement Agreements

Protection from disclosure for leniency and settlement agreements with the Norwegian Competition Authority is not clearly regulated in statutory law, nor has this question been explicitly addressed in the case law of Norwegian courts thus far. However, based on the relevant legal sources available, it is highly likely that leniency and settlement agreements with the national competition authority would be protected from disclosure.

However, Borgarting Court of Appeal stated in a 2020 procedural decision from the trucks cartel case (*Posten v OEMs*) that leniency and settlement information from the EU Commission could be withheld and/or redacted by the defendants based on EU law.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Norwegian courts are free in their assessment of evidence, which, in theory, means that witness testimonies can be given great or decisive importance in a case. However, in practice and according to Supreme Court case law, courts in civil cases often rely on written documents from the time before the dispute occurred if these contradict later witness testimonies.

In commercial proceedings, witness testimonies are often a supplementary form of evidence that elaborates on the documentary evidence presented.

The main rule is that witnesses give their statements orally, but written statements can be filed if all parties consent. Witnesses giving oral statements are subject to cross-examination.

As a starting point, everyone has a duty to give witness testimony if so requested, and witnesses can be compelled to give evidence. However, a witness does not have a duty to give evidence regarding information that is subject to legal privilege, trade secrets, sensitive personal information outside the scope of the proceedings, etc.

6.2 Expert Evidence

The Dispute Act gives the possibility for party-appointed expert witnesses as well as court-appointed ones. The parties do not need the court's permission to present expert witnesses and expert reports.

All expert witnesses are subject to cross-examination unless this right is waived by the opposing party. According to the Dispute Act, expert witnesses are heard sequentially and have the

possibility to ask questions to other expert witnesses. In principle, the presiding judge has the discretionary power to adopt alternative methods (“hot-tubbing”, etc), but this is seldom used in practice.

7. Damages

7.1 Assessment of Damages

Norwegian damages law prescribes that the claimant shall be awarded its actual financial loss. Punitive damages are not recognised in Norway.

7.2 “Passing-On” Defences

Since the claimant can only be awarded its actual financial loss, any passing on of the damages incurred to third parties shall be reduced from the awarded amount. The pass-on defence is thus available under Norwegian damages law.

7.3 Interest

Depending on the circumstances of the underlying case, a claimant may claim deprivation interest from the time the damage occurred, in accordance with principles developed in case law. Under certain conditions, the claimant will be entitled to depreciation interest to compensate his actual loss. An example where the court awarded compensation for depreciation is the “Full City case” (LB-2015174299): the court of appeal came to the conclusion that the Norwegian state was entitled to deprivation interest to reflect the state’s actual loss by prepaying for pollution costs that should have been paid for by the shipowners. Based on the facts of the case, the court set an interest rate at 2.5% per year to reflect the “normal price” of money, based on the banks’ deposit interest rates.

Penalty interests (at 11.75% as of 1 July 2023) will, according to statutory provisions, accrue after either a statement of claim has been sent to the defendant or court proceedings have been initiated.

8. Liability and Contribution

8.1 Joint and Several Liability

The main rule under Norwegian law is that, if there are multiple offenders, the offenders are jointly and severally liable for damages caused by their infringement.

Joint and several liability implies that if several parties are liable for damage caused by them then a claim can be brought against any of the parties for the same amount as if that party had been liable for all the damage.

8.2 Contribution

If a claimant has filed a claim for full compensation against one offender, the offender can initiate contribution proceedings against any other offenders that are jointly and severally liable for these damages as a part of the already pending proceedings.

Contribution claims can also be filed in separate proceedings.

9. Other Remedies

9.1 Injunctions

The Dispute Act gives the possibility for arrest injunctions and regular injunctions. There is, however, no right for a claimant to receive an interim award of damages in competition damages cases.

Arrest injunctions can only be made for monetary claims and can only result in an asset being seized (real estate, vehicles, the freezing of a bank account, etc). A regular injunction cannot be filed for a money claim and can consist of a court order for the defendant to take, omit or submit to some action.

To be granted an injunction, the claimant must establish (i) a claim, and (ii) a reason for an injunction; eg, that the defendant's actions give reason to fear that execution or fulfilment of the claim will otherwise be materially more difficult, or that it is shown to be necessary to order an injunction in a disputed matter to avoid material loss or inconvenience, or to avoid violent action.

Injunctions can be obtained without notice to the other parties if there is reason to fear that notification to the other party may prevent the injunction from being executed.

An injunction can be granted the same day if the court finds the matter to be urgent. Usually, a petition for injunction will be processed by the court within 4–5 working days.

As mentioned in **5.1 Disclosure/Discovery Procedure**, a claimant can also request a pre-action order from the court to seize documents or other material (seizure of evidence). Such requests may also be granted without notice to the other party.

9.2 Alternative Dispute Resolution

All courts offer in-court mediation, which is regulated by Chapter 8 of the Dispute Act. It is up to the parties if they want to accept in-court mediation. A substantial number of disputes are mediated in Norwegian courts each year, especially at the district court level.

In Chapter 7 of the Dispute Act, there are rules on out-of-court mediation, which the parties can agree to follow if they so choose. It is also possible for parties to have a private mediation without following the rules set out in Chapter 7 of the Dispute Act.

Parties can also agree that the dispute should be subject to arbitration.

10. Funding and Costs

10.1 Litigation Funding

Historically, there has not been a tradition for third-party litigation funding in Norway. However, over the past few years, third-party litigation funding has increased. There is no procedural legislation nor mandatory rules explicitly governing third-party funding in court proceedings.

As mentioned in **1.1 Recent Developments in Antitrust Litigation**, in a recent decision, the Supreme Court was asked to rule on whether the Disputes Act allowed for the costs of external litigation funding – in an opt-out lawsuit – to be (indirectly) covered by the class members through a reduction in any compensation awarded. The Supreme Court found that the case should be dismissed because the funding arrangement did not satisfy the conditions for an opt-out class action.

10.2 Costs

As a main rule under the Dispute Act, the winning party has the right to full compensation of its necessary legal costs associated with the proceedings. The court has wide discretionary power to reduce the amount of legal costs awarded, depending on, inter alia, whether the claim was questionable, the balance of strength between the parties, etc.

As mentioned in **4.2 Jurisdiction/Applicable Law**, foreign claimants (domiciled outside of the EU/EEA) may, if requested by the defendant, be compelled to provide security for the defendants' legal costs before the case preparation can proceed (eg, by deposit or bank guarantee). This is not an alternative in domestic proceedings.

11. Appeals

11.1 Basis of Appeal

A judgment from a district court can be appealed to the competent court of appeal within one month after the judgment has been announced. Any party has the right to appeal on points of fact/evidence, points of law and procedural errors.

Further appeal of a judgment from a court of appeal to the Supreme Court is possible, but the Supreme Court will only hear disputes that possess potential legal value as precedent, or if the dispute is of particular interest to one or more of the parties involved.

Trends and Developments

Contributed by:

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Advokatfirmaet Selmer is a full-service Norwegian law firm, with offices in Oslo and Stavanger, providing legal advice relating to all business law areas. The firm assists Norwegian and international companies in both the public and private sectors. Selmer has an in-house financial analysis and transaction support team, enabling it to provide a unique combination of legal, strategic and financial expertise. Today, Selmer is one of Norway's leading legal practices, housing 150 employees. Its EU, competi-

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Introduction

In line with international developments, the awareness of and willingness to pursue potential damages claims has also clearly increased in Norway, although the number of cases is still limited. Following competition investigations, potential claimants are regularly approached by Norwegian and international law firms eager to take on the case. However, the EU Antitrust Damages Directive (2014/104) is not implemented in Norway. Although Norwegian courts are placing considerable weight on EU and European Economic Area (EEA) law, Norway's national law on damages still seems to prevail in the field of antitrust follow-on claims, firmly placing the burden of proof for any loss on the claimant.

Although most of the follow-on claims against the so-called truck cartel following the European Commission's (EC) decision(s) seem to be before courts in the usual major jurisdictions and in Spain, a couple of major truck purchasers have decided to try their luck before Norwegian courts. The judgment in the case brought by the Norwegian postal service and group companies ("Posten") against Volvo Group, DAF Trucks, Daimler AG, Iveco and MAN Truck & Bus is the first of its kind and, as such, is the leading case in Norwegian antitrust litigation. The original equipment manufacturers (OEMs) were acquit-

ted of all claims in the first instance in February 2023. The case is now under appeal, and the court of appeal is expected to render its decision by the end of 2024 or in early 2025.

During 2023, the Supreme Court has also ruled on the ability to fund class actions through external funding. The Supreme Court confirmed that the Dispute Act does not allow for the costs of external litigation funding – in an opt-out lawsuit – to be (indirectly) covered by the class members through a reduction in any compensation awarded.

There are a couple of follow-on litigation cases related to airfreight and trucks that are currently stayed before the district court in Norway, pending outcome in the ongoing infringement proceedings before the ECJ.

Posten's Case against Truck Manufacturers

Posten's claim against the OEMs that were subject to the EC's settlement decision was initiated in 2017. However, the claim started with a battle about jurisdiction that found its way through all three levels of the Norwegian court system. The foreign Posten companies had not bought trucks in Norway and therefore could not rely on special jurisdiction based on the principle that the alleged damage occurred in Norway. Arti-

cle 6(1) of the Lugano Convention allows for the cumulation of claims against several defendants in a jurisdiction where one of them has its domicile, even if the other parties are based in other countries. The prerequisite for this is that there is a sufficient connection between the claims. For this purpose, Posten wanted to use Volvo Group's Norwegian subsidiary as an "anchor defendant", in order to obtain venue for the case in Norway. Volvo Group's Norwegian subsidiary was not covered by the cartel decision, and the OEMs therefore argued that the use of Volvo Norge as an anchor defendant for this purpose was not permissible. Despite this, the Supreme Court held that the claims against the truck manufacturers were proficiently "closely connected" and that no reservation for circumvention applied in this case (HR-2019-2206-A). Thus, follow-on claims raised by the Norwegian postal service providers "Posten" and "Bring" against MAN Truck & Bus, Daimler AG, Volvo Group and others could proceed in Norwegian courts. The case had potentially important principal value at the time, but the practical significance of the judgment may now be limited after the ECJ's judgment in Sumal in 2021 (C882/19).

The main hearing for Posten's claim was held between September and November 2022, and the court rendered its decision in February 2023. The court concluded that Posten had failed to prove that it had actually suffered any loss and acquitted the OEMs.

As a general rule, a concrete economic loss has to be proven by the claimants under Norwegian tort law. Both Posten and the OEMs presented regression analysis and expert witnesses before the court. The court found, however, that the regression analyses presented by the claimants and the defendants respectively were considered to have weaknesses to such a degree that

they could not be relied upon by the court. As the court was not able to find a sufficiently trustworthy approximation of what truck prices would have been without the anti-competitive conduct, a detectable loss could not be proven. Since the burden of proof was on Posten, the OEMs were acquitted. Posten has appealed the decision, and a hearing is scheduled before the court of appeal between September and November 2024.

The case sheds light on the strict requirement for proving a concrete loss under Norwegian tort law. In this context, it is also noteworthy that the EU Damages Directive has not been implemented in the EEA or Norway, so no presumption of harm can be established on this basis. This means that potential claimants cannot merely expect that the existence of an infringement gives rise to compensation claims in Norway. Although the case is under appeal, claimants should carefully consider whether they are able to prove the merits of their claim.

Tine's Case against Truck Manufacturers

In contrast to the above-mentioned damages case, follow-ons where Scania is among the defendants are set on pause. While the rest of the manufacturers have settled with the EC, consequently admitting their participation in the trucks cartel with final effect, Scania has appealed the European General Court's dismissal of the company's pleas concerning the EC's decision. Norwegian courts, therefore, await a final precedent from the ECJ before handling follow-on claims.

In a similar damages lawsuit filed by the Norwegian dairy producers Tine and Diplom-Is against Daimler AG, MAN Truck & Bus, Volvo Group and Scania, the Oslo District Court decided to stay the proceedings, pending the outcome of Scania's appeal before ECJ. The question of whether proceedings were to be stayed depended on the

interpretation of Regulation 1/2003/EC. As Article 16(1) prohibits national courts from giving decisions that may deviate from decisions of the EC, it is up to the courts to decide whether a stay of proceedings is required to comply with the regulation. The court addressed the claimant's submission that EU and EEA law did not force a stay of proceedings in this case. With reference to the ECJ's decision in *Masterfoods* (C-344/98) and other relevant sources of law, the court stated that the only two alternatives when a decision by the EC is pending before the ECJ are to (i) stay proceedings and await the ECJ's ruling, or (ii) request a preliminary ruling from the ECJ.

As Norway is a member state of the European Free Trade Association (EFTA) rather than the EU, it cannot make requests to the ECJ for preliminary rulings. Additionally, a preliminary ruling by the EFTA Court would not provide the necessary clarifications regarding the validity of the EC's decision against Scania. Therefore, in this case, the only alternative left under EEA law was to await the ECJ's decision. The claimants argued in vain that increased legal fees, the unlikelihood of a ruling in Scania's favour by the ECJ, and the possibility of considering the question of culpability irrespective of the EC's decision precluded the need for a stay of proceedings. The court held that these were extraneous considerations under EEA law and that it was not practical to contemplate the criteria of culpability without considering the question of the temporal and territorial scope of Scania's infringement of competition law.

The court considered whether the decision to stay the case should only apply for the case against Scania but held that it would be efficient to treat the cases against the OEMs jointly. The court also held that the consideration behind a stay order also applies, to some extent, to the

claims against the other defendants, as the plaintiffs allege joint and several liability also for any loss related to Scania trucks. The claims against the other truck manufacturers were thus also put on hold.

Meanwhile, a case concerning follow-on claims from the so-called air-freight case, which was initiated against SAS Cargo Group, Koninklijke Luchtvaart Maatschappij (KLM), Air France and Lufthansa back in 2012, remains stayed before Romerike and Glåmdal District Court, pending the outcome of the second round of appeals before the ECJ following Commission Decision C(2017) 1742 final of 17 March 2017.

These cases show that Norwegian courts are not inclined to push forward with compensation claims as long as the alleged underlying infringement is still subject to legal proceedings.

The Supreme Court Ruling on External Funding

On 25 November 2021, the Competition Tribunal upheld the Norwegian Competition Authority's 2020 decision which found that Verisure had violated the Competition Act by co-ordinating illegally with its competitor, Sector Alarm, in the market for providing alarm services to residential customers. Sector Alarm had already accepted a fine of NOK467 million.

In June 2021, the Alarm Customer Association (ACA) filed claims for damages from the alarm companies on behalf of the customers in an opt-out class action. Under the Norwegian Dispute Act (2005), class actions require a willing class representative who is responsible for any legal costs on behalf of the group.

The ACA was established to act as class representative and be responsible for costs in case

the claim was unsuccessful (and the alarm companies were therefore awarded costs). The ACA was financed by the litigation funding firm Therium. Therium thereby took the financial risk on the condition that it would have a priority right to a share of any damages awarded if the claim was successful.

The principal question before the Supreme Court was whether the Disputes Act allowed for the costs of external litigation funding – in an opt-out lawsuit – to be (indirectly) covered by the class members through a reduction in any compensation awarded.

The Norwegian Supreme Court ruled (HR-2023-1034-A), in accordance with lower instances, that the suit could not proceed due to its system of external funding.

In its reasoning, the Supreme Court expressed some sympathies with the claimants' view that it was not obvious that a deduction from the damages awarded to the class members (in order to cover the costs of external financing) should be excluded. The Supreme Court nonetheless concluded that the Dispute Act does not allow for this model, as it undermines the requirement that the class members must be liable for costs. The court of appeal had not erred in its interpretation when it held that the ACA, by requiring that a share of any damages award cover the costs of external financing, did not fulfil the condition of willingness.

The Supreme Court explicitly stated that it is up to the legislator to consider whether a change in the Dispute Act is needed, and to decide if the need for effective antitrust litigation outweighs the potential qualms with letting foreign funds use class action lawsuits as a business strategy to receive profits. It is likely that several profes-

sional actors and consumer bodies may have an interest in the facilitation of these types of damages claims and will therefore lobby for the relevant amendments to the Dispute Act. However, it remains to be seen if the legislator will pick up on this invitation. It is not obvious that they will want to encourage litigation that is largely driven by the economic interests of the funds and law firms involved.

Looking Ahead – the Grocery Market

In 2020, the NCA issued a statement of objections to the three grocery chains, NorgesGruppen, Coop Norge and Rema 1000, notifying that it is considering imposing fines totalling NOK21 billion. The NCA's preliminary view is that the three chains have co-operated illegally by agreements related to so-called price hunting, allowing each other's employees to access stores with a view to scan shelf prices. The NCA's decision is expected during 2023. If the NCA concludes and issues an infringement decision, it is probable that several entities will carefully assess the potential for damages claims. The above-mentioned cases related to burden of proof and the limitation of third-party financing in the Norwegian opt-out class action system are not helpful in this context: proving a concrete loss can be challenging, and the potential decision is likely to be a "by object" decision which does not establish any effect of the co-operation. Furthermore, the obvious group of potential claimants will be individual consumers and households. This type of claim would clearly be suitable for opt-out class actions, which may be difficult to fund without being able to rely on third-party financing. However, there is little doubt that the grocery chains will appeal an infringement decision and a final outcome will take several years. In the meantime, the courts and legislator will be invited to revisit the outcome of the recent cases discussed here.

PORTUGAL



Law and Practice

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PRA – Raposo, Sá Miranda & Associados is a full-service firm benefitting from the collaboration of over 190 professionals with high levels of expertise, organised into 13 practice areas and five economic units. The firm has offices in Lisbon, Porto, Faro, Ponta Delgada, Leiria, Évora, and Funchal. It has a compact yet strong Competition team consisting of seven lawyers working out of its Lisbon and Porto offices, providing full geographical coverage across Portugal. The firm handles the whole range of work in litigation, representing clients before all courts,

including the Supreme Court. The firm provides legal support regarding competition and EU law, including dominance issues, pricing, and commercial contracts. PRA also advises global multinationals on one of the biggest cartel cases (trucks case) currently being handled in Europe. To date, all private enforcement actions brought by PRA in this regard have been fully upheld. The team frequently acts in cross-border matters including advising the government and public companies.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

In 2012, the *Tribunal da Concorrência, Regulação e Supervisão* (the “Competition Court” - TCRS) was established in Portugal (Law No 46/2011, Decree-Law No 67/2012, and Ministerial Order No 84/2012), located in Santarém. The court’s area of territorial jurisdiction corresponds to the national territory (Decree-Law No 49/2014).

The creation of the TCRS was a Troika demand, in order to consolidate the competence for the assessment of issues relating to competition law in one court, thus decongesting and reducing the number of pending issues in the commerce courts.

In fact, it falls to the TCRS, among other issues, to keep abreast of the issues related to the appeal, review, and execution of decisions in administrative infraction proceedings subject to legal challenge from the Portuguese Competition Authority (AdC) as well as AdC decisions issued in administrative procedures referred to

in the competition rules, and to judge actions for damages for infringements of the competition law (Article 112 of Law 62/2013).

A decade later, notwithstanding that antitrust litigation in Portugal began in the late 1980s after the first national competition rules entered into force (Decree-Law No 422/1983), antitrust litigation in Portugal is growing rapidly, not only because the AdC has recently strengthened the fight against anti-competitive practices (such as cartels, unilateral conducts or the failure to notify a merger operation subject to prior assessment) by detecting, investigating, and sanctioning those who participate in it, but also because the trucks cartel (condemned by the EC) triggered private enforcement in Portugal, with hundreds of actions, the filing of which continues to this day.

Typically, in the TCRS, at present, there are large-scale judgments, particularly complex cases and a large number of participants regarding a wide variety of antitrust matters, such as re-sale price maintenance and price fixing. Several class actions have been filed in recent months, seek-

ing very large damages awards and requesting access to documents in order to determine whether further class actions can be brought on behalf of consumers in Portugal. Furthermore, the representation of Portugal in the Court of Justice of the EU (CJEU) has increased, in part because of preliminary ruling procedures that are being conducted.

With the transposition of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the EU (the “Directive”) into the Portuguese legal system by Law No 23/2018 (the “Law”), claims based on infringements of EU competition law, as well as those based on purely national infringements with no cross-border effects, will keep increasing.

1.2 Other Developments

Another development in Portugal that is relevant to antitrust litigation is that, in some aspects, the Law has gone beyond the Directive.

In fact, the Law applies not only to damages actions, but also to other requests based on infringements of competition law (eg, declarations of nullity of agreements or contractual clauses), according to Articles 1(1) and 2(l) of the Law. Additionally, it applies not only to damages actions for infringements of EU competition law, with or without parallel application of equivalent national rules, but also to damages actions exclusively based on infringements of Portuguese competition law or of equivalent provisions of other EU member states, according to Articles 1(1) and 2(l) of the Law.

Furthermore, in addition to the company that committed the infringement, any party that exercised a dominant influence over the infringer during the infringement is also liable (bearing in mind that there is a presumption of a dominant influence if the influencing entity holds 90% or more of the share capital of the infringing party), according to Article 3 of the Law. Moreover, although the Directive does not contain any provisions regarding collective actions, the Law includes a provision concerning popular actions; Article 19(2) of the Law provides that legitimacy to bring popular actions is given to:

- associations and foundations whose purpose relates to consumers’ defence; and
- associations of companies whose members have been harmed.

Finally, in addition to attaching an irrefutable presumption of the existence of an infringement to AdC final decisions and those of Portuguese courts, the Law also attaches a refutable presumption to the final decisions of national competition authorities and courts of other EU member states; this is set out in Article 7(1), (2), and (3) of the Law.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The substantive provisions of the Law, including those relating to the burden of proof, are not applicable retroactively, according to Article 24(1) of the Law. On the other hand, the Law’s procedural provisions are not applicable to actions brought before its entry into force, pursuant to Article 24(2) of the Law. The Law came into force on 5 August 2018 (Article 25 of the Law).

This means that:

- the substantive provisions of the Law should not be applicable to judicial actions related to an infringement that ceased before 5 August 2018; and
- the procedural provisions of the Law should not be applicable to judicial actions brought before 5 August 2018 (but may be applicable to infringements that ceased before 5 August 2018 if the judicial actions are brought on or after that date).

For this reason, in Portugal, the legal basis for a claim for damages for breach of competition law depends on the moment the breach ceased (notwithstanding the fact that the CJEU has already established that substantive provisions of the Directive, such as the ones regarding limitation period, are applicable to infringements that ceased before 5 August 2018).

The following points arise where the infringement ceased before 5 August 2018.

- The rules set out in the Portuguese Civil Code and in the Civil Procedure Code apply. These codes do not provide any particular rules for claims for damages for breach of competition law.
- There is no legal distinction between standalone and follow-on actions; any person may claim regardless of whether there has been a prior finding of an infringement by a competition authority. This applies without prejudice to the application of Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“Council Regulation (EC) No 1/2003”), which states that when national courts rule on agreements, decisions, or

practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. Additionally, a final condemnatory decision issued by the AdC or by a Portuguese appeal court shall be deemed to give rise to an irrefutable presumption of the existence of the infringement, and a final condemnatory decision issued by a national competition authority of another EU member state or an appeal court of another EU member state shall be deemed to give rise to a refutable presumption of the existence of the infringement, thus giving it a qualified evidentiary value, according to Article 7(1) and (2) of the Law.

- Any injured party can claim damages from any breach where a causal link can be established between the conduct and the damages, according to Article 483(1) of the Portuguese Civil Code (the extra-contractual liability regime).

If the infringement ceased on or after 5 August 2018:

- the applicable rules are those set out in the Law, and, in the alternative, in the rules set out in the Portuguese Civil Code and in the Civil Procedure Code which are not against the Law, with reference to Article 23(1) of the Law;
- both standalone and follow-on actions claims are available (without prejudice to the application of Article 16(1) of Council Regulation (EC) No 1/2003 and Article 7(1) and (2) of the Law); and
- according to Article 3(1) of the Law, an undertaking or association of undertakings that breaches competition law is obliged to compensate in full any person who has suffered

harm as a result of that infringement, pursuant to the terms indicated in Article 483(1) of the Portuguese Civil Code.

The infringements may consist of mere national infringements, with no cross-border effects (or corresponding legal provisions in other member states), such as agreements restricting competition (Article 9 of the Portuguese Competition Law - PCL), abuse of dominant position (Article 11 of the PCL), abuse of economic dependence (Article 12 of the PCL), and Articles 101 and 102 of the Treaty (Article 483(1) of the Portuguese Civil Code and Articles 1(1) and 2(l) of the Law).

The claims may also be related to claims regarding nullifying agreements that restrict competition or to the violation of standstill obligations in merger control (Article 483(1) of the Portuguese Civil Code and Article 1(1) of the Law).

The person who has suffered harm caused by an infringement of competition law is entitled to full compensation, covering both actual loss and loss of profit, with interest, according to Article 562, and what follows, of the Portuguese Civil Code and Article 4(1) and (2) of the Law.

2.2 Specialist Courts

As mentioned in **1.1 Recent Developments in Antitrust Litigation**, a specialist court named the TCRS was established in Portugal in 2012. Additionally, the competent court to hear the appeals against the TCRS's decisions is a specific section of the Lisbon Court of Appeal (as provided under Article 67(3) of Law 62/2013) and the last instance of appeal is the Supreme Court of Justice. The judges of all of these three instances are not specialist judges in competition – without prejudice to the skills they have gained with experience.

According to Article 112 of Law 62/2013, the TCRS, among other duties, reviews the AdC's decisions and holds exclusive jurisdiction to rule on all civil actions solely based on the violation of competition rules; this last part means that the civil courts are competent to decide on claims in which the violation of competition rules is just one of the grounds invoked by the claimant.

If the cases are wrongfully launched with other courts, they will be dismissed on account of lack of jurisdiction, unless the incompetence is declared after the pleadings have ended and the claimant requests, within ten days of the decision becoming *res judicata*, the referral of the case to the court in which the action should have been brought, since the defendant has not offered justified opposition (Articles 96(a) and 99(1) and (2) of the Civil Procedure Code).

2.3 Decisions of National Competition Authorities

Beyond the provision of Article 16(1) of Council Regulation (EC) No 1/2003 (see **2.1 Legal Basis for a Claim**), the declaration by the AdC through a final decision, or by an appeal court through a final decision, of the existence of an infringement of competition law constitutes an irrefutable presumption of the existence, nature and material, subjective scope, time, and territory of that offence, according to Article 7(1) of the Law.

In turn, the declaration by a national competition authority of another member state or appeal court of another member state through a final decision of the existence of an infringement of competition law constitutes a refutable presumption of the existence, nature and material, subjective, temporal, and territorial scope of that offence, according to Article 7(2) and (3) of the Law.

In addition, if knowing the subject matter of an action depends on the identification of an infringement subject to an investigation by a competition authority, a non-final decision of a competition authority, or a decision of a court of appeal which has not yet become final, the court may decide to suspend the proceedings, with reference to Article 7(4) of the Law. Also, according to Article 16(1) of Council Regulation (EC) No 1/2003, the national court may assess whether it is necessary to stay its proceedings.

Finally, the AdC may intervene in damage actions; according to Article 9(3) of the Law, it assists the court at its request in quantifying damages resulting from the infringement of competition law, although the AdC may request the court not to assist it, provided that justification is given.

2.4 Burden and Standard of Proof

To initiate a standalone action, the following must be demonstrated by the claimant:

- an infringement has occurred;
- the damages it suffered; and
- the causal link between the infringement and the damages invoked (Article 342(1) of the Portuguese Civil Code).

On the other hand, in the case of follow-on actions, because of Article 16(1) of Council Regulation (EC) No 1/2003 and Article 7(1) and (2) of the Law, it is easier for the claimant to demonstrate the existence of an infringement, although it still has to demonstrate the damages it suffered and the causal link between the infringement and the damages invoked.

Additionally, it is presumed that cartel infringements cause harm, although the infringer has

the right to rebut this presumption, according to Article 9(1) of the Law.

On the contrary, the defendant must prove facts that hinder, modify, or extinguish the effects alleged by the claimant (Article 342(2) of the Portuguese Civil Code), such as the “pass-on” defence (Article 8(1) of the Law). This means that the defendant may argue (and will have to prove) that the damages invoked by the claimant were passed on down the supply chain.

Regarding the standard of proof, in Portugal there is not a specific standard of proof in force. The principle of free assessment of evidence applies, which consists of a conscientious weighting of the probative elements by a judge. However, some means of proof enjoy special evidentiary value (eg, authentic acts, as per Article 371(1) of the Portuguese Civil Code).

2.5 Direct and Indirect Purchasers

Both direct and indirect purchasers may bring claims. The direct purchasers may bring actions on the basis outlined in 2.4 **Burden and Standard of Proof**. The indirect purchasers have to prove the existence and extent of the overcharge passed on to the claimant (Article 342(1) of the Portuguese Civil Code and Article 8(2) of the Law).

However, in the absence of proof to the contrary, the indirect purchaser is considered to have proved that the overcharge has been passed on if it shows 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 (Article 8(3) of the Law).

2.6 Timetable

In the Portuguese courts, proceedings may go on for at least five years until a final decision is announced. That is the current average waiting time.

As covered in 2.3 **Decisions of National Competition Authorities**, the court may decide to suspend the proceedings according to Article 7(4) of the Law if knowing the subject matter of an action depends on the identification of an infringement subject to:

- an investigation by a competition authority;
- a non-final decision of a competition authority; or
- a decision of a court of appeal which has not yet become final.

Also according to Article 16(1) of Council Regulation (EC) No 1/2003, the national court may assess whether it is necessary to stay its proceedings.

The parties may apply for an order to stay proceedings by mutual agreement for periods which do not exceed three months in their entirety, provided that this does not result in the postponement of the final hearing (Article 272(4) of the Civil Procedure Code). The court may also order a stay of proceedings when there is another justified reason to do so (Article 272(1) of the Civil Procedure Code).

3. Class/Collective Actions

3.1 Availability

In the Portuguese jurisdiction, class/collective actions are available (since 1995), on an opt-out basis, according to Article 19(1) of the Law and Law No 83/95. This means that the claimant, on its own initiative, represents all the rights holders who have not exercised the right of self-exclusion without needing any type of authorisation from them. This is stated in Article 14 of Law No 83/95.

Those actions may be brought on behalf of both direct and indirect purchasers.

3.2 Procedure

Article 19(2) of the Law gives legitimacy to bring popular actions to associations and foundations whose purpose relates to consumers' defence and to associations of companies whose members have been harmed.

In Portugal, there is no certification process.

On the other hand, a claim will be rejected if the judge considers that it is manifestly unlikely that the request will be granted, according to Article 13 of Law No 83/95.

Finally, the court shall take the initiative in the gathering of evidence (ie, it is not bound by the initiative of the parties), as stated in Article 17 of Law No 83/95.

3.3 Settlement

In Portugal, judges are required to make serious and effective efforts to end a dispute by agreement between the parties.

To date, only one popular action has been concluded by settlement.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

In Portugal, strike-out/summary judgment is not available. As a rule, there is a trial after the extensive taking of evidence.

There are, however, some rare exceptions. For instance, a claim is rejected when the request is manifestly unfounded, if any insuperable dilatory objection occurs (Article 590(1) of the Civil Procedure Code) or, after the pleadings, if the court considers that it can adequately assess the merits of the case without the need for further evidence (Article 595(1)(b) of the Civil Procedure Code).

4.2 Jurisdiction/Applicable Law

The court within whose jurisdiction the claimants are situated has international and territorial jurisdiction, according to Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Additionally, the law applicable is the law of the country where the damage occurs, pursuant to Article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (ROME II).

4.3 Limitation Periods

According to Article 6(1) of the Law, the duration of the limitation period is five years, which begins to run when the claimant knows, or can reasonably be expected to know:

- of the infringing behaviour and the fact that it constitutes an infringement of competition law;
- the identity of the infringer; and
- of the fact that the infringement of competition law caused harm to it (even if it does not know the full extent of the damages).

The limitation period does not begin to run before the infringement of competition law has ceased, according to Article 6(2) of the Law.

The limitation period is suspended if the AdC starts an investigation of an infringement related to the claim (where the limitation period only begins to run again one year after the final decision) and during out-of-court settlement procedures. This is set out in Article 6(4), (5), and (6) of the Law.

Lastly, the limitation period is interrupted by the summons or judicial notification of the alleged offender of any acts that express the intention to exercise the right, according to Article 6(7) of the Law.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In proceedings relating to an action for damages, upon the request of one party who has presented reasonably available facts and evidence sufficient to support the plausibility of its claim or of its defence, the court is able to order the other party or a third party (including public authorities) to disclose relevant evidence which lies in their control, provided that the facts to be proved are indicated. This is provided for in Article 12(1) and (2) of the Law.

The court orders the presentation of evidence if it considers that it is proportionate and relevant to the decision of the case, and it will refuse requests that presuppose indiscriminate searches for information, according to Article 12(4) of the Law.

Proportionality

According to Article 12(5) of the Law, in determining whether any disclosure requested by a party is proportionate, the court will consider the legitimate interests of all parties and third parties concerned, considering, in particular:

- the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; and
- whether the evidence for which disclosure is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

Confidential Information

According to Article 12(7) of the Law, the court orders the presentation of evidence containing confidential information when it deems it relevant to the action for damages by adopting effective measures to protect it, namely:

- hiding sensitive excerpts from documents;
- conducting hearings behind closed doors;
- restricting the number of persons authorised to have access to the evidence, in particular, limiting access to legal representatives and defenders of the parties or to experts subject to an obligation of confidentiality; and

- requesting the preparation by experts of summaries of the information in aggregated or otherwise non-confidential form.

Other Provisions

The court does not order the presentation of evidence without the possessor having the opportunity to comment, in accordance with Article 12(9) of the Law. Pre-action disclosure is available, as stated in Article 13 of the Law. The presentation of evidence in the possession of a competition authority may also be requested, according to Article 14 of the Law. Failure to comply with the order of the court may result in the imposition of a fine and may lead to the reversal of the burden of proof, as outlined in Article 18 of the Law.

5.2 Legal Professional Privilege

The court cannot order the disclosure of information covered by professional confidentiality of lawyers under national law or EU law, as stated in Article 12(8) of the Law.

5.3 Leniency Materials/Settlement Agreements

The court cannot order the presentation of evidence that includes leniency statements and settlement submissions, according to Article 14(5) of the Law.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

In Portugal, the court may hear witnesses whose testimonials are subject to the principle of free assessment of evidence, in accordance with Article 396 of the Portuguese Civil Code. All those who have the mental capacity to testify in relation to the facts that constitute the subject of

evidence have the capacity to testify as witnesses (Article 495(1) of the Civil Procedure Code).

All persons are required to co-operate in the discovery of the truth. As a result, if appointed, they are compelled to render testimony, under penalty of a fine or an order that the witness appear under custody (Article 508 of the Civil Procedure Code). However, some people may refuse to testify, for example, certain family members (Article 497(1) of the Civil Procedure Code) and all those who are bound by professional secrecy (Article 497(2) of the Civil Procedure Code).

As a rule, witnesses testify at the final hearing in person or via tele-conference with the judge, or by written statement in exceptional cases (Article 497(2) of the Civil Procedure Code), and they are subject to cross-examination (Article 516 of the Civil Procedure Code). Each party cannot nominate more than ten witnesses (unless the court decides otherwise), as set down in Article 511(1) and (4) of the Portuguese Civil Code.

Providing false testimony is a crime, according to Article 360 of the Portuguese Criminal Code.

6.2 Expert Evidence

Under Portuguese law, expert evidence is allowed; both parties and the judge may request expert evidence, when special knowledge is required and the judges do not have it, as set out in Articles 388 and 467(1) of the Portuguese Civil Code.

Expert evidence can be provided by three experts or by one expert only (Article 468 of the Portuguese Civil Code).

If the expert evidence is provided by a panel of experts, two of them are appointed by the parties (one each) and the last one by the parties'

agreement or by the judge (Article 468 of the Portuguese Civil Code).

The expert(s) must prepare a written report before the trial takes place, in which agreement or disagreement can be expressed by any of the appointed experts regarding each matter in the report (Article 484 of the Portuguese Civil Code) and their attendance in the final hearing may be required in order to provide explanations or clarifications of the report (Article 484 of the Portuguese Civil Code).

Additionally, the parties may object or request clarifications of the report if it is defective, lacks clarity, is contradictory, or lacks sufficient justification (Article 485 of the Portuguese Civil Code) and may request a second expert, although the second expert does not replace the first one (Article 487 of the Portuguese Civil Code).

The report is subject to the principle of free assessment of evidence (Article 389 of the Portuguese Civil Code).

7. Damages

7.1 Assessment of Damages

Any person who has suffered harm caused by an infringement of competition law is entitled to full compensation, covering both actual loss and loss of profit, plus interest, counted from the date of the decision until effective and full payment (Article 4 of the Law). In Portugal, there are no exemplary or punitive damages.

Regarding the assessment of damages, it is presumed that cartel infringements cause harm, and the infringer has the right to rebut this presumption (Article 9(1) of the Law).

On the other hand, if it is practically impossible or excessively difficult to calculate the damages, the court makes that calculation using a rough estimate (Article 9(2) of the Law).

The AdC may assist the court, at its request, in quantifying the damages resulting from the infringement of competition law, although the AdC may request the court not to assist it, provided that justification is given (Article 9(3) of the Law).

7.2 “Passing-On” Defences

The passing-on defence is available in Portugal. The defendant can invoke as a defence that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proving overcharge was passed on is on the defendant (Article 8(1) of the Law).

On the other hand, where the overcharge was passed on to the claimant, the burden of proving the existence and scope of such an action rests with the claimant (Article 8(2) of the Law).

According to Article 8(3) of the Law, in the absence of proof to the contrary, the indirect purchaser has proved that the overcharge was passed on if it shows that:

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

7.3 Interest

See 7.1 **Assessment of Damages**. As of the time of writing, the interest rate is 4%. However, this is updated from time to time.

8. Liability and Contribution

8.1 Joint and Several Liability

Firstly, according to Article 3 of the Law, in addition to the company that committed the infringement, whoever exercised a dominant influence over the infringer during the infringement is also liable (bearing in mind that there is a presumption of a dominant influence if the influencing entity holds 90% or more of the share capital of the infringing party).

Also, undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement (Article 5(1) of the Law), except in the following cases (Article 5(2) of the Law).

- Where the infringer is a small or medium-sized enterprise (SME), the infringer is liable only to its own direct and indirect purchasers and providers where:
 - (a) its market share in the relevant market was below 5% at any time during the infringement; and
 - (b) 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.
- Where the infringer is an SME, the infringer is liable to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement.

These exceptions are not applicable if the SME has led the infringement or has coerced other undertakings to participate therein or if the SME has previously been found to have infringed competition law (Article 5(3) of the Law).

In addition, an immunity recipient is jointly and severally liable only:

- to its direct or indirect purchasers or providers; and
- to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law (Article 5(4) of the Law).

8.2 Contribution

An infringer may recover a contribution from any other infringer. The amount is determined in light of their relative responsibility for the harm caused by the infringement, which is presumed to be equivalent to the average of their market shares in the markets affected by the infringement (Article 5(5) of the Law).

To the extent that the infringement caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers is determined in light of its relative responsibility for that harm (Article 5(7) of the Law).

9. Other Remedies

9.1 Injunctions

In Portugal, injunctive relief is available if the following conditions are met:

- the applicant must credibly demonstrate an underlying substantive right (*fumus bonus iuris*);
- the underlying right must be threatened by possible harm caused by an action of the respondent;
- the applicant must demonstrate credibly that it would face an injustice which is not (or not easily) repairable if the injunctive relief is not ordered;
- there must be a need for urgent action in order to avoid the imminent and irreparable (or not easily repairable) harm (*periculum in mora*); and
- the court must balance the parties' interests and deny the request if there is possibility that the injunctive relief inflicts more harm to the respondent than it prevents the applicant from incurring (Articles 362(1) and (2), 363, and 368(1) and (3) of the Civil Procedure Code).

The injunctive relief may be filed while the main proceedings are ongoing or the main action must be filed within 30 days of the outcome of the successful application being notified to the respondent (Article 373(1)(a) of the Civil Procedure Code).

However, the court may release the applicant from commencing a claim if it is convinced of the existence of the underlying substantive right and the injunctive relief is able to regulate the litigation with certainty (Article 369(1) of the Civil Procedure Code).

The injunctive relief may be obtained without notice to the other parties (Article 366 of the Civil Procedure Code).

The respondent's interests are safeguarded by its right to seek compensatory damages where

an injunctive relief was granted (Article 374(1) of the Civil Procedure Code). Additionally, whenever it deems it convenient in view of the circumstances, the court may, even without hearing the applicant, make the grant dependent on the provision of adequate security by the applicant (Article 374(2) of the Civil Procedure Code).

Injunctive relief is an urgent proceeding that should be decided on within a few weeks.

9.2 Alternative Dispute Resolution

In Portugal, the parties may resolve an action through alternative dispute resolution procedures such as arbitration. The methods of alternative dispute resolution are not mandated.

10. Funding and Costs

10.1 Litigation Funding

In Portugal, there is no regulation on litigation funding and nothing prevents it; a third party unrelated to the dispute (a litigation funder) may bear the costs associated with an action, mainly in light of the principle of contractual freedom.

In fact, in Portugal, there are several actions (namely, class actions) financed through this mechanism.

10.2 Costs

The parties are required to pay the respective court fees with the submission of the statement of the case and the statement of defence.

In its final decision, the court will impose the costs on the losing party (Article 527 of the Civil Procedure Code).

According to Articles 25 and 26 of *Regulamento das Custas Processuais*, the losing party has to

reimburse the winning party for the costs the latter incurred in the action, but this compensation is limited by law. Therefore, it consists of:

- the judicial fees paid by the winning party;
- the charges incurred by the winning party; and
- 50% of the sum of the judicial fees paid by the winner and by the loser, to compensate the winning party against the expenses of its lawyers.

The court may also award costs incurred through lawyers' fees without limitation, if it rules that a party acted with procedural bad faith (Article 543 of the Civil Procedure Code).

In addition, in class actions, the claimant is exempt from the payment of costs if the pleading is partially granted (Article 20(2) of Law No 83/95).

11. Appeals

11.1 Basis of Appeal

In Portugal, there are two levels of ordinary appeals against the rulings of the TCRS: firstly, to the Lisbon Court of Appeal and, secondly, to the Supreme Court of Justice.

However, the parties, provided some conditions are fulfilled, may request that the appeal against a ruling of the TCRS be heard directly by the Supreme Court of Justice (Article 678 of the Civil Procedure Code).

To appeal to the Lisbon Court of Appeal, which decides on matters of fact and law, the value of the claim must be higher than EUR5,000 and the decision of the TCRS must be unfavourable to the appealing party in an amount more than half

of EUR5,000 (Article 629 of the Civil Procedure Code).

To appeal to the Supreme Court of Justice, which decides on matters of law only, the value of the claim must be higher than EUR30,000 and the decision of the TCRS must be unfavourable to the appealing party in an amount more than half of EUR30,000 (Article 629 of the Civil Procedure Code).

In fact, it is not allowed to submit an appeal to the Supreme Court of Justice if the Lisbon Court of Appeal confirms the TCRS's decision without any dissenting vote and without essentially different reasoning (Article 671(3) of the Civil Procedure Code).

There are also extraordinary appeals, where an appeal is filed after the decision becomes *res judicata* (Article 627 of the Civil Procedure Code).

SOUTH KOREA

Law and Practice

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Shin & Kim has the largest team of antitrust specialists in South Korea, with more than 70 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairman, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep familiarity with

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in South Korea can largely be classified into three types. The first occurs when the Korea Fair Trade Commission (KFTC), the agency which regulates violation of the Monopoly Regulation and Fair Trade Act (MRFTA) in South Korea, imposes measures such as remedies or a surcharge on a violator of the MRFTA, in which case the violator may file an administrative lawsuit against the KFTC for cancellation of the measures (Administrative Lawsuit Against the KFTC). The second type of litigation is a civil lawsuit in which a victim of a violation of the MRFTA seeks damages against the violator, who is the perpetrator (Antitrust Damages Lawsuit). The third type is a criminal lawsuit against a violator of the MRFTA after investigation by the investigating agency and filing of charges (Antitrust Criminal Lawsuit).

Recently, the MRFTA was wholly amended, which took effect on 30 December 2021. The wholly amended MRFTA presently in effect (the current MRFTA) contains several changes and

brought many changes to the three types of antitrust litigation outlined above.

Administrative Lawsuit Against the KFTC

In relation to the Administrative Lawsuit Against the KFTC, the area often at issue in South Korea is the administrative lawsuit regarding collusion. Under the MRFTA, collusion requires an “agreement”, and the previous version of the MRFTA did not include a specific provision regarding information exchange. Accordingly, the Supreme Court has strictly reviewed whether business entities’ information exchange constitutes collusion in several information exchange cases with the view that “it cannot be concluded that there is an agreement on unfairly restricting competition based only on the fact that information was exchanged”. In fact, the court has cancelled the KFTC’s measures in many information exchange cases.

The current MRFTA includes information exchange that substantially restricts competition as a type of collusion, and when external conformity of actions, such as joint increase in price and information exchange, is found, an “agreement” is presumed by law.

Due to the change above, the KFTC's burden of proof will be significantly eased. Under the current MRFTA, if an agreement is presumed on the basis of external conformity of actions, of increased prices and information exchange, the KFTC only has to prove anti-competitiveness, and the business entity has to prove there is no agreement.

This provision that presumes collusion when there is an exchange of information applies only to conduct that terminated after the date of the enforcement of the current MRFTA (30 December 2021).

Antitrust Damages Lawsuit

Recently, in cases where a violation of the MRFTA has been found, damages lawsuits have been brought more actively.

Many construction projects were carried out in South Korea around 2010 and, as a result, there were many public tenders. In a lot of tenders, construction companies engaged in bid-rigging, such as agreeing on the successful bid price, bid rate, and construction area allocation, and they were caught by the KFTC. Victims of the collusion filed a number of civil lawsuits seeking damages against the construction companies from around 2015. The biggest issue in these civil lawsuits was how to calculate the damages caused by those who had participated in the bid-rigging.

Appraisals were conducted in various courts in South Korea to calculate the damages. There were arguments between the victims and the perpetrators regarding the selection of an appraisal method for calculating the amount of damages. The victims who filed lawsuits generally preferred an econometrics analysis method based on regression analysis of similar cases,

while the perpetrator construction companies preferred a cost-based approach that was expected to reflect the unique characteristics of the construction site. The courts have recently tended to calculate the amount of damages by relying more on the appraisal according to the econometrics analysis method.

As such, in an Antitrust Damages Lawsuit, it was difficult for the victim to prove the amount of damages incurred due to the violation of the MRFTA. The current MRFTA introduces a new system of court orders to submit materials. Under this court orders system, pursuant to a party's request in an Antitrust Damages Lawsuit, the perpetrator can be ordered to submit materials necessary to prove damage or calculate the amount of damages. This is expected to alleviate some of the burden of proving damages.

Meanwhile, there were recent cases where shareholders of companies that participated in cartel conduct have filed shareholder derivative lawsuits and sought compensation from the CEO for damages resulting from their breach of duty of oversight. The Supreme Court ruled, in a case in which a sales employee engaged in cartel conduct, that the CEO was liable for damages equivalent to penalty surcharges paid out by the company for the cartel conduct. The Court found that the CEO breached a duty of oversight based on the fact that the collusion took place for an extended period of time without any form of restraint and based on the lack of an adequate internal control system to prevent the breach of law (and the lack of efforts to establish such system).

Antitrust Criminal Lawsuit

Criminal litigation was previously conducted pursuant to the KFTC's referral of the violator for criminal prosecution after finding a viola-

tion of the MRFTA. It seems that, recently, the number of criminal litigation cases being pursued by investigating agencies, separate from the KFTC's referral, is increasing. Investigating agencies are pursuing violators based on other laws that allow punishment of some violations of the MRFTA without the KFTC's referral, such as the Criminal Act and the Framework Act on the Construction Industry. In cases where the Prosecutors' Office receives a self-report about cartels under the criminal leniency programme, they typically transfer the cases to the KFTC. However, there have been recent instances where the Prosecutors' Office initiated its own investigations and later requested a referral to the KFTC.

In addition, there is a provision in the MRFTA that even if the KFTC determines that the requirements of referral for criminal prosecution have not been met, if there is a request from the chairman of the Board of Audit and Inspection, a minister of the Ministry of SMEs and Start-Ups (MSS), or an administrator of the Public Procurement Service (PPS) to the KFTC to make a referral, the chairperson of the KFTC must refer the matter for criminal prosecution. In recent years particularly, there have been an increasing number of cases where the minister of the MSS requested criminal referrals in view of the social ripple effects and potential damage to SMEs. Thus, the provision of the MRFTA limits the KFTC's exercise of the right to refer or not refer a case for criminal prosecution. According to the MOU between the KFTC, MSS, and PPS, the minister of the MSS and the administrator of the PPS are required to request a referral to the KFTC within 4 months after receiving the relevant decisions from the KFTC.

Regarding the Antitrust Criminal Lawsuit, the current MRFTA removed the criminal punish-

ment provision for certain conduct where there has been no case of criminal punishment and such punishment would not be in accordance with the legal system. Such conduct includes that relating to M&A, some unfair trade practices (including refusal to deal, discriminatory treatment, exclusion of competitors, and conditional transactions), and resale price maintenance. As such, these types of MRFTA violations are no longer subject to criminal litigation. Meanwhile, the Ministry of Government Legislation has issued a legislative notice regarding the amendment bill of the MRFTA, which removes the criminal penalties provision for exclusionary abuse.

1.2 Other Developments

Treble Damages

When liability for damages arising from a violation of the MRFTA is at issue, the scope of the liability for damages borne by the perpetrator is generally limited to damage that actually occurred or is presumed to have occurred. However, when the MRFTA amended the relevant regulation in 2018, in the event that a person suffers damage due to collusion or prohibited retaliatory measures in connection with the unfair trade practices among the violations of the MRFTA, a new provision imposes damages liability on the business entity or business entities' organisation (ie, an association formed by two or more businesses for the purpose of promoting common interests) (business entities' organisation) that engaged in such conduct "to the extent that it does not exceed three times the damage incurred by the victim". It also provided that, in the event that the business entity or business entities' organisation can prove that there was no intent or negligence, then it does not bear such liability for damages.

Private Person's Injunction Claim System

The current MRFTA introduced a new system for a private person's claim for an injunction. This

system allows the victim of unfair trade practices (except for unfair support) to petition the court directly for prohibition or prevention of infringing conduct without going through the KFTC. Since the current MRFTA recognises a victim's right to injunctive relief, a victim can now request the suspension or prevention of unfair trade practices without having to wait for the KFTC's measures, so that infringement can be stopped promptly or so that damages can be prevented in advance.

Note that the MRFTA's private prohibitory injunction system and provisional disposition effected to protect the right to injunctive relief has never been implemented so far, and thus the court's specific judgment criteria for the application factors have not been established either. Hence, when filing a lawsuit for prohibitory injunction in the future, it is essential to take heed of the specific judgment criteria used by the court.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Legal Basis and Requirements of Antitrust Litigation

The legal basis for claiming damages due to violation of the MRFTA is provided in the law. The representative laws are the Civil Act and the MRFTA.

Claiming under the Civil Act

The Civil Act has a provision on claiming damages for general torts, and the requirements for claiming damages for tort under the Civil Act are as follows:

- there is intent or negligence in the perpetrator's conduct;
- there is damage to the victim;

- the perpetrator's conduct is unlawful; and
- there is a causal relationship between the perpetrator's conduct and the damage to the victim.

Violation of competition law, including violation of the MRFTA, is generally considered a tort, so a victim of the tort can claim damages based on the Civil Act. However, in order for the tort to be established, all four of the requirements above must be met, and the victim must prove the facts meeting the requirements.

Claiming under the MRFTA

Meanwhile, the MRFTA has a provision for claiming damages caused by violations of the MRFTA, separate from the Civil Act. The requirements for claiming damages under the MRFTA are as follows:

- the perpetrator (business entity or business entities' organisation under the MRFTA) violates a provision of the MRFTA;
- there is damage to the victim;
- there is a causal relationship between the perpetrator's violation of the MRFTA and the damage to the victim; and
- there is intent or negligence in the perpetrator's conduct.

There is no significant difference between the requirements under the MRFTA and those under the Civil Act. However, in contrast to the need for the victim to prove the intent or negligence of the perpetrator in the case of a claim for damages under the Civil Act, the MRFTA provides that the perpetrator needs to prove that there is no intent or negligence.

Proof of Damage in Antitrust Damages Lawsuits

The MRFTA provides that where it is recognised that the victim incurred damage due to the violation of the MRFTA, but it is extremely difficult to prove the precise amount of damages, due to the nature of the facts, the court may recognise a reasonable amount of damages based on the gist of the overall arguments and the results of evidence examination. As such, the burden on victims to prove a specific amount of damages has been alleviated, and the court has been granted discretion in calculating the amount of damages.

Supreme Court development

In this regard, the Supreme Court further determined that when the court applies the provision to recognise the amount of damages, it must do what it can to search for indirect facts that may be grounds for calculation of the amount of damages and to reasonably evaluate the indirect facts that have been found to calculate an objectively acceptable amount of damages. If the fact that damage was incurred due to tort is recognised, the court must encourage proof by vigorously exercising its right to seek clarification, even if a party's argument and proof of the amount of damages is lacking, and, in some cases, determine the amount of damages based on its authority.

The Supreme Court has determined that the method of calculating damage from collusion is not limited to an econometrics model, and as long as they are reasonable and objective, various methods may be considered to calculate the amount of damages, such as:

- statistical data on excess prices due to collusion;

- the amount of damages found in similar cases;
- the size of profits gained by a business entity from the violation;
- comparing the supply price of business entities that participated in the collusion during the collusion period with those of the entities that did not; and
- making certain adjustments to the result of one party's calculation of the amount of damages.

Independent Litigation Proceedings

An Antitrust Damages Lawsuit can proceed independently of an Administrative Lawsuit Against the KFTC, regardless of whether the KFTC investigates and the degree of investigation. However, since it is not easy for the victim to prove the facts that are a requirement for claiming damages, in practice, there are many cases where the victim files the damages lawsuit after observing – and according to the results of – the investigation and decision of the KFTC.

2.2 Specialist Courts

The Administrative Lawsuit Against the KFTC falls under the exclusive jurisdiction of the Seoul High Court, as prescribed by the MRFTA. Unlike ordinary litigation, which proceeds through a three-tiered court system of district courts, high courts and the Supreme Court, in the case of an Administrative Lawsuit Against the KFTC, it actually goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

Among the several judicial panels within the Seoul High Court, there are some dedicated to the Administrative Lawsuit Against the KFTC. The Administrative Lawsuit Against the KFTC is assigned to one of these judicial panels. Even if the case is reallocated, it will be reassigned to one of the remaining judicial panels dedicated

to the Administrative Lawsuit Against the KFTC. Since the Seoul High Court is prescribed as having exclusive jurisdiction over the Administrative Lawsuit Against the KFTC, an Administrative Lawsuit Against the KFTC received by the Seoul High Court will not be transferred.

However, since the Seoul High Court does not have exclusive jurisdiction over the Antitrust Damages Lawsuits and Antitrust Criminal Lawsuits, these go through a three-tiered court system, as is generally the case.

2.3 Decisions of National Competition Authorities

The national competition authority in South Korea is the KFTC. The KFTC's decisions are not binding on the court and the court can review the validity of the KFTC's decisions in full, find different facts from those found by the KFTC, and make different legal determinations.

In the case of an Antitrust Damages Lawsuit, the victim proceeds by filing a lawsuit against the perpetrator, and there is no statutory basis for the KFTC to impose damages measures directly on the perpetrator or intervene in the damages process carried out by the victim. The MRFTA provides that the court in charge of an Antitrust Damages Lawsuit may make a request to the KFTC to send records related to the violation of the MRFTA.

2.4 Burden and Standard of Proof Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the KFTC bears the burden of claiming and proving that there has been a violation of the MRFTA and that the measures imposed by the KFTC are appropriate. The party subject to the measures bears the burden of claiming and proving that there is justification for the violation

of the MRFTA. The court determines whether the KFTC has deviated from or abused its discretion by reviewing whether there are errors in the findings of fact that were the bases for the measures and whether the general principles of administrative law, such as the principles of proportionality and impartiality, have been followed.

For example, in the case of the KFTC's surcharge imposition, the court considers that the KFTC has discretion to determine whether to impose a surcharge and the amount of that surcharge. The court believes that the "Notice on Standard for Imposing Surcharge" (Surcharge Notice) is only an internal standard within the KFTC and the KFTC's measures are not immediately unlawful simply because the Surcharge Notice was not followed. However, if the KFTC has repeatedly imposed measures pursuant to the Surcharge Notice so that it has become an administrative practice, then the court has determined that measures contrary to such administrative practice are unlawful. The fact that such administrative practice has been established must also be claimed and proved by the party subject to the measures.

Regarding the degree of proof, the Supreme Court has determined that even if the proof of facts in an Administrative Lawsuit Against the KFTC and an Antitrust Damages Lawsuit does not mean proof of the sort required by the natural sciences, where there is no shred of doubt, it does mean proof of high probability that a certain fact existed after comprehensive review of all the evidence in light of empirical rules – unless there are special circumstances – so that an ordinary person should have no doubt.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, if the victim has filed a damages lawsuit based on

the provisions of the MRFTA, the victim bears the burden of asserting and proving that they incurred damage and the extent of the damage (amount of damages). The perpetrator bears the burden of asserting and proving that there was no intent or negligence regarding the violation of the MRFTA and that there are circumstances under which the victim's claimed amount of damages should be limited. On the other hand, if the victim has filed a damages lawsuit based on a provision of the Civil Act, the victim must prove the perpetrator's intent or negligence.

The victim must also prove the specific amount of damages. The most problematic issue in this regard is calculating the amount of damages caused by collusion. The court deducts the estimated price that the victim would have borne had there been no collusion (hypothetical competitive price) from the actual price where there was collusion. In order to calculate the hypothetical competitive price, special appraisal methods such as an econometrics analysis are used. Appraisal according to the econometrics analysis method is usually carried out by academic experts. The court generally accepts the amount of damages calculated from the appraisal result as long as there is no clear error. Accordingly, the victim usually proves the amount of damages from collusion by making a request to the court for such an appraisal and reviewing the result.

However, a victim who has difficulty bearing the cost of the appraisal or who wants to end the lawsuit quickly may instead prove the amount of damages without undergoing the appraisal method described, such as by using the amount of damages calculated in similar cases. In this situation, the court alleviates the burden on the victim of proving the amount of damages by recognising the amount, based on the provision that

eases the burden of proving damages under the MRFTA.

With regard to the passing-on defence, the perpetrator may assert and prove that the amount of damages claimed by the victim should be limited because the victim passed the damage from the violation of the MRFTA (eg, through collusion) on to consumers. However, the Supreme Court does not take the view, even if the court accepts the passing-on defence, that there is a causal relationship in which the victim's harm is immediately reduced or in which the victim immediately recovers from it. Rather, its view is that the perpetrator's liability for damages can be limited by taking into account the circumstances of passing-on the victim's damages when determining the amount of damages.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, the prosecutor bears the burden of proving the facts necessary for maintaining the charges, such as the fact that the defendant has violated the MRFTA and should be subject to criminal punishment accordingly.

With regard to the degree of proof in an Antitrust Criminal Lawsuit, the Supreme Court has determined that for guilt to be found in a criminal trial, it must be based on evidence that has the power to prove that the charges are true beyond reasonable doubt on the part of the judge. The Supreme Court also determines that reasonable doubt does not include all doubts and distrust but rather means a rational question about the probability of facts. It is considered that conceptual suspicion or suspicion based on abstract possibility is not included in reasonable doubt.

2.5 Direct and Indirect Purchasers

Both direct purchasers who purchased a product directly from the business entity that colluded or otherwise violated the MRFTA, and indirect purchasers who purchased the product from that direct purchaser or a product using such products as raw materials, may, in principle, file a damages lawsuit against the business entity.

Although it is not specified in the Civil Act and the MRFTA whether an indirect purchaser may file a damages lawsuit against the business entity, the Supreme Court generally takes the view that violation of the MRFTA constitutes a tort under the Civil Act so that pursuant to general legal principles of tort under the Civil Act, if there is a substantial causal relationship between the business entity's violation of the MRFTA and an indirect purchaser's damages, the indirect purchaser may also claim damages.

2.6 Timetable

Administrative Lawsuit Against the KFTC

In general, it takes about three to four months for the first hearing to be held after a complaint is filed, but the time it takes for the court to announce its judgment after the first hearing varies from case to case. At the Seoul High Court level, it usually ends within two years, but at the Supreme Court level, it can take as little as four months and as long as several years.

An Administrative Lawsuit Against the KFTC is only possible after the KFTC's investigation has been completed and measures have been imposed, so it is not possible for the court proceeding to be suspended or postponed according to the KFTC's investigation.

Antitrust Damages Lawsuit

An Antitrust Damages Lawsuit basically proceeds irrespective of the investigation by the

KFTC but, in practice, a victim often waits for the result of the KFTC's investigation and files the lawsuit according to its results. Even if the victim files a lawsuit before the KFTC's investigation results are released, the court may postpone or suspend the court proceeding until the KFTC's investigation results are available. If an Administrative Lawsuit Against the KFTC is filed regarding a violation of the MRFTA, whether there was a violation of the MRFTA is a preliminary question in the damages lawsuit, so in many cases, the court in charge of the damages lawsuit proceeds at full pace with the case after the results of the administrative lawsuit have been confirmed.

The parties may ask the court to postpone or suspend the court proceeding until the results of the KFTC's investigation or related administrative lawsuit are available. However, a legal right to proceed as above is not recognised, and the court may decide whether to proceed with the court proceeding regardless of the views of the parties.

Accordingly, in the case of an Antitrust Damages Lawsuit, much time is spent waiting for the result of the related administrative lawsuit. In order to calculate the amount of damages, an additional six months to one year is required during the appraisal process.

3. Class/Collective Actions

3.1 Availability

There is no system that allows class/collective actions in antitrust litigation in South Korea. However, in the case of an Antitrust Damages Lawsuit, victims can file a lawsuit as joint plaintiffs. While the result of the damages lawsuit filed by some of the victims is not legally binding on the rest of the victims, it does have an impact

on them. Thus, the victims who have not filed a lawsuit can proceed more easily by filing a separate damages lawsuit based on the result of the initial lawsuit.

In this regard, the Ministry of Justice announced a Class Action Law that was intended to introduce the class action system by around September 2020, but in September 2021, the Ministry of Government Legislation stopped reviewing the legislative bill. Nevertheless, as the discussion on class action has been ongoing for some time, there is a possibility that the legislative bill could be reconsidered in the future.

3.2 Procedure

There is no system in South Korea that allows class/collective action in antitrust litigation. See **3.1 Availability**.

3.3 Settlement

There is no system in South Korea that allows class/collective action in antitrust litigation. See **3.1 Availability**.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

There is no provision allowing strike-out/summary judgment in an Administrative Lawsuit Against the KFTC and an Antitrust Damages Lawsuit. However, in the case of an Antitrust Criminal Lawsuit, the proceeding is often simplified, the prosecutor requesting a summary trial and the court issuing a summary judgment. In this case, if a defendant objects to the summary judgment and requests a formal trial, the case will proceed through a formal trial.

Meanwhile, since the Supreme Court is a court that deals with matters of law, the grounds for appeal that can be asserted are primarily limited to claims that the judgment of the lower court is legally incorrect. If the appellant's reason for filing an appeal with the Supreme Court is not based on legal grounds, the Supreme Court may issue a brief dismissal decision, discontinuing the trial.

4.2 Jurisdiction/Applicable Law Jurisdiction

In the case of an Administrative Lawsuit Against the KFTC, the MRFTA specially provides that the Seoul High Court has exclusive jurisdiction of the first instance, and accordingly, an Administrative Lawsuit Against the KFTC goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

An Antitrust Damages Lawsuit is a civil lawsuit, and jurisdiction is determined according to the provisions of the Civil Procedure Act. Under the Civil Procedure Act, the court in charge of the following has jurisdiction over the case:

- if the defendant is a person, the place of domicile (if the person has no domicile in South Korea or the person's domicile is unknown, then the person's place of residence, and if the place of residence is unfixed or unknown, then the place of the last domicile); and
- if the defendant is a corporation or other association or foundation, the place of principal office or place of business (if there is no such office or place of business, then the domicile of the main person in charge).

If jurisdiction is recognised for multiple courts in different regions for a single case, a plaintiff may file a lawsuit with any of them. Furthermore, even

if a plaintiff files a lawsuit in a court that does not have jurisdiction, jurisdiction is recognised if there is an agreement between the plaintiff and the defendant, or if the defendant responds to the pleading without an objection.

In the case of an Antitrust Criminal Lawsuit, jurisdiction is determined according to the provisions of the Criminal Procedure Act. The Criminal Procedure Act basically provides that the court with jurisdiction is the court in charge in the place where the offence took place, the place of the defendant's domicile, the place of the defendant's residence, or the defendant's present location.

Applicable Law

In an Administrative Lawsuit Against the KFTC, since the issue is whether the KFTC's measures based on the MRFTA are lawful, the MRFTA applies in terms of substance. In terms of procedure, the MRFTA, the Administrative Litigation Act, and the Civil Procedure Act apply, among other pieces of legislation.

In an Antitrust Damages Lawsuit, in terms of substance, the Civil Act and the MRFTA apply, and the victim may choose the law that is the basis for the claim in filing the lawsuit. In terms of procedure, the Civil Procedure Act applies.

In an Antitrust Criminal Lawsuit, various laws such as the Criminal Act and MRFTA can be applied, and procedurally, the Criminal Procedure Act is applicable.

4.3 Limitation Periods

In the case of an Administrative Lawsuit Against the KFTC, under the MRFTA, a company has to file a lawsuit with the Seoul High Court against the disposition of the KFTC within 30 days from the date the company was notified of the KFTC's

disposition. If the company has filed an objection to the disposition by the KFTC, the company also has to file a lawsuit with the Seoul High Court within 30 days from the date of receipt of the original copy of the KFTC's decision regarding the objection. An Administrative Lawsuit Against the KFTC will be dismissed after the 30-day period.

In the case of an Antitrust Damages Lawsuit, there is no time limit for the victim to comply with, other than the statute of limitations in accordance with the characteristics of the victim's right to claim damages. The victim's right to claim damages for a violation of the MRFTA corresponds to the right to claim damages resulting from tort in the Civil Act. Under the Civil Act, the statute of limitations for claiming damages resulting from tort is three years from the date on which the victim (or their legal representative) became aware of the damage and the perpetrator, or ten years from the day the perpetrator committed the tort. The statute of limitations is complete when one of the above two periods elapses. Victims of MRFTA violations must, in principle, file a lawsuit with the court within the above period, unless a ground for suspension of the statute of limitations provided by the Civil Act is recognised.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

In South Korean law, there is no "discovery" system as in common law. However, the current MRFTA introduces court orders that can compel the opposing party to submit materials essential for proving damages or calculating the amount of damages.

In addition, in the course of proceeding with a lawsuit, the parties to the lawsuit may follow the procedure for getting the opponent or a third party to submit documents via court in accordance with the Civil Procedure Act. Based on the MRFTA, a court in charge of a damages lawsuit can ask the KFTC to send records related to the MRFTA violations.

A party to a lawsuit that wants an opponent or third party to submit documents may ask the court to request that the opponent or third party submit the document voluntarily. Where the opponent or third party does not submit the document voluntarily, the party can petition the court to order the opponent or third party to submit the document, by means of a “document submission order petition”.

Requirements and Procedure for Court Orders to Submit Materials

Under the system for court orders to submit materials introduced in the current MRFTA, in lawsuits for damages due to collusion, unfair trade practices (excluding unfair support), and collusion by business entities’ organisations, a party may ask the court to issue an order to submit materials necessary for proof of damage or calculation of the amount of damages. Upon a party’s request, the court can order the other party to submit the relevant materials (except for material related to leniency). The system requires a party’s request, and the target of the court’s order to submit materials is the other party. This is distinct from a document submission order under the Civil Procedure Act, which can also be issued to a third party in possession of the document.

Even if a party asks the court to order submission of materials, if the holder of the materials has justifiable grounds for refusing to submit the

materials, the court cannot order submission of the materials. If the holder of the materials claims there is a justifiable ground for refusing to submit the materials, the court can order presentation of the materials in order to determine whether the claim is appropriate. In this case, the court should not allow others to view the materials. However, even if the materials to be submitted pursuant to the court order are business secrets, the current MRFTA does not consider this as a justifiable ground for refusing to submit if that submission is necessary for proof of damage or calculation of the amount of damages. In this case, the court must designate the scope or persons who can access the materials within the purpose of the court order.

If the other party fails to comply with the court order to submit materials without justifiable grounds, the court may recognise the party’s assertion as to the content in the materials to be true.

Requirements and Procedure for a Document Submission Order Petition

If the court orders the opposing party or a third party to submit a document, the person who is in possession of the document bears the duty of submitting the document unless there is a ground for denial, as provided in the Civil Procedure Act. In this regard, the Civil Procedure Act stipulates that a person who is in possession of a document cannot refuse to submit it in the following cases.

- When a party is in possession of documents cited in a lawsuit.
- When a petitioner has a private legal right to request that the person who is in possession of the document hand it over or show it.
- When a document has been written for the benefit of the petitioner or prepared with

regard to the legal relationship between the petitioner and the person in possession of the document; however, this is not applicable to any of the following cases:

- (a) documents that contain matters related to occupational secrets of a current or former public official, if the consent of the relevant public official or related organisations has not been obtained;
 - (b) documents that contain matters related to information that may lead to the prosecution or conviction of, or the disgrace of, the person who is in possession of the document, their relative (or a person who used to be one), their legal guardian, or ward; or
 - (c) documents that contain matters concerning secrets of professional duties or skills or occupational secrets of a person who is obliged to keep secrets under laws and regulations, and that are not exempted from the obligation to keep secrets.
- When documents other than “documents that a public official or a person who used to be one holds or is in possession of, for their public duty” are not within the scope of either b) or c) for the exceptions above, or documents that exist solely for the utility of their owners.

When a party petitions for a document submission order, the court first hears the opinions of the respondent regarding their possession of the document, and whether they have a reason to object to the document submission. If the court determines that the document submission order petition is appropriate, the court will order the respondent to submit the document.

In principle, the petitioner must clearly specify the target document when petitioning for a document submission order. However, it is not always easy for a person who is not in possession of a

document to accurately specify the target document. In such a case, the Civil Procedure Act stipulates that the document submission order petitioner first submit a general description of the target document’s gist or the facts to be proved by the document. Then, according to the Act, the court may order the respondent to organise the titles and the gist of the documents they are in possession of, or of the documents to be submitted as documentary evidence in relation to the petition, etc, as a list, and submit it. Following the procedure, the petitioner can petition for a document submission order by checking the list of documents and specifying those they deem necessary.

Consequences of Refusal to Submit

If a respondent refuses to submit a document without giving any of the reasons mentioned above, or if a respondent destroys or discards a document that they are required to submit, or renders it unusable for the purpose of hampering the petitioner’s use of it, the court may recognise the petitioner’s claims about the contents of the document as true. However, the court may not determine that the fact the petitioner intended to prove with the document has been instantly proved. For example, if a petitioner petitions for a document submission order to prove that a sales contract has been made, and the respondent refuses to submit a copy of the contract without any grounds, despite the court’s order for the document submission, the court may acknowledge that there was a copy of the contract with the written content alleged by the petitioner, but beyond that, it may not immediately acknowledge that the sales contract alleged by the petitioner has been made.

5.2 Legal Professional Privilege

Privileges such as attorney–client privilege are not recognised under South Korean law.

5.3 Leniency Materials/Settlement Agreements

In principle, the MRFTA stipulates that the KFTC and its officials may not provide information or data regarding leniency applicants to others unrelated to the handling of the case. However, should the leniency applicant consent, or if it is necessary in order to file or carry out a lawsuit related to the case, such information or data can be provided to others.

Meanwhile, in accordance with the MRFTA, the court has the authority to compel the opposing party to provide evidence regarding damages, but leniency-related materials are exempt from this requirement.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

A court can admit facts based on a witness statement. A witness statement can be made both orally and in writing. In principle, a witness statement is subject to cross-examination, but cross-examination is not conducted in exceptional cases where a witness submits a written affidavit. A court sometimes only requires a written affidavit from a witness when the case does not concern factual grounds that need to be verified through cross-examination. It is sufficient for a witness to make a statement, and they do not bear the burden of providing evidence to support the authenticity of the statement.

6.2 Expert Evidence

Expert witnesses are often utilised where one of the issues in a lawsuit requires special learning and experience. The procedure for the expert witness statement is the same as for the general witness statement. The expert witness state-

ment can be made both orally and in writing, and is subject to cross-examination in principle.

A party does not need to obtain court approval to submit expert statements in writing, but they must obtain court approval if they conduct an interrogation of the expert in court or if they request an expert's appraisal. Courts do not require experts to produce joint statements in advance of a trial indicating the areas in which they agree or disagree.

In addition to receiving expert opinions or questioning experts as witnesses to investigate expert evidence, courts can also adopt other measures such as requesting experts to appraise the issues of the trial, or follow the process of simultaneously seeking opinions from multiple experts.

7. Damages

7.1 Assessment of Damages

In an Antitrust Damages Lawsuit, the amount of damage is calculated based on the actual amount of injury or estimated amount of injury sustained by the victim. Regarding some violations, such as collusive acts, a provision established in 2018 renders a perpetrator liable for compensation of damages for an amount not exceeding three times the damages incurred by the victims. Compensation for damages in accordance with this provision are regarded as punitive damages.

When the court determines the amount of compensation in accordance with the provision above, certain factors should be taken into account, including:

- intent or degree of recognition of the concern that damage will arise;
- the extent of damage caused by the violation;
- the economic gain the perpetrator has acquired from the violation;
- the fines and surcharge for the violation;
- the duration and frequency of the violation;
- the financial condition of the business entity; and
- the extent of efforts the business entity or business entities' organisation has made to remedy the damages.

7.2 “Passing-On” Defences

The perpetrator can claim and prove that the victim has not been harmed by a collusive act that violates the MRFTA by passing on the victim's damages to consumers. When the court accepts the passing-on defence, it is also considered as a factor that limits the scope of the perpetrator's liability.

7.3 Interest

Interest and damages for delay are distinguished from one another by law, and while compensation does not accrue interest, damages for delay do. The court views that in the case of liability for damages arising from tort, in principle, the damages for delay accrue from the time the liability is established. In the case of a violation of the MRFTA, which is a form of tort, the damages for delay, in principle, also accrue from the time the liability is established. Accordingly, the victim can claim damages for delay incurred during the period from the time the liability for damages arising from the MRFTA violation is established until the actual payment of all damages, including before and after the trial, unless extraordinary circumstances exist.

Damages for delay are generally calculated by applying an interest rate of 5% per year, which

is the statutory interest rate under the Civil Act, to the compensation for damages. However, depending on the result of a damages lawsuit, the rate of 12% per year stipulated in the Act on Special Cases Concerning Expedition of Legal Proceedings can be applied. If the victim wins completely in the litigation, the annual rate of 12% is applied from the day after the date on which the complaint of the case was delivered to the perpetrator. If the victim partially wins, the annual rate of 12% is applied from when the court makes the decision. In short, the damages for delay are calculated at a rate of 5% per year from the time the liability is incurred, and are calculated at an annual rate of 12% at some point after the victim files the lawsuit for damages.

8. Liability and Contribution

8.1 Joint and Several Liability

In a case where several people commit a violation of the MRFTA and thereby inflict damage on a victim, the violators become jointly liable for the damages to the victim. The South Korean Civil Act stipulates that in a case where multiple people inflict damage on others in a joint tort, they are jointly liable for the compensation for damages (quasi-joint debt). An MRFTA violation is a tort under the Civil Act, and when multiple people commit a tort together, it constitutes a joint tort. Accordingly, the MRFTA violators become jointly liable for a victim's damages. As a result, the violators are obliged to compensate the victims for all the damages until the victims' damages are compensated in full, and whether all or only some of the violators compensate the victims for damages, they all become exempt from the liability to pay further damages to the victim.

On the other hand, even if some of the violators have obtained mitigations of, or exemptions from, the KFTC's dispositions or criminal prosecution procedures, for reasons such as leniency or co-operation with the investigation, this does not reduce or exempt them from liability for damages to the victim.

8.2 Contribution

Where a victim prevails in a damages lawsuit against multiple violators, the violator who has compensated the damages suffered by the victim can file a civil lawsuit against the other violators, claiming compensation for the portion of the damages paid beyond their liability. In this case, with respect to the criteria for determining whether the violator has paid compensation beyond their liability to the victim, the Supreme Court suggests using "the degree of wrongdoing of the joint tortfeasor in the joint illegal acts" as a criterion.

9. Other Remedies

9.1 Injunctions

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the business entity may petition for suspension of the enforcement of a disposition on the ground that there is a risk of irreparable damage due to the disposition of the KFTC, while claiming cancellation of the disposition on the ground that the disposition is unlawful. The court may decide to suspend the enforcement of the disposition before its judgment on the case on the merits on petition by that business entity or on its own official authority.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, the court's role becomes limited to the extent of

ordering the perpetrator to monetarily compensate for the damages, and deciding whether it will accept the victim's request for provisional seizure for effective recovery of damages.

In order for the victim to request seizure by rendering the right to claim damages arising from the MRFTA violation as a right to preservation, there must be a serious concern that it may not be possible to enforce the award without the seizure, even if the victim prevails in the damages lawsuit. The fact that there is a concern that it will be very difficult or impossible to enforce the award will be acknowledged depending on whether the level of situation that provides for the court's presumption of certainty, if not its confidence, has been shown.

When the victim requests the seizure, the court usually decides whether to accept the request without notifying the perpetrator. The court's decision can be made within one month from the time the request is made.

On the other hand, if the victim has obtained a decision approving the seizure but lost in the main case, the perpetrator can request the cancellation of the seizure on the grounds that they have prevailed in the main case, and the victim could be liable for damages if they have inflicted damages on the perpetrator by the decision that approved the seizure.

9.2 Alternative Dispute Resolution

In the case of an Antitrust Damages Lawsuit, the parties can resolve the case in accordance with alternative dispute resolution procedures by going through procedures such as reconciliation and mediation both inside and outside the lawsuit. Particularly for a case regarding damages caused by collusion, it takes a considerable amount of time and money to calculate

the appropriate amount of damages. Resolving the case through alternative dispute resolution procedures can be effective for all the parties concerned.

10. Funding and Costs

10.1 Litigation Funding

There is no regulation in South Korea that limits or guarantees litigation funding in relation to litigation procedures.

10.2 Costs

Dividing Litigation Costs

In filing a suit, the plaintiff pays a certain amount of the litigation costs in accordance with the relevant laws and regulations. Where additional litigation costs are incurred, for example, due to an expert appraisal procedure during the course of the litigation, the party that has applied for the procedure will pay such costs in advance. When the court makes a decision, it rules on which party should ultimately bear the litigation costs incurred in the course of the trial and the ratio of litigation costs the respective parties must bear. Litigation costs are, in principle, to be borne by the losing party, and in the case of partial victory, the ratio of the litigation costs is usually determined according to the percentage of victory between the parties. The specific amount of litigation costs to be borne by the parties will be determined through a separate trial process known as the procedure for confirming litigation costs, and the parties will go through the process of paying the confirmed litigation costs to the other party afterwards.

Attorneys' Fees

Attorneys' fees are also a type of litigation cost, but the full amount of attorneys' fees is not included in the litigation costs the parties will

actually pay. The Supreme Court rules about calculating and including attorneys' fees in litigation costs stipulate that the lesser of the amounts calculated, based on a certain standard prepared according to the value of the litigation and the actual amount of attorneys' compensation paid, is included in the litigation costs to be borne by the parties. In most cases, the prevailing party receives a refund that is less than the amount the party actually spent on attorneys' fees.

Collateral

According to the Civil Procedure Act, if the court finds that the provision of collateral for litigation costs is necessary, as the plaintiff does not have an address, office, or a place of business in South Korea, or when it is obvious that the plaintiff's claim is unreasonable, upon request of the defendant, the court may order the plaintiff to provide collateral for litigation costs. Where the court orders the plaintiff to provide the collateral, the plaintiff can provide it by depositing money or securities recognised by the court, or submitting a document (guarantee insurance policy) in which a payment guarantee contract with a financial institution or insurance company has been made.

11. Appeals

11.1 Basis of Appeal

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the losing party can file a final appeal with the Supreme Court within two weeks after they receive the service of the Seoul High Court's decision. Unlike general cases, the Seoul High Court becomes the court of first instance for an Administrative Lawsuit Against the KFTC, and thus, the Administrative Lawsuit Against the KFTC actually operates as a two-tiered

court system. In order to appeal to the Supreme Court, the appellant must file a petition of final appeal with the Seoul High Court, which may or may not state the grounds for appeal. If the appellant submits the petition without stating the grounds for the final appeal, the appellant must submit the grounds for appeal to the Supreme Court within 20 days from the date of receiving notice that the Supreme Court has received the record of the lawsuit from the Seoul High Court. If the appellant does not submit the grounds for appeal within that period, the Supreme Court will dismiss the final appeal.

Since the Supreme Court operates as a court that addresses questions of law, grounds for appeal that can be claimed are limited, in principle, to grounds that the judgment of the Seoul High Court is incorrect from a legal perspective. A statement that the Seoul High Court has incorrectly admitted the facts cannot be provided as grounds for appeal.

The Supreme Court will dismiss the final appeal if it determines that the grounds for appeal cannot be admitted. If it determines that the grounds for appeal can be admitted, the Supreme Court will reverse the ruling of the Seoul High Court and, in principle, remand the case to the Seoul High Court to reconsider the case.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, the district court becomes the court of first instance, and the party that loses in the first instance trial can appeal by filing a petition of appeal with the court of first instance, while the party that loses in the appeal can file a petition of final appeal with the Court of Appeal. A petition of appeal and final appeal must be filed within two weeks from receiving the original copy of the decision from the court. In the case of the appeal at the second-instance court, even if the grounds for the appeal are not stated in the petition of appeal, there is no legal deadline for filing a brief stating the grounds for appeal. The Court of Appeal will dismiss the appeal if it decides that the judgment of the first instance court is valid. If it decides that the judgment of the first instance court is wrong, it will reverse the judgment and rule on the case on its own. The procedure for final appeal at the third-instance court follows the same procedures.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, a party that objects to the judgment of the first instance court or the Court of Appeal must file a petition of appeal or final appeal within seven days from when the court gives the decision, and must submit the grounds for appeal within 20 days from when the party received the notice from the Court of Appeal or final appeal that the record of the lawsuit had been sent.

SPAIN



Law and Practice

Contributed by:

Cristian Gual, Patricia Vidal, Cristina Ayo and Ignacio García-Perrote
Uría Menéndez

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Uría Menéndez is the leading law firm in the Ibero-American market. With more than 600 lawyers, including 134 partners, the firm advises on Spanish, Portuguese, and EU law in relation to all aspects of corporate, public, litigation, tax, and labour law. It has 12 offices in eight countries, and over 2,000 clients. Uría Menéndez's lawyers' extensive experience and comprehensive knowledge of their clients' industries allow the firm to offer value-added advice in all areas of business, and find innovative technical

solutions to the most complex legal issues. In January 2015, after more than 20 years working in the region, the firm took a ground-breaking step by creating the first Latin-American integration between leading local firms (Philippi in Chile and Prietocarrizosa in Colombia). In 2016, the firm integrated two Peruvian firms, Estudio Ferrero Abogados and Delmar Ugarte, becoming Philippi Prietocarrizosa Ferrero DU & Uría (PPU), the first major Ibero-American firm.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Spain has recently become a leading jurisdiction in antitrust litigation, with a number of judgments issued in cartel damages claims in the last three to four years. In previous years, however, Spain had some experience with nullity claims and damages claims resulting from distribution agreements with vertical restraints. The situation has drastically changed, and Spain is currently a very attractive jurisdiction for damages claims, with thousands of claimants and proceedings concerning cartel cases and abuse of dominant positions.

Active Antitrust Litigation Cases in Spain

Spain has several active antitrust cases giving rise to relevant damages claims.

- Nullity claims filed between petrol stations and petrol distributors for the inclusion of vertical restraints.
- Cartel damages cases giving rise to very proactive litigation and which developed case law from lower courts. The damages claims filed here are either follow-on or hybrid. There are also damages claims against dominant undertakings, but those are quantitatively fewer. Examples of these cases include:
 - (a) the Spanish paper envelopes cartel fined by the *Comisión de los Mercados y de la Competencia* (CNMC – the Spanish Competition Authority);
 - (b) the trucks cartel fined by the European Commission (EC);
 - (c) the Spanish decennial insurance cartel; and
 - (d) car dealers and car manufacturers fined by the CNMC after issuing several infringement decisions in 2015, upheld by

the review courts in 2021.

- Upcoming damages claims against:
 - (a) milk buyers after the CNMC found that there had been anti-competitive conduct within the dairy industry;
 - (b) banks for the different infringements found by the EC for tampering with the interest-rates derivatives; and
 - (c) envelopes cases (and repetition claims between co-infringers) concerning several cartel cases decided by the CNMC (a first wave of claims were decided by the Spanish courts a few years ago and a new wave is now coming as a result of the interpretation of time periods arising from the ECJ preliminary ruling in the case C-267/20, Volvo and DAF (see 1.2 Other Developments)).

Developments in Spain Regarding Antitrust Private Litigation

In May 2017, Spain transposed Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the EU (Directive 2014/104); this was five months after the deadline to transpose the Directive expired. The transpositional rules were crystal clear: substantive provisions transposed in Articles 71-81 of the Spanish Defence of Competition Law (*Ley 15/2007, de 3 de julio de defensa de la competencia*- LDC) could not be applied retroactively, while procedural provisions (ie, rules on disclosure of evidence) transposed into the Spanish Civil Procedure Law (*Ley 1/2000, de 7 de enero, Enjuiciamiento civil*- LEC), in particular Articles 283-bis (a) to 283-bis (k) were applicable to actions filed after 27 May 2017.

Courts must adjudicate active cases by applying the general damages claims regime and including the new provisions on disclosure of evidence. Consequently, lower courts have awarded damages applying general damages claims rules, namely Article 1902 Spanish Civil Code (*Real Decreto Ley de 24 de julio de 1889 por el que se publica el Código Civil- CC*), and the Supreme Court's case law developing it, complemented by general principles of tort law, EU law, and ECJ case law.

1.2 Other Developments

Spanish antitrust litigation is heavily affected by the preliminary rulings issued by the ECJ regarding certain aspects of competition law damages actions. Indeed, many of these preliminary rulings were requested by Spanish judges and almost all refer to the so called "trucks case". In particular, the latest and most relevant cases for Spain are the following.

CJEU, C-30/20, RH v AB Volvo

This preliminary ruling dealt with issues regarding jurisdiction, the interpretation of the concept "where the harmful event occurred or may occur" included within Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation Brussels I recast") and, in particular, the scope of the jurisdiction granted by Regulation Brussels I recast.

The Court ruled that the courts with jurisdiction are those located in the country where the claimant purchased the goods affected by the infringement or where the claimant has its registered offices. Furthermore, the Court clarified that the jurisdiction granted by Article 7(2) is both international and territorial.

CJEU, C-882/19, Sumal v Mercedes Benz Trucks España

In this preliminary ruling, the Court was asked whether it is possible to bring a damages claim against a subsidiary which was not an addressee of the infringement decision for the harm caused by the parent company which participated in a cartel.

The Court ruled that liability is joint and several within the same undertaking and the subsidiary can be held liable for the harm caused by the parent company provided that it belonged to the same economic unit at the time of the infringement and the infringement affected the same products and services offered by the subsidiary. Nevertheless, the subsidiary can challenge this liability on two grounds that:

- the conduct did not actually infringe competition law; and
- the subsidiary did not belong to the parent company's economic unit or it did not market/offer the products affected by the infringement.

CJEU, C-267/20, Volvo and DAF

The Court had to decide whether the following were substantive or procedural provisions:

- Article 10 of Directive 2014/104 regarding limitation periods;
- Article 17(1) of Directive 2014/104 regarding the courts' possibility to quantify the damages awarded if it is excessively difficult or practically impossible for the claimant; and
- Article 17(2) of Directive 2014/104 regarding the rebuttable presumption that cartels cause harm.

It also had to decide on the applicable *ratione temporis* to the trucks cartel litigation in Spain.

The Court, taking into account the fact that Spain transposed the Directive late, ruled as follows.

- On limitation periods, Article 10 of Directive 2014/104 is a substantive provision. It can be applicable *ratione temporis* if the action arises after the expiry of the transposition deadline and the situation is not “consolidated” according to the applicable damages claims rules on limitation periods.
- On a national court’s ability to quantify the damage, Article 17(1) of Directive 2014/104 is a procedural provision (ie, it can be applied to actions filed after the approval of the Directive in 2014).
- On the rebuttable presumption that cartels cause harm, Article 17(2) of Directive 2014/104 is a substantive provision (ie, it cannot be applied retroactively). In the trucks case, it is not applicable *ratione temporis* because the infringement ended before the expiry of the Directive’s transposition deadline. This is without prejudice to the pre-existing national rules that could establish similar/ other types of presumptions.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Actions for damages arising from a breach of Spanish or EU competition law have to be filed with commercial courts.

Legal Basis

The legal basis for competition law damages claims, irrespective of whether they are collective actions, depends, as a general rule, on when the infringement took place.

- If it happened before 26 December 2016, the legal basis is Article 1902 of the CC, the gen-

eral basis for damages claims in Spanish law. Some provisions of the new regime (those of procedural character) might be nonetheless applicable.

- If the infringement took place or lasted until after 26 December 2016, claims will be based on Articles 71–81 of the LDC, which transpose the substantive aspects of the Directive.

Damages Claims Available

In Spain, standalone, follow-on, and hybrid claims are available.

Standalone claims

In standalone claims, claimants must file a double claim.

- A declarative claim requesting the court to rule that the defendant’s conduct was anti-competitive. They must establish the anti-competitive conduct of the defendant(s) and bring evidence thereof.
- A damages claim, where claimants must establish, for the claim to succeed:
 - (a) that the defendant(s) infringed competition law;
 - (b) that the claimant suffered harm;
 - (c) the causation between the infringement and the harm; and
 - (d) the defendant’s intent or, at least, fault.

Follow-on claims

Claimants only have to bring the damages claim and rely on a decision of a competition authority (eg, the EC, the CNMC, or a regional competition authority) to establish the infringement. Decisions of competition authorities from other EU member states can also be used to declare the existence of the infringement. In these cases, claimants will focus on (b), (c), and (d) above.

The distinction of whether the decision is final after it was reviewed by a court, or whether it is final because the time limits for appeal were exhausted, is irrelevant if the claim is based on Articles 71–81 of the LDC. In these cases, final infringement decisions bind the court adjudicating damages claims regarding the infringement and its temporal and geographic scope. For further information on this, see **2.3 Decisions of National Competition Authorities**.

Hybrid claims

Hybrid claims are also available. Claimants rely on the infringement decision, but only as “qualified” evidence of the infringement (not binding the civil court). Claimants shall file a declarative claim for the infringement and also a claim for the award damages.

Another type of hybrid claim is one that relies on a binding sanctioning decision for a certain period of the infringement and for another, subsequent period demonstrates for the first time in the civil courts the continuation of the infringement and the damages arising from both periods (the first is a sanctioned period, and the second is a non-sanctioned period).

2.2 Specialist Courts

Damages claims have to be brought before commercial courts.

Commercial Courts in Spain

Commercial courts are located in the capital of each province and judges are specialists in commercial matters.

By law, these courts are allocated cases relating to commercial matters, and competition law damages claims belong to that group. However, in some provinces there are no full-time commercial courts, and a first instance court (ie, a

general civil court) assumes its functions and is allocated these cases.

Transfer of Cases Between Courts

The procedure to transfer cases in Spain depends on the transferral grounds, which can be *ratione materiae* if the case should have been allocated to a specialist court, or may be based on territorial jurisdiction.

*Transferral *ratione materiae**

When the case is allocated to a court, the court should *ex officio* assess whether it has jurisdiction *ratione materiae*. If the assessment’s result is negative, it will issue a court order declaring that the court has no jurisdiction and identifying the court that has jurisdiction. If the court’s assessment is positive and it declares it has jurisdiction *ratione materiae*, the defendant will have to file a plea as to jurisdiction of the court to challenge it.

Transferral on territorial grounds

If the court where the claim has been brought has no territorial jurisdiction, it cannot order the transfer *ex officio*. The defendant will have to file a plea as to jurisdiction or accept the court’s lack of jurisdiction and file a new claim before the correct court.

Filing pleas as to jurisdiction

Defendants may file pleas as to jurisdiction during the first ten days of the term to file the statement of defence and it suspends the latter until jurisdiction is declared. Defendants will state the court to which they believe the case should be allocated. Claimants and other defendants (if any) will be allowed to argue for, or against, the jurisdiction of the court to which the case was initially allocated and the proposed new court with jurisdiction.

The parties may appeal the court order whereby the court refrains from dealing with the case. However, when the court recognises its own jurisdiction, the parties may raise the issue when appealing the court's judgment if the lack of jurisdiction is *ratione materiae*.

2.3 Decisions of National Competition Authorities

The binding effect of infringement decisions by national competition authorities depends on the competition authority of origin and whether the decisions are final.

Decisions of the CNMC

Under Article 75(1) of the LDC, infringement decisions of the CNMC that are final (because they have been confirmed by a review court or they have not been appealed) bind the civil court that has to adjudicate on a damages claim. The binding effect extends to the legal qualification of the infringement itself and its material, personal, temporal, and geographic scope. It does not extend to the "effects" of the infringement (if any) declared by the CNMC.

For those cases, Article 75 of the LDC is not applicable to *ratione temporis*; the binding effect differs between infringement decisions that have not been appealed and those upheld by review courts. According to the Spanish Supreme Court, the former are "strong pieces of evidence" ("*instrumento de gran convicción*") (Supreme Court, judgment 634/2014). However, the latter bind the court where the damages claim has been filed (Supreme Court, judgment 651/2013).

Decisions of National Competition Authorities of Other States

Under Article 75(2) of the LDC, final infringement decisions of national competition authori-

ties of other EU member states do not bind the Spanish civil court, but they are not merely evidence either. Claimants may rely on the decision because it allows the existence of the infringement to be presumed, though defendants can rebut this.

When Article 75(2) of the LDC is not applicable *ratione temporis*, these infringement decisions are not binding either. Claimants can, however, use them as relevant pieces of evidence to build the claims.

Decisions of the EC

Infringement decisions of the EC bind civil courts adjudicating in damages claims from the moment they are adopted (even if pending on appeal), according to Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"). The reason for this is that national courts cannot issue judgments that run counter to EC decisions. The legal qualification and the material, personal, temporal, and geographic scope of the EC decision bind the court.

Commitment decisions under Article 9 of Regulation 1/2003 (which are not sanctioning decisions) will be considered *prima facie* evidence (CJEU, C-547/16, *Gasorba*).

Competition Authorities' Intervention Before Civil Courts

Spanish competition authorities and the EC may intervene in competition law damages proceedings as an *amicus curiae*. The CNMC has lately been requested to advise upon the damages quantification criteria used by economic experts, though it is not empowered to quantify the damages award itself or to act as an impartial economic expert appointed to support courts.

2.4 Burden and Standard of Proof

According to the general principles of Spanish civil and commercial law, claimants have the burden of proof for those elements that support their claim. Defendants have the onus of proving the arguments leading to the dismissal of the claim.

Competition law damages claims, irrespective of whether they are standalone or follow-on, follow the same rules, and claimants bear the burden of proving the elements of the claim. Claimants, however, may rely on the infringement decision to prove the infringement when the claim is follow-on and, depending on the decision's content and degree of detail (for instance, a decision declaring an abuse of dominance against one particular entity), to prove the causal link. However, they will have to bring evidence on the other elements of the claim. Their burden is further alleviated when Article 76(3) of the LDC applies *ratione temporis* to cartel infringements in particular, as it provides for a rebuttable presumption that cartels cause harm. In this scenario, claimants who are direct clients of the infringing parties will only focus on quantifying the damage, while defendants will have to rebut the presumption.

If a defendant argues that claimants passed on the overcharge to their customers, they may raise the pass-on defence, and the burden of proof will be on the defendant.

2.5 Direct and Indirect Purchasers

Both direct and indirect purchasers may bring damages claims against infringers. Potential claimants base their claims on Article 1.902 of the CC or Article 72 of the LDC, depending on the application *ratione temporis* of the latter regime.

Article 79 of the LDC, a specificity of the new regime, includes a rebuttable presumption favouring indirect purchasers when bringing a damages claim based on passing-on. The overcharge will be presumed to have been passed on to them if the defendant infringed competition law, the infringement caused an overcharge to the direct client and the indirect purchaser acquired goods or services affected by it. Defendants, however, may rebut this presumption by arguing that there has been no actual pass-on downstream.

2.6 Timetable

Typical Duration of Proceedings

There is no average or typical duration of competition law damages claims proceedings. It varies depending on the facts of the case, the prior experience of the court dealing with this kind of claim, and the evidence submitted by the parties.

The Relation Between Damages Claims and Parallel Investigations by the NCA

Since competition law damages claims can be standalone, their outcome can be independent from that of the public enforcement by the competition authority. However, defendants may request a stay of proceedings until the pending public enforcement procedure finishes and courts may accept it after hearing the parties' opinion. Although it is not legally obliged to, the court may agree to stay the proceedings either in the first instance or when the case is under appeal (Articles 434(3) and 465(6), LEC, respectively); the court must undertake all steps of the proceeding but for issuing the final ruling.

When the affected competition authority is the EC or when the case is under review of the General Court or the European Court of Justice, the ECJ judgment in *Masterfoods* (CJEU, C-344/98,

Masterfoods) must be taken into account. There, the ECJ ruled that it is for the national court to decide whether to stay proceedings or not. However, if the damages claim's outcome depends on the validity of the EC's decision, the court will have to stay the proceedings.

3. Class/Collective Actions

3.1 Availability

At the time of writing, Spain has a judicial collective redress mechanism denominated as "collective actions". The existing system is basically an opt-out system, in the sense that the Spanish Civil Procedure Law provides that a decision issued in a collective action is binding on all members of the class whether the court rules on the claim or dismisses it. However, at the same time, this system has important limitations. To start with, it has no certification process and the Spanish Civil Procedure Law does not establish any mechanism to allow represented consumers to opt-out (to avoid being bound by the decision on the collective claim and, therefore, to preserve their individual action).

Likewise, pursuant to the Spanish Civil Procedure Law, represented consumers are entitled to appear in the proceedings to contribute to the case by filing allegations that are supplementary to the collective action and to those allegations made in the lawsuit. However, this cannot be understood as an opt-in mechanism since, as noted, the consumer will be bound by the decision (whether or not the consumer appears in the proceedings in which the supplementary allegations are filed).

In that regard, Spanish law establishes specific procedures for publicising a lawsuit to facilitate

any class member's joinder to the claim on a supplementary basis.

The current regulation may suffer some changes in the future due to the approval of the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC ("Representative Actions Directive") and the future modifications of the Spanish Civil Procedure Law that are still being discussed.

Although the Directive does not imply significant changes in the Spanish procedural regulation since, as noted, Spanish law already provides for the option to join the compensation remedy action to an injunction action, it may oblige the Spanish regulator to take important decisions on specific matters such as the standing of the entities permitted to file this type of action, the confirmation of the effects of the decision issued within this action, or the publicity of the action before being filed.

Taking into consideration that this type of action is intended to defend consumers' rights and interests, both direct and indirect purchasers can be part of a collective action, provided that they are final consumers and the underlying factual issues are sufficiently similar with regard to the terms outlined in **3.2 Procedure**.

3.2 Procedure

Initially, the procedural standing to initiate a collective action under the Spanish Civil Procedure Law is not granted to a member of the class but to certain consumer associations and groups of aggrieved consumers.

In particular, if the number, identity and specific circumstances of the aggrieved consumers are determined or are easily determinable at the declaratory stage of the proceedings, both the consumer associations and the groups of aggrieved consumers by themselves can sue on behalf of all the aggrieved consumers. In this regard, a group of consumers has procedural standing when at least 50% of its determined potential members have joined it.

However, when those circumstances are not met, the procedural standing is limited to certain consumer associations. In this regard, only consumer associations that are members of the Spanish National Consumer Committee have legal standing to file legal actions on behalf of an undetermined number of consumers.

Moreover, in March 2014, Spanish parliament passed Law 3/2014 of 27 March, amending the 2007 Consumer Protection Law and adding new regulations on standing to initiate collective actions to the Civil Procedure Law. Pursuant to the new regulations, Spanish public prosecutors also have standing to initiate collective actions seeking compensation for consumers.

As noted in **3.1 Availability**, there is no certification process under the Spanish regulation prior to initiating the proceeding itself. There is no express regulation of compliance requirements for class actions, such as numerosity, commonality, typicality, or the adequacy of representation. Although it is understood that actions can only be considered as class actions where the individual cases have underlying factual issues that are sufficiently common between the members of the group, this lack of regulation is problematic.

3.3 Settlement

Although there is no specific legislation relating to the settlement of collective action cases and no judicial experience on class settlement has been reported to date, it may be understood, given the consequences of the settlement, that court approval is required for collective actions to be settled. In any case, it must be noted that a court can only reject a settlement if it affects the fundamental individual rights of any of the parties that cannot be waived or the interests of third parties.

As there is no provision that provides for a mechanism that entitles consumers to opt-out from the class action, there is no specific provision that provides for a mechanism by which class members can object and refuse to be bound by the settlement. Taking into consideration the lack of judicial experience, the way in which a court would manage a petition by a class member not to be bound by the settlement cannot be described. In principle, and owing to the lack of any specific regulation, Spanish courts may be inclined to allow those individuals who are members of the class to keep their individual rights to claim if they expressly request this before the court in which the settlement has been enforced.

Finally, due to the lack of regulation on class action settlements, there are no provisions on the need to publish settlement agreements. This may make it more difficult for class members to exercise their right not to be bound by the settlement agreement, should such right be finally accepted by the courts.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Under Spanish procedural law, when the claim is filed, the judge or the law clerk may assess *ex officio*:

- the parties' legal standing;
- the international jurisdiction of the court the case has been allocated to; and
- the court's jurisdiction *ratione materiae* over the claim.

Furthermore, at the request of the parties, the judge will assess whether the court has territorial jurisdiction over the case.

If the court assesses any of these issues, it will issue a court order either confirming its jurisdiction or indicating that it has no such jurisdiction. Any other matter is considered to be part of the merits of the case and they will be dealt with in the judgment.

4.2 Jurisdiction/Applicable Law

Jurisdiction

If the damages claim has an international element, for example if the defendant's headquarters are located outside of Spain, jurisdiction will be established according to the rules of Regulation Brussels I recast or Spanish private international law, depending on the states involved. If the claim is purely national, then jurisdiction will be established according to national rules on jurisdiction as set out in the Spanish Civil Procedure Law.

General forums – international and national disputes

As a general rule, claimants can file their actions in the courts:

- of the defendants' domicile (Article 4 of Regulation Brussels I recast, and Articles 50 and 51 of the LEC); or
- that the parties agreed to give jurisdiction on the claims arising from the contract that bound them, provided that the claim falls within the scope of the agreement.

Alternatives forums – international disputes

Article 7.2 of Regulation Brussels I recast has a specific provision for jurisdiction when it comes to torts: claimants may bring their claims where the harmful events occurred. According to the ECJ's interpretation of "where the harmful event occurred or may occur" this place comprises:

- courts of the domicile of one of the infringers, even if there has been an out-of-court settlement with that defendant, provided that there is no evidence that there was an agreement between the claimant and the said defendant to artificially set the jurisdiction in those courts (CJEU, C-352/13, CDC Hydrogen Peroxide);
- courts of the place where the cartel was established (CJEU, C-352/13, CDC Hydrogen Peroxide);
- courts of the place where the agreement identified as the cause of the harm was signed (CJEU, C-352/13, CDC Hydrogen Peroxide; and CJEU, C-27/17, FlyLAL);
- courts of the place of the market affected by the infringement where potential victims suffered the harm (CJEU, C-27/17, FlyLAL; CJEU, C-30/20, RH v AB Volvo); or
- courts of the place where the potential victim acquired the cartelised product or service (CJEU, C-451/18, Tibor-Trans).

The ECJ confirmed that the jurisdiction given by Article 7.2 of Regulation Brussels I recast pro-

vides both international and national jurisdiction (CJEU, C-30/20, RH v AB Volvo).

Alternatives forums – national disputes

Spanish national rules on jurisdiction have no specific provision for competition law damages claims, though Article 52.1.12 of the LEC has alternative forums for infringements of unfair competition rules. The Spanish Supreme Court has interpreted this provision analogously to establish jurisdiction in damages claims caused by anti-competitive conduct (Supreme Court, order of 15 June 2021 and, previously, order of 26 February 2019). According to this provision, the alternative forums are:

- courts of the place where the defendant has its establishment open to the public;
- courts of the place where the defendant has its domicile; or
- courts where the anti-competitive conduct happened or where its effects were felt, as identified by the claimant.

Applicable Law

Under Spanish law, the applicable law in relation to a competition law damages claim is generally governed by the agreement between the parties. Otherwise, the law applicable to a competition law damages claim will be that of the place where the harm arose (*lex loci delicti*).

4.3 Limitation Periods

Rules on limitation periods depend on the applicable law to competition law damages claims. As explained in **1.1 Recent Developments in Antitrust Litigation**, the point to be taken into account to set the applicable regime is the moment the action arises, taking into consideration whether it is still running when there is a change in the substantive regime.

General Principle and Plausible Regimes

The general principle is that people harmed by an infringement of competition law can file damages claims from the moment they know, or are reasonably expected to know, that they were victims of a competition law infringement, they suffered harm, and they know the identity of the infringer. Under the pre-Directive 2014/104 regime, this was the case irrespective of whether there had been a public enforcement procedure.

The extension of the limitation period depends on the applicable regime:

- damages actions arising before the expiry of the transposition deadline of Directive 2014/104 have a one-year limitation period as established by Article 1968(2) of the CC, the general provision on limitation periods for damages claims;
- damages claims arising after the Spanish transposition of Directive 2014/104 or that were not time-barred when the Directive was transposed into Spanish law, will be subject to the five-year limitation period of Article 74 of the LDC, the specific provision for competition law damages claims.

Setting the Dies a Quo

Under the application of the general regime, the dies a quo starts running when injured parties know, or are reasonably expected to know, that they were victims of a competition law infringement, they suffered harm, and they know the identity of the infringer. There is no requirement for the infringement to cease to set the dies a quo if the claimant has the necessary information.

The Court of Justice's interpretation of the requirements of the principle of effectiveness in relation to setting the dies a quo in Volvo and

DAF (CJEU, C-267/20, Volvo and DAF) added the following criteria and, thus, limitation periods cannot start running unless the following have taken place.

- The infringement ceased.
- The victim knows, or is expected to know:
 - (a) that there was an infringement of competition law;
 - (b) that the infringement caused them harm (ie, there has been a harm, and there is a causal link between the infringement and the harm); and
 - (c) the identity of the infringer.

For claims against addressees of an EC decision, the limitation period will normally start running from the moment the summary of the decision is published in the Official Journal of the EU, though defendants may prove that the claimant was aware of the requirements before that date.

Under the application of Article 74 of the LDC, the dies a quo of any damages claim (irrespective of whether it is standalone or follow-on) starts running whenever the infringement ceased and the potential claimant knows, or should reasonably know, about the conduct and that it was an infringement of competition law, the harm suffered, and the identity of the infringer.

Interruption or Suspension of the Limitation Period

Under the application of the general regime of claims for damages caused by competition law infringements, judicial or extrajudicial claims interrupt the limitation period, provided that they are addressed to the infringer. Thus, the limitation period restarts on the day that the interruption occurred.

Under the application of Article 74 of the LDC, in addition to the general cause for interruption of judicial and out-of-court claims, the limitation period will be interrupted when one of the following occurs.

- The competition authority starts an investigation related to the competition law infringement that the damages claim is, or would be, based on. The limitation period would not restart until a year has elapsed since:
 - (a) the competition authority's decision is final; or
 - (b) the investigation proceedings finish in any other form.
- Out-of-court settlement negotiations start. The limitation period will not restart while they are ongoing. This interruption only affects those infringers that are part of the negotiations or represented therein.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure Disclosure Before and After the Transposition of Directive 2014/104

Before the transposition of Directive 2014/104, claimants could only file pre-trial proceedings to prepare the claim if the claimants' situation fell under the scope of Article 256 of the LEC. For competition law damages claims, the only circumstance where this would be possible is to prepare a collective action against an infringer of competition law. Otherwise, there was no specific procedure for the disclosure of documents.

After the transposition of Directive 2014/104, apart from pre-trial proceedings, claimants and defendants can seek the disclosure of evidence from the (future) claimant or defendant or from

third parties according to Articles 283-bis (a) and following the LEC.

Disclosure of Evidence: Procedure

When filing the request, claimants should identify the infringer, the infringement, the affected products, the identity of the affected direct or indirect purchasers, and the prices set for the products or services. The elements taken into account by the court when deciding whether to accept or deny the request are the following:

- the prima facie evidence submitted with the request;
- the extent and cost of the disclosure;
- the proportionality of the request; and
- the information sought, to protect confidential information.

Whenever there is confidential information not protected by legal professional privilege or by virtue of being leniency or settlement materials, the court may provide “data rooms” so that only the parties to the proceedings can access it.

Disclosure can happen either as a pre-trial disclosure, with the subsequent obligation to bring the damages claim, or once the claim has been filed. In the former case, the court will have to assess its own jurisdiction regarding the damages claim itself. The requestor bears the costs of the access to evidence and will also be liable for the damages caused by the misuse of the information accessed. The court may ask the requestor of the disclosure, on behalf of the requested party, to provide a guarantee to compensate for both the costs of the disclosure and the potential damages.

Once the request has been filed, the court will submit the request to the requested party and other interested parties, and it will organise a

hearing on the adequacy and appropriateness of the request. Then, the court will issue a court order either ordering the disclosure including the details regarding the procedure and its organisation or not ordering disclosure. If the requested party hinders access to the evidence disclosed, the court may:

- accept the facts that the requestor sought to prove with the undisclosed evidence;
- understand that the requested parties acknowledge and acquiesce in the claims of the requestor;
- deny the defences raised by the defendant blocking access; and/or
- impose a fine on the requested party.

Requestors cannot disclose confidential information accessed during this proceeding. If requestors breach the rules on confidentiality or use of evidence obtained, courts may:

- dismiss the claim or the defences, depending on the party making the request;
- declare the requestor liable for the damages caused; and/or
- condemn the requestor to pay for the costs and expenses of the claim and the access to evidence proceedings.

5.2 Legal Professional Privilege

According to Article 283-bis (b)(3) of the LEC, the court organising the disclosure of evidence must respect the legal professional privilege and, thus, privileged documents will be withheld from disclosure.

5.3 Leniency Materials/Settlement Agreements

According to Article 283-bis (i) of the LEC, courts may grant access to the administrative proceeding before the competition authorities, provided

that the requestor cannot reasonably find this evidence elsewhere once the administrative proceeding has ended. However, courts cannot order the disclosure of leniency materials and settlement requests (Article 283-bis (i)(6) of the LEC).

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness evidence is permitted in antitrust litigation. The parties propose the witnesses to the court, which evaluates how relevant and useful their evidence will be. Witnesses called to give evidence are obliged to do so and may be fined if they fail to appear without just cause.

Witness statements are given orally with few exceptions (eg, a legal person or public entity can make a written statement when it is not necessary that a specific individual with knowledge of the facts testify).

Although cross-examination is not expressly regulated in the Spanish Civil Procedure Law, this type of interrogation is permitted under the general rules. After the party that has proposed the witness has conducted its examination, the opposing party may cross-examine the witness on any issue. The judge may also ask the witness additional questions.

In antitrust litigation, witness evidence is not particularly important. Circumstances such as the length of time that usually elapses between the facts at issue and the litigation starting, or, typically in the context of follow-on litigation, discussion about the reading and interpretation of the infringement decisions of the competition authorities tend to imply that witness evidence is regarded as having a secondary role.

6.2 Expert Evidence Procedural Issues

Unlike in other jurisdictions, courts in Spain cannot appoint an expert witness on their own initiative. However, as per Article 76(4) of the LDC and Article 15-bis of the LEC, courts can request the corresponding competition authority to intervene to provide technical and theoretical knowledge in the proceedings, but limited to the criteria for quantifying damages. They cannot act as court-appointed experts to quantify damages themselves. In practice, competition authorities are notably reluctant to intervene and it is far from a common practice.

Thus, each of the parties mandates its own independent expert to submit the opinions. They may request the court to appoint an expert witness, but this is rarely used, and this is almost unprecedented in antitrust litigation practice.

The law does not provide for the possibility of agreeing on the way of appointing, or on the identity of, the court-appointed expert. Furthermore, the existing expert list available for court-appointment may lack the required technical expertise. Consequently, given the complexity of the subject matter and the uncertainty of the outcome of the court-appointed expert's opinion, it is highly unusual for the parties to request such a court appointment.

Expert opinions are presented in the form of a written report. The parties may seek verbal clarifications during the trial. For these purposes, experts are examined according to the same rules as non-expert witnesses.

Spanish courts do not typically require experts to produce joint statements indicating the areas on which they agree and disagree in advance of trial. A court may agree to a "confrontation"

between the experts during the clarification phase, where they are asked questions on the points on which there are discrepancies.

An interesting phenomenon is the increased use of cross-examination and expert conferencing, both of which had been alien to Spanish civil litigation and, for the time being, lack a positive legal grounding. Practice and the natural complexity and relevance of economic discussions are clearly driving this change.

Importance of, and Usual Approach to, Expert Reports

Economic reports prepared by experts are common and of crucial importance in antitrust litigation.

Plaintiffs have the onus of proving the existence of damage and its quantification. The claimants' expert report ought, then, to address these two main issues. In follow-on litigation, it is relatively common to see claimants' experts' reports addressing the quantum and devoting either little or no effort to discussing matters of causation, let alone the existence of the damage. This seems to be highly correlated with the discussion regarding the binding effect of infringement decisions.

In contrast, defendants' experts must propose a reasonable alternative that refutes the existence of damage (if it has not been established as an undisputed proven fact) or justifies a lower quantification of the damage. It is also common for defendants' experts to critique the plaintiffs' experts' reports.

The precise limits and scope are still subject to much debate and discussion. It is now very frequent for lower courts to paraphrase some considerations made by the Supreme Court in

judgment 651/2013. According to this ruling, a claimant's expert needs to formulate a reasonable hypothesis with a technical basis supported by verifiable and non-erroneous data. There is a strong and intense debate as to the extent to which these findings translate into practice. In the said judgment, the Court ruled that, since the existence of damage was clear in that case, the defendant's expert report should not exclusively criticise the claimant's report, but rather suggest an alternative quantification. Even if the debate in the above-mentioned ruling was limited to the quantum, judicial debate remains as to whether this alternative approach should encompass the theory of harm and causation as well.

7. Damages

7.1 Assessment of Damages Compensatory Damages

Article 72(2) of the LDC recognises the right to full compensation for damages suffered and specifically for the following concepts:

- actual loss, understood as the overcharge caused by the infringement;
- loss of profit, understood as profits lost due to the pass-on of the overcharge; and
- interest.

Damages are strictly compensatory and aim to place the injured party in the situation it would have been in had it not suffered the damage. Article 72(3) of the LDC expressly prohibits over-compensation by means of punitive damages.

Article 72 of the LDC is broad enough to allow injured parties in cartel cases to claim for harm suffered as a result of an infringement's umbrella effect. Causation in those cases needs to be carefully assessed.

Assessment of the Damage

The assessment of damage has two main steps. Firstly, proving the existence of the damage. Secondly, if proved, quantifying the damage. Expert reports should address both of these steps.

In antitrust litigation, particularly in follow-on damages litigation, the first step is deeply intertwined with the discussions regarding the content and interpretation of the infringement decision, including whether the decision established and empirically assessed the effects of the infringing conduct on the market on the one hand, and causation and the specific harm suffered by claimants on the other hand.

The proper quantification of harm (ie, step two) only happens if the existence of damage has been proved. Current litigation shows that the main focus is set on step two. Among the many aspects currently being debated (eg, the standard and burden of proof, methodologies, and availability and access to data sets), judicial estimation of the award, its availability before the transposition of Directive 2014, and the relevant requirements lie at the centre of the debate. The focus of the debate nowadays, after certain rulings of the Supreme Court in the trucks litigation case, is whether the judge can estimate damages when it is convinced (via an assumption) of the existence of damage but the claimant (i) relies only on meta studies, which is clearly insufficient to determine the amount of the claim and (ii) has not made use of the tools at their disposal (such as request to access to sources of evidence) in order to better demonstrate the existence and the quantification of the damage.

7.2 “Passing-On” Defences

Directive 2014/104 introduced the passing-on defence as hard law. In Spain, however, courts

had already recognised it as a reflection of the compensatory nature of damages claims.

The passing-on defence allows the defendant to argue that the claimant passed on the overcharge caused by the infringement and, thus, the award should be reduced in part or in full. In practice, the evidentiary requirements make it excessively difficult to prove since it is insufficient to prove only that the claimant increased its prices. Lower courts’ judgments on this matter require defendants to prove that the damage has been passed on in its entirety, and to demonstrate how it was passed on and in what amount (Court of Appeal of Valencia, judgment 4/2022).

Causation is essential in this respect. Defendants must prove that the price charged by the plaintiff to its customers is higher than the price that would have been charged had the infringement not occurred. Thus, the cause of the increase has to be the infringement of competition law and not other market effects, such as an increase in the demand.

According to the Supreme Court’s case law, the defendant must also prove that the claimant’s sales were not reduced due to the price increase (Supreme Court, judgment 651/2013).

It must be noted that it is common for the courts to reject the passing-on defence when the defendant denies the very existence of any harm. Courts argue that the premise of the passing-on defence rests on the recognition of the existence of harm that could have been passed on by the claimant and, thus, it is incompatible with its denial (Court of Appeal of Zaragoza, judgment 471/2021).

7.3 Interest

Interest is expressly listed as a head of damage for compensatory damages and it is considered an essential element of the right to full compensation. The most crucial question, given that in antitrust infringements several years usually elapse between the occurrence of the damage and the claim being filed, is to determine the date from which the interest should accrue (the so-called *dies a quo*).

Although Article 72 of the LDC does not state the date on which interest must start to accrue, following the ECJ's doctrine and the wording of Directive 2014/104, case law considers that interest accrues from the occurrence of the damage until the compensation is paid, without the need for judicial involvement (Court of Appeal of Girona, judgment 302/2022).

The applicable interest rate is the so-called "legal interest rate of money", which is currently fixed at 3%.

8. Liability and Contribution

8.1 Joint and Several Liability

General Rule

Directive 2014/104 states that where several undertakings breach competition rules jointly (eg, a cartel), it is appropriate to hold co-infringers jointly and severally liable for the entire harm caused by the infringement.

After the transposition of Directive 2014/104, Article 73 of the LDC expressly provides, as a general rule, that the co-infringers are jointly and severally liable to the injured parties for the resulting damages, regardless of whether or not they had a direct or indirect relationship with the claimant.

The basis of this liability rests on the premise that the intrinsic cause of the damage in such cases is the collusive behaviour of the co-infringers, irrespective of which infringer had a direct or indirect commercial relationship with the injured party.

Before Directive 2014/104, joint and several liability was applied on the basis of *in solidum* liability, which refers to joint and several liability that arises from a judgment and not from the law. Its application was very common when it was not possible to determine the specific role of each party in the harmful event or apportion the harm caused between co-infringers.

The consequence of the change from *in solidum* liability to joint and several liability is that it is now irrelevant whether it is possible to identify the specific role of each co-infringer in a particular harmful event, since they will continue to be jointly and severally liable without prejudice to their right to seek reimbursement from one another pursuant to Article 73(5) of the LDC (Court of Appeal of Pontevedra, judgment 242/2022).

Exceptions and Limitations

Article 73 of the LDC sets out two exceptions to the joint and several liability rule.

The first provides that when the infringer is considered a small or medium-sized company according to Commission Recommendation 2003/361/EC, it is liable only to its own direct or indirect purchasers, provided that:

- its market share was less than 5% throughout the infringement;
- the imposition of the joint and several liability regime would endanger its economic viability; and

- it did not direct the infringement or coerce other companies to participate in it, nor had it previously been found guilty of an anti-competitive infringement.

The LDC also states that beneficiaries of a leniency programme are only jointly and severally liable for damages directly or indirectly caused by other co-infringers when it is proved that the injured parties could not obtain full compensation from the other companies involved in the infringement.

Finally, there is no advantage or limitation for applicants or beneficiaries of a leniency programme with respect to their own direct or indirect purchasers.

8.2 Contribution

Article 73(5) of the LDC provides that the defendant who is liable to compensate for the damage on the basis of joint and several liability is entitled to claim the corresponding proportional amount paid from the other co-infringers. The amount shall be determined on the basis of the relative liability for the damage caused.

The right of reimbursement shall be brought in separate and subsequent proceedings to the main proceedings, since Spanish law does not allow third-party compulsory summons to proceedings unless expressly provided by the law, which is not the case in this regard.

According to Article 1964(2) of the CC, the limitation period for this action is five years.

The right of reimbursement is limited in cases where a claim is made against a beneficiary of immunity under a leniency programme (claims are limited to the damage that the beneficiary caused directly or indirectly to its own purchasers or suppliers).

9. Other Remedies

9.1 Injunctions

In all Spanish proceedings, parties have the option of requesting injunctive relief (Articles 720–747 of the LEC) to ensure the resulting judgment can be enforced.

Conditions

The requirements for injunctive relief are the following:

- the existence of *fumus boni iuris*, which is the existence of evidence sufficient to suggest, under a preliminary assessment, that the case has merits;
- the existence of *periculum in mora*, understood as the risk of it not being possible to enforce the judgment if the requested precautionary measures are not granted; and
- the provision of a security, in that it is imperative to propose a security to cover the potential damages that the measures adopted by the court could cause, and to justify the proposed amount.

Procedure

Normally, injunctive relief will be requested together with the filing of the action. However, it may be requested prior to the filing of the lawsuit on urgency grounds, or even after the lawsuit is filed if there is a change of circumstances that makes it necessary.

Injunctive relief can be adopted without notifying the defendant (*inaudita parte*). In this case, the plaintiff will have to prove that the relief is needed urgently, or that notifying the defendant might risk the effectiveness of the precautionary measure. If the request is granted, the injunction will be adopted, but the defendant will have the opportunity to oppose it within 20 days. If the

request is dismissed, the proceedings will be conducted according to the standard rules for notified injunctive measures.

In the standard procedure, the defendant is given prior notice and the parties are summoned to a hearing in which the defendant must be given the opportunity to argue that the requirements necessary to grant the requested injunction are not fulfilled.

Article 733(2) of the LEC provides that, with regard to precautionary measures granted without notifying the defendant, the court shall grant them within five days of the filing. If the standard procedure is followed, according to the law, it should not exceed 25 days.

However, these time limits are not usually respected by courts and are, therefore, not useful in indicating time spans adopted by each court in practice.

The duration of the procedure depends on several factors. The main factor is the workload of the court dealing with the request. In this regard, there are significant differences between judicial districts and even between courts within the same district. Therefore, it is advisable to manage expectations of response times once the court that will hear the request for precautionary measures has been determined.

Finally, if the case is dismissed on its merits, the applicant for precautionary measures must compensate the defendant for the damage caused by the injunction and forfeit the security provided.

9.2 Alternative Dispute Resolution

The parties may submit their disputes to arbitration but cannot be forced to do so.

It is also possible for the parties to reach an out-of-court settlement, with or without the assistance of a mediator.

If an out-of-court settlement is reached, Article 77 of the LDC provides that the liability of the infringer who reaches the settlement can be limited. Any co-infringers who have not reached a settlement may not claim part of the remaining compensation from the co-infringer who has reached the settlement. Likewise, the injured party may not claim the part of the damage caused by the infringer with whom the out-of-court settlement was reached, from the other co-infringers.

10. Funding and Costs

10.1 Litigation Funding

Litigation funding is not regulated in Spain.

In Spain, fundamentally, litigation funding can be described in two ways (Supreme Court, judgment 53/2020).

Assignment of the Right to Claim

This option basically consists of acquiring the claim rather than just investing in it. Some courts question the legal standing of the purchaser. Commercial Court 11 of Barcelona recently ruled in favour of the assignee in a case involving the assignment of a right to claim compensation arising from incidents on commercial flights (judgment 120/2022).

Funding

The Supreme Court stated that the absence of regulations means that this matter is left to the will of the parties, who can agree on the degree of control that the investor will have over the trial.

10.2 Costs

In Spanish proceedings, legal costs include several elements, including the fees of the lawyers and experts involved in the proceedings. These costs are limited to one third of the amount claimed in the proceedings, except in the cases of bad faith.

Article 394 of the LEC provides that the costs must be paid by the party whose claims are fully rejected, unless there are “serious doubts of fact or law”.

In antitrust litigation, although costs awards are common, there are judgments that do not award costs due to the existence of legal doubts resulting from the complexity and novelty of the matter, especially in favour of the claimant when its claim is rejected (Court of Appeal of Madrid, judgment 53/2022).

Furthermore, technically, only a fully successful claim should give rise to an award of costs. This issue led Commercial Court 3 of Valencia to request the ECJ for a preliminary ruling on whether this rule complies with the principle of full compensation.

Finally, it is not common for courts to order measures to secure the recovery of costs. In any case, such a request could be made to the court through a request for injunctive relief.

Appeals are heard by the Court of Appeal of the province corresponding to the court that issued the appealed judgment. The appeal may be based on factual or legal grounds.

A judgment issued by the Court of Appeal may be appealed before the Supreme Court on the basis of the existence of a relevant procedural error (*recurso extraordinario por infracción procesal*) or when the Court of Appeal has infringed the applicable rules (*recurso de casación*).

In particular, a *recurso de casación* will only be admitted and examined in the following cases.

- When the judgment was issued for the civil judicial protection of fundamental rights.
- Whenever the amount of the proceedings exceeds EUR600,000.
- When the amount of the proceedings does not exceed EUR600,000 or the proceedings have been determined *ratione materiae*, provided that, in both cases, the appeal presents cassational interest. It is understood that there is cassational interest when the contested decision applies new legislation (ie, in force for less than five years), when it opposes the case law of the Supreme Court, or when there are divergent positions on the issue among different courts of appeal.

The Supreme Court shall not modify the Court of Appeal’s findings of fact and must instead analyse whether the law has been applied correctly, so the appeal will be only on points of law.

11. Appeals

11.1 Basis of Appeal

All first-instance judgments may be appealed, except those issued in oral proceedings determined by reason of the amount (instead of *ratione materiae*), when that amount is less than EUR3,000.

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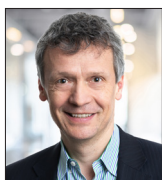
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AGON PARTNERS LEGAL has offices in Zurich and Berne, and specialises in antitrust and competition law. The firm offers a wide array of essential in-house services to anticipate, assess and overcome the various challenges businesses face in antitrust proceedings. In addition to their expertise, AGON PARTNERS' experienced specialists have the privilege to draw on an international network of senior managers in regulatory agencies, as well as long-term experience in developing and executing effective

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1. Overview

1.1 Recent Developments in Antitrust Litigation

The dispatch on the partial revision of the Federal Act on Cartels and other Restraints of Competition was adopted by the Federal Council on 24 May 2023. The primary focus of the partial revision is on the modernisation of merger control. The previously applied qualified market dominance test will be replaced by the significant impediment to effective competition test (SIEC test). This will make it possible to prohibit mergers that hinder competition in a more targeted manner or to approve them subject to conditions and obligations. Furthermore, the partial revision also adapts the civil antitrust law as well as the so-called opposition proceeding. The following elements are at the centre of the revision of civil law.

- The right to sue is extended to all parties affected by unlawful restrictions of competition, including consumers and the public sector (eg, public contracting authorities). In addition, indirectly affected parties are also covered, which means in particular customers at the next but one market level.
- A suspension of the statute of limitations for civil law claims arising from unlawful restraints of competition is introduced, namely from the time the Swiss Competition Commission (COMCO) opens an investigation until the final decision.
- The existing actions will be supplemented by a claim for a declaration of the unlawfulness of a restriction of competition.
- Voluntary payments of damages should now also be able to be taken into account after the decision of the Competition Commission in order to reduce the burden of any administrative sanction.

In addition to the Federal Act on Cartels and other Restraints of Competition, the competition authorities are also to be restructured, as the unclear division of responsibilities between the Commission as the decision-making authority and the Secretariat as the investigating authority are repeatedly criticised. For this reason, the Federal Council initiated work on a reform of the competition authorities on 17 March 2023. Various approaches for improvement have already been discussed in the business and political communities. One possibility would be for the Secretariat of COMCO to be transferred to a legally autonomous competition authority, independent of the federal administration, and for COMCO to be upgraded to a trial competition court. The competition authority would conduct the investigations and “bring charges” against behaviour, much like a prosecutor and the trial competition court would make the court decision and impose any sanctions.

Furthermore, the revised Notice on Vertical Agreements entered into force on 1 January 2023. This notice concerns agreements between companies at different market levels – for example, an agreement between a manufacturer and a retailer. In principle, such agreements are permissible and commonplace. However, agreements on price maintenance are inadmissible for example. The Notice on Vertical Agreements shows companies exactly which agreements are permissible and which are not. With the revision, COMCO adapted its Treatment of Vertical Agreements to the revised EU law so that uniformity is maintained.

Finally, on 16 August 2022, COMCO initiated an investigation against an internationally active pharmaceutical company. There are indications that the pharmaceutical company is refusing to sell pharmaceutical and health products to

a Swiss pharmaceutical wholesaler at more favourable conditions abroad. COMCO is now analysing whether the internationally active pharmaceutical company has relative market power towards the Swiss pharmaceutical wholesaler and whether this relative market power is being abused.

1.2 Other Developments

COMCO has had a new president since 1 January 2023. The Federal Council appointed Laura Melusine Baudenbacher as the new President of COMCO on 16 November 2022. She takes over the office from Andreas Heinemann. Laura Melusine Baudenbacher has a very broad knowledge of antitrust law at a national and international level.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Legal Basis for a Claim for Damages

Article 12 (1) litera b of the Swiss Cartel Act constitutes the legal basis for a claim for damages resulting from a breach of competition law. However, the article explicitly refers to the Swiss Code of Obligations (CO) for such claims. As a result, claimants may recover damages resulting from a breach of competition law in accordance with the ordinary principles and provisions of Swiss contract and tort law. While Articles 13 and 15 of the Swiss Cartel Act provide some specific procedural rules for civil proceedings concerning such claims, the majority of the procedural rules stem from the Swiss Code of Civil Procedure (CPC).

Follow-On and Standalone Claims

Even though there is no specific legislation for follow-on claims, both follow-on and standalone claims are available according to Swiss law. The

plaintiff may take civil action based on the findings of COMCO. However, a decision of COMCO is not necessary, as civil proceedings may also be started without an open investigation by COMCO.

2.2 Specialist Courts

There are neither specialist competition courts nor specialist competition judges in civil courts in Switzerland. In fact, civil competition cases are assigned to the common civil courts or commercial courts (if any).

As every Swiss canton is competent to establish the organisation of its courts, the court is assigned by cantonal law, the only federal law requirement being that there may only be one single court in each canton that handles competition cases (Article 5 (1) litera b, CPC). In most cantons, the law assigns civil competition cases to a higher cantonal court. Some cantons (ie, Zurich and Berne) have established special courts for commercial matters, which are also the competent courts for civil competition cases in these cantons. However, even these courts do not specialise exclusively in competition law, but deal with commercial matters more generally.

2.3 Decisions of National Competition Authorities

Decisions of the Competition Commission

Decisions of COMCO are not binding for civil courts. Such decisions will nevertheless be of great importance in civil proceedings, as, in practice, civil judges will hardly ever deviate from COMCO's opinion. As a result, such decisions may facilitate follow-on claims.

Expert Opinion by the Competition Commission

In the event that a civil court has to assess the legality of a restraint of competition, it is obliged

by law to refer the case to COMCO for an expert opinion (Article 15 (1), Cartel Act). The opinion is limited to a legal assessment based on the facts provided by the court and, as is the case for COMCO's decisions, COMCO's expert opinion is not binding on the civil court; rather, how the expert opinion is weighed and evaluated as evidence is a matter for the judge.

Decisions of National Competition Authorities (NCAs) of Other Countries

Decisions of foreign NCAs may be submitted by the parties as evidence during civil proceedings. However, as a consequence of the principle of unfettered assessment of evidence by the court, how much weight to give the decision of a foreign competition authority is a matter for the judge.

2.4 Burden and Standard of Proof

Burden of Proof

As a general principle of Swiss civil law, the burden of proof lies with the person who derives rights from the disputed fact in question (Article 8, Swiss Civil Code). Therefore, the burden of proof concerning claims for damages lies with the plaintiff. In particular, the plaintiff has to quantify and prove the damages. However, the court may estimate the damages according to Article 42 (2) of the CO if an exact quantification is impossible.

In accordance with the general rule mentioned above, the burden of proof in establishing a pass-on defence lies with the defendant.

Standard of Proof

The parties need to provide persuasive evidence for all relevant disputed facts for which they have the burden of proof. The judge has to be fully convinced that the facts took place as the party alleges. It is to be noted that the court is free

to weigh and evaluate the evidence provided by the parties. There are no specific rules on how to assess the evidence (principle of the free assessment of evidence).

2.5 Direct and Indirect Purchasers

Although there are no specific rules and there has been no court ruling on this matter, claims are, in principle, not limited to those purchasers directly affected by illicit behaviour. In order to have standing for a claim, it is therefore sufficient for the claimant to be affected by the restraint of competition even in an indirect way. As a result, it is neither necessary for the claimant to be a competitor nor does the restraint necessarily have to be directly aimed at them. According to the prevailing doctrine, consumers are, however, not authorised to bring claims based on the Cartel Act.

2.6 Timetable

An estimation of an average duration of the proceedings is difficult. On the one hand, there are not many comparable cases in Switzerland. On the other, the duration depends on several factors, such as the complexity of the case, the workload of the court and granted extensions of deadlines to the parties. Consequently, the duration varies from case to case. Civil competition actions tend to be more complex than most other civil proceedings, which is likely to contribute to the proceedings taking longer than other civil proceedings in Switzerland. The duration can therefore range from one year to several years. This is especially true if the proceedings are suspended.

Suspension of Proceedings

The court may stay the proceedings based on Article 126 (1) of the CPC if expediency so requires. The proceedings may be suspended if the decision is dependent on the outcome

of other proceedings. This could be the case if the civil judge submits a question to COMCO for an expert opinion. The judge can only make their decision once the expert opinion is available. Moreover, it is conceivable that a civil court would stay civil proceedings pending the conclusion of parallel administrative antitrust proceedings. This could be the case if the civil action were based on a cartel infringement to be established in the cartel proceedings.

The parties have the right to apply for suspension (see Article 126 (1)). The decision on this is subject to appeal in accordance with Article 126 (2) of the CPC.

Precautionary Measures

Strictly speaking, the handling of precautionary measures constitutes a separate procedure from the main proceedings. Such summary proceedings last between a few days and a few months. The duration also depends on whether the counterparty will be heard by the court in advance. See **4.1 Strike-Out/Summary Judgment**.

3. Class/Collective Actions

3.1 Availability

Class/collective actions are not available in Switzerland – even though the introduction of class actions was discussed during the preliminary work for the CPC, the proposal was rejected in the end.

Individual claims arising from the same factual basis may, however, be bundled by way of consolidation and joinder of parties. Furthermore, it is also possible to assign individual claims to one person, who may bring all claims together.

3.2 Procedure

Swiss law does not permit class actions.

3.3 Settlement

Swiss law does not permit class actions.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

In the context of cartel law, summary decisions are particularly relevant in connection with precautionary measures. According to Article 261 of the CPC, the court can take the necessary precautionary measures if the requesting party credibly demonstrates that:

- a right to which that party is entitled has been violated or a violation is anticipated; and
- the violation threatens to cause not easily reparable harm to the applicant.

Furthermore, even if not explicitly mentioned in Article 261 of the CPC, urgency in terms of time is part of the catalogue of prerequisites for precautionary measures.

In cases of particular urgency, especially where there is a risk of frustration, the court may order the precautionary measure immediately and even without hearing the other party (Article 265, CPC).

It is in the nature of things that precautionary measures are granted even before the filing of an action. In practice, interim relief is relevant in cases of abuse of a dominant position; for example, if a manufacturer with market power no longer supplies the dealer of its selective distribution system, even though the dealer continues to fulfil the selective distribution criteria. In this

case, the civil judge can uphold the status quo of the supply with a summary decision valid for the duration of the proceedings.

Summary decisions would also be possible concerning claims that are based on undisputed or immediately provable facts and where the legal situation is obvious (so-called legal protection in clear cases).

4.2 Jurisdiction/Applicable Law

International Cases

In international cases, jurisdiction for civil competition actions in Switzerland is assessed according to the Swiss Federal Act on International Private Law and the Lugano Convention. Jurisdiction in Switzerland is given in the following cases:

- the defendant has its seat or domicile in Switzerland;
- for lack of domicile – the defendant's habitual residence is in Switzerland;
- the damaging event occurred in Switzerland;
- the damaging event had its effects in Switzerland; and
- the parties may also agree on a place of jurisdiction for an existing or for a future legal dispute concerning pecuniary claims (Article 5, Federal Act on Private International Law, or PILA). This also includes claims based on the Cartel Act.

Domestic Cases

Similar rules apply in domestic cases. The court at the seat or domicile of the defendant has jurisdiction. Jurisdiction is also given at the place where the damaging event occurred or where it had its effects. Additionally, jurisdiction is also given at the seat or domicile of the claimant. Finally, the parties may agree on a place of jurisdiction and/or the applicable law.

4.3 Limitation Periods

Claims Based on Tort Law

For claims based on tort law, the relative limitation period is three years. The limitation period starts when the plaintiff has sufficient information about the damage and the person responsible for it. Irrespective of the claimant's knowledge, however, damage claims based on tort law become statute-barred within ten years of the damaging conduct having come to an end.

Contract Claims

The statute of limitation period of a claim based on contract law depends first on the existing specific provisions of the contract in question. If there is no specific provision, the limitation period is ten years.

Claims for Removal or Cessation of Unlawful Restraints

There is no specific limitation period regarding claims for removal or cessation of the unlawful restraint of competition. Such claims can be brought before the court as long as the restraint exists or is imminent.

In addition, a party may waive the assertion of the limitation period for a maximum of ten years. This waiver may be repeated several times.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure No General Duty of Disclosure or Pre-action Disclosure

Swiss law does not provide for a general duty of disclosure between the parties; in particular, pre-action disclosure is not available in Switzerland. Prior to the commencement of an action, a party can therefore only obtain information from the opposing party based on existing substantive

information rights; for example, a contractual right to information or the right of a shareholder of a company. The Cartel Act does not grant to private plaintiffs any additional rights to access information.

Applications for disclosure in Swiss civil proceedings, meanwhile, are handled restrictively. Generally, disclosure will only be granted if the applying party succeeds in demonstrating that it requires a specific document in the possession of the other party.

Disclosure of COMCO's Documents

If the plaintiff is a party to the administrative proceedings, it may obtain access to the competition authorities' documents, except for leniency application files. The question of whether COMCO is obliged to also disclose files to a civil court has not yet been answered. The Federal Supreme Court recently ruled that, based on Swiss data protection legislation, COMCO may grant a canton at least partial access to the files of the proceedings if the canton wishes to bring a civil action (2C_1040/2018, 2C_1051/2018).

The public prosecutor's office and the criminal courts can consult files from other proceedings if this is necessary to prove the facts of the case or to assess the accused (Article 194 (1), CPC). A civil plaintiff who is at the same time affected by the criminal proceedings could inspect the files of the criminal proceedings and obtain COMCO's files this way.

5.2 Legal Professional Privilege

Legal Professional Privilege

Practising registered lawyers are subject to a professional duty of secrecy and may refuse not only to testify as a witness in a case on which they are advising but also to produce privileged documents. This is a comprehensive privilege

that applies irrespective of where the documents in question are located, and irrespective of when they were created. However, this only applies to documents drawn up by a lawyer in the exercise of their traditional activities as a lawyer. If, for example, they act as a board member and prepare documents in this capacity, they are not protected.

In-House Counsel

Under Swiss law, no similar privilege exists to protect advice provided by in-house counsel. Documents prepared by, or held in the possession of, in-house counsel may therefore be requested by opposing parties in civil proceedings.

5.3 Leniency Materials/Settlement Agreements

COMCO will generally deny access to statements made, and documents submitted, by leniency applicants. These files can only be inspected by the parties involved in the proceedings and are subject to a restriction on use. COMCO shall decree under penalty of infringement that the files may only be used to protect the rights within the scope of its proceedings. They may explicitly not be used for the enforcement of civil claims.

If a case has been the subject of an EU investigation, claimants may apply for access to the files and records of the European Commission and if access is granted, use the documents concerned in the respective civil proceedings in Switzerland.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness testimony can be submitted as evidence under the CPC and, if necessary, the court may compel witnesses to give evidence. Witness statements are usually made orally, the witnesses being subject to cross-examination. If the court does not deem it necessary for the witness to be questioned, though, it may request a witness to give evidence in writing.

The subject matter of the testimony is the statement of facts potentially relevant to the decision on a certain matter, which the witness has directly perceived themselves. Since cartel agreements are often concluded orally and secretly, testimony can be of great practical importance. However, courts tend to rely on written documentation rather than on witnesses if written documentation is available.

6.2 Expert Evidence

In competition law cases, judges can rely on expert witnesses.

The court may consider expert evidence on its own or at the request of a party. If the legality of a restraint of competition is in question, the court is even obliged to submit the question to COMCO for an expert opinion (Article 15 (1), Cartel Act). Since the Cartel Act calls on COMCO to act as an expert witness for competition violations and since the judge can even estimate damages in compensation cases, expert witnesses have not historically played a central role in civil cases. This could change, however, as even the estimation of damages in competition law cases is complex for civil judges. It would be conceivable that a civil judge could call in experts to better assess damages.

Expert opinions will always be requested in writing. The parties are free to challenge the expert opinions with their own expert reports. As a rule, a court attaches greater credibility to a court-appointed expert than to a party expert who is paid to represent a certain opinion. The court expert is not only subject to a duty to tell the truth but is also liable to prosecution for deliberately false expert opinions. Although various expert opinions are compared and assessed by the judge, there is no actual oral “hot tubbing”.

7. Damages

7.1 Assessment of Damages

The amount of awarded damages will mainly be determined on the basis of the incurred loss that a claimant is able to prove. However, if it is not possible to establish the exact amount of damages, the judge may assess them at their discretion (Article 42 (2), CO). Furthermore, the judge may also assess the damages at their discretion if it is not possible to prove that an effective damage even occurred.

If it is impossible or unreasonable for the claimant to quantify their claim at the outset of the proceedings, they may bring an action for an unspecified claim. However, it must state a minimum value, which shall be deemed to be the provisional amount in dispute. The claim must be quantified as soon as the claimant is in a position to do so after the conclusion of the evidential steps or after the defendant has provided information (Article 85 (1) and (2), CPC).

Exemplary/Punitive Damages

Swiss law does not provide for an award of exemplary or punitive damages. However, parties affected by competition law breaches can demand restitution of the profits realised by the

defendant due to the illicit behaviour under the Cartel Act. While claims for damages purport to compensate the claimant for losses suffered due to a breach of competition law, the restitution targets the return of ill-gotten gains. As such, it may, in particular, come into play where it is not possible to establish the claimant's losses with sufficient certainty.

7.2 “Passing-On” Defences

There are no specific legal provisions on pass-on defences and the question of their admissibility has not yet been decided by the Swiss courts. However, since the purpose of Swiss tort law consists in compensating the victim only for the damages effectively sustained, it must be assumed that the pass-on defence is admissible. Fundamental principles of Swiss tort law – particularly the prohibition of overcompensation in favour of the victim and the principle that a victim has to deduce any advantages and savings that they are able to achieve from the suffered damages – also lead to this conclusion.

As a result, if the defendant is able to successfully invoke the pass-on defence, the claimant will only be entitled to compensation for their remaining losses.

7.3 Interest

Interest on damages resulting from a breach of competition law is payable under the same conditions as interest for other damages based on tort or contract law. Interest includes pre-judgment interest, if applicable, as well as post-judgment interest. Interest is payable at the rate of 5% for the year, where the parties have not contractually agreed on another rate.

8. Liability and Contribution

8.1 Joint and Several Liability

Joint and Several Liability

If several enterprises have contributed to a breach of competition law together (ie, participants in a cartel), the contributors are jointly and severally liable to those who have suffered damages from the breach. Thus, the claimant has the right to claim the full amount of damages from one selected contributor, who may then subrogate against the other contributors.

Liability of Immunity Applicants

There is no legal basis under Swiss law to treat immunity or leniency applicants differently from other contributors in this regard. Though leniency is offered by COMCO with regard to administrative sanctions, there is no direct link between leniency applications and civil procedures. As a result, leniency applications might fully or partly release the applicant from administrative sanctions, but not from the duty to pay damages or from the retribution of illicitly earned profits.

De facto, COMCO protects immunity applicants by not releasing their files for civil actions (see 5.3 **Leniency Materials/Settlement Agreements**).

8.2 Contribution

Except for cases of summary judgments, the defendant may bring contribution proceedings against a third party; eg, other participants of a breach of competition law (Article 81 CPC). Contribution proceedings enable the defendant to lodge their claims against third parties within the proceedings of the claim against them. This constitutes a valuable remedy for the defendant if they intend to take regressive action against other contributors when ordered by the court to pay damages.

9. Other Remedies

9.1 Injunctions

It is possible to obtain a preliminary injunction so as to prevent one party from continuing to engage in competition law breaches. In order to do that, the applicant must provide evidence of the competition law breach and demonstrate that they are likely to suffer irreparable harm if the infringement continues. In cases of extraordinary urgency, courts may even grant preliminary injunctions without hearing the other party.

Unlike in ordinary civil proceedings, the courts are not required to obtain a prior legal opinion from COMCO (Article 15, Swiss Cartel Act) in such cases even if the legality of the restraint of competition is in question.

Depending on the urgency of the dispute, the order can take anywhere from a few days to a few weeks or months.

9.2 Alternative Dispute Resolution

As methods of alternative dispute resolution in civil competition law cases, mediation and arbitration are available in Switzerland and international contracts often provide for arbitration in Switzerland. Civil competition law disputes may therefore be submitted to arbitration, the arbitral tribunals being obliged to apply Swiss or European competition law if these laws are relevant to the outcome of the case.

However, in the event that European competition law is not, or not correctly, applied by an arbitral tribunal, it is extremely difficult to obtain an annulment of the result as the incorrect application of European competition law does not constitute a challenge ground in terms of a public policy ground in Switzerland.

10. Funding and Costs

10.1 Litigation Funding

The Swiss Federal Supreme Court decided in 2004 that third-party funding is permitted in Switzerland. However, the court also pointed out that, under certain circumstances, third-party funding might affect the independence required by law of the respective lawyer. Incidentally, there are very few organisations that offer third-party funding for civil litigation in Switzerland. The organisations that do offer litigation funding assess the case based on its chances of successful trial. The litigation funder provides the financial resources for litigation funding on an ongoing basis. In many cases, they also assume the risk that the plaintiff has to pay the costs of the other party. In return, the litigation financier receives a share of the litigation profits. The participation can be determined, for example, on a percentage basis or on the basis of the investments made by the litigation funder.

10.2 Costs

As a general rule in Swiss civil law, the losing party bears the court costs and has to pay compensation for the expenses of the prevailing party. The judge has a certain amount of discretion, though, regarding the eventual allocation of the costs. The compensation is calculated based on cantonal fee schedules and does not usually cover all incurred expenses.

11. Appeals

11.1 Basis of Appeal

The decisions of the cantonal courts may be appealed to the Swiss Federal Supreme Court. Grounds for appeal are limited to false application of the law (federal law, international public law and constitutional law) by the cantonal court

and to any obvious mistakes in the determination of the relevant facts. The Swiss Federal Supreme Court is bound by the facts established by the cantonal court (unless they are obviously erroneous) and, in general, new facts and evidence may not be submitted during the appeal proceedings.

Trends and Developments

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Introduction

Between August 2022 and 2023 there were interesting changes and developments in anti-trust law. On 24 May 2023, the Federal Council adopted the dispatch on the partial revision of the Federal Act on Cartels and other Restraints of Competition. The modernisation of merger control forms the core element of this revision. Furthermore, the revised Treatment of Vertical Agreements, which has been adapted to the EU law, has been in force since 1 January 2023. Besides, the Swiss Competition Commission (COMCO) has had a new president, Laura Melusine Baudenbacher, since the beginning of the year. In addition, COMCO opened and closed new and exciting cases, and the Federal Supreme Court and the Federal Administrative Court of Switzerland were each able to judge an antitrust case.

Investigation of the Interchange Fees of New Debit Cards

On 29 June 2023, COMCO opened an investigation against VISA and Mastercard regarding the domestic interchange fees of new debit cards. The interchange fee is the fee that the card issuer receives when their debit card is used. The acquirer then passes on the interchange fee as part of its merchant commission to the company that accepts the card in the payment transaction.

During the market launch phase of the new debit cards from VISA and Mastercard, the interchange fee was accepted by COMCO. With the achievement of a market share of 15% each, the phase of the market launch has been completed. The subject of the two investigations is the amount of the interchange fee. In the case of Mastercard, an agreement is expected to be reached quickly, whereas in the case of VISA

there are differences that need to be clarified in more detail.

Investigation of Possible Collusion in Online Business

An investigation was initiated on 8 June 2023 against the two wholesale companies Oridis AG and Ecomedia AG, which both belong to the Office World Group AG. They are accused of influencing the resale prices of various online retailers (inadmissible vertical price agreements). The conduct in question concerns the distribution of office supplies and printer accessories. COMCO is now investigating whether there is in fact a restriction of competition that is inadmissible under antitrust law.

The Coop Payment Processing Proceedings was Completed

At the beginning of 2021, COMCO opened a pre-clarification into Coop's payment processing via Markant. The retail and wholesale company Coop had been processing its payments to suppliers via Markant since 2021. This enabled Coop to save on collection and accounting costs. However, this led to higher costs for the suppliers.

During the preliminary investigation, COMCO found indications that Coop held a dominant position in certain procurement markets for necessities. In addition, there were indications of abusive behaviour by Coop due to the payment processing via Markant.

The Secretariat of COMCO recommended that Coop reintroduce cost-neutral payment processing – as it was used by Coop before 2021. This recommendation was implemented by Coop. They terminated the contract with Markant at the end of 2023. For this reason, the

preliminary investigation was discontinued on 1 March 2023.

Investigation of Relative Market Power in the Field of French-language Books

COMCO opened an investigation against Madrigall, one of the largest publishing groups in France, on 31 January 2023. It is accused of abusing relative market power by preventing Swiss booksellers from procuring books in France at the French market price and on French conditions. The abusive behaviour was reported to COMCO by the French-speaking Swiss book-seller Payot.

As part of the investigation, COMCO is examining whether Madrigall has relative market power towards Payot and whether Madrigall can be accused of abusive behaviour according to the Federal Act on Cartels and other Restraints of Competition.

COMCO Revises the Treatment of Vertical Agreements

The revised Notice on Vertical Agreements entered into force on 1 January 2023.

The Notice on Vertical Agreements concerns agreements between companies at different market levels – for example, an agreement between a manufacturer and a retailer. Such agreements are generally unproblematic and commonplace. However, agreements on price maintenance are inadmissible for example. COMCO publishes a Treatment of Vertical Agreements so that companies know which agreements are permissible and which are not.

COMCO is trying to ensure that the same rules are applied in the Swiss Treatment of Vertical Agreements as in EU law. Since the EU has revised its rules as of 1 June 2022, COMCO has

also revised its Treatment of Vertical Agreements. This ensures consistency between EU law and Swiss law. In addition, the revised version also takes into account the latest Swiss case law.

Companies have time until 1 January 2024 to adapt their distribution to the new provisions of the revised Treatment of Vertical Agreements.

Opening of a Preliminary Investigation in the Banking Sector

On 5 December 2022, the Secretariat of COMCO opened a preliminary investigation against 34 banking institutions in six German-speaking regions of Switzerland. These banking institutions regularly exchanged information on the salaries of their employees. This could constitute an illicit collusion according to the Federal Act on Cartels and other Restraints of Competition. The preliminary investigation seeks to clarify whether this exchange of information is unlawful.

COMCO has a New President

COMCO has had a new president since 1 January 2023. Laura Melusine Baudenbacher was appointed as the new President of COMCO by the Federal Council on 16 November 2022. She takes over the office from Andreas Heinemann.

Laura Melusine Baudenbacher is admitted to the bar in Switzerland and Belgium. She has a very broad knowledge of antitrust law at a national and international level with references to the two leading antitrust jurisdictions of the EU and the USA.

Relative Market Power in the Health Sector

An investigation was initiated against an internationally active pharmaceutical company on 16 August 2022. There are indications that the pharmaceutical company is refusing to sell pharmaceutical and health products to a Swiss

pharmaceutical wholesaler at favourable conditions abroad. These products are offered both in Switzerland and abroad. COMCO is now analysing whether the internationally active pharmaceutical company has relative market power towards the Swiss pharmaceutical wholesaler and whether this relative market power is being abused.

Revision of the Federal Act on Cartels and other Restraints of Competition

The Federal Council adopted the dispatch on the partial revision of the Federal Act on Cartels and other Restraints of Competition on 24 May 2023. This partial revision is divided into four parts.

In the first part, the merger control will be modernised. The previously applied qualified market dominance test will be replaced by the significant impediment to effective competition test (SIEC test). As a result, mergers that hinder competition can be prohibited in a more targeted manner or approved subject to conditions and obligations. The SIEC test corresponds to the international test standard.

Furthermore, the civil antitrust law will be strengthened. In the future, consumers and the public sector will also have the possibility to file a civil action based on antitrust law. A suspension of the statute of limitations for civil law claims arising from unlawful restraints of competition is introduced, namely from the time COMCO opens an investigation until the final decision. The existing actions will be supplemented by a claim for a declaration of the unlawfulness of a restriction of competition.

The so-called opposition proceeding is also adapted in the partial revision of the Federal Act on Cartels and other Restraints of Competition. A company can report planned market conduct

to COMCO for review. If COMCO does not open an investigation within an objection period, the direct risk of sanctions for companies in the case of the reported conduct falls away. The objection period will be reduced from five to two months.

Finally, the partial revision also implements three parliamentary proposals.

Reform of the Competition Authorities (Institutional Reform)

On 17 March 2023, the Federal Council initiated work on a reform of the competition authorities. The motives for the institutional reform are the unclear division of responsibilities between the Commission as the decision-making authority and the Secretariat as the investigating authority as well as procedural deficiencies. Various approaches for improvement have been discussed in the business and political communities. One possibility would be the institutional reorganisation, which was already discussed in parliament in 2014. This envisages that the Secretariat of COMCO would be transferred to a legally autonomous competition authority that would be independent of the federal administration and that COMCO would be upgraded to a trial competition court. This should allow a clear separation between the investigation and decision-making levels. The competition authority would conduct the investigations and “bring charges” against behaviour, much like a prosecutor and the trial competition court would make the court decision and impose any sanctions.

As a first step, the Federal Department of Economic Affairs, Education and Research has to submit a concrete proposal to the Federal Council in the first quarter of 2024.

Case Law of the Federal Supreme Court of Switzerland

In its judgment of 2 November 2022, the Federal Supreme Court of Switzerland dismissed Swisscom's appeal against the judgement of the Federal Administrative Court of Switzerland issued in 2021. The subject matter were the precautionary measures imposed by COMCO on Swisscom due to the planned expansion of the fibre-optic network.

In February 2020, Swisscom announced that instead of the four-fibre model, a single-fibre model with a tree structure would be used in the future. This would mean that other telecommunications providers would no longer be able to obtain physical access to fibre-optic lines between Swisscom's access centre and the subscriber connection itself. For this reason, COMCO initiated proceedings in December 2020 and prohibited Swisscom from implementing this planned project. Swisscom lodged an appeal against this at the Federal Administrative Court of Switzerland, which was dismissed in 2021.

The Federal Supreme Court of Switzerland also dismissed Swisscom's appeal on 2 November 2022. According to the Federal Supreme Court of Switzerland, the precautionary measures imposed by COMCO are not obviously untenable.

Case Law of the Federal Administrative Court of Switzerland

In December 2013, COMCO issued a disposal in which price agreements were identified in the airfreight industry. This disposal concerned routes between Switzerland and five countries outside the EU. Eleven airlines were sanctioned.

Nine airlines lodged an appeal against these sanctions at the Federal Administrative Court of Switzerland. Three appeals were fully approved, as the airlines concerned first transported their freight by land to an EU country and only then by air to a third country. In this case, COMCO was not competent to assess the freight transports.

In five cases, the Federal Administrative Court of Switzerland affirmed a violation of the Cartel Act due to anti-competitive information exchanges between the airlines. However, it reduced the sanctions imposed by COMCO, as it considered the airlines' conduct to be less serious than COMCO did.

In the December 2013 disposal, COMCO also imposed a ban on the airlines. They were prohibited from arranging airfreight prices, price elements and price mechanisms outside their own group association or from exchanging corresponding information. The Federal Administrative Court of Switzerland considered this prohibition – considering recent case law – to be disproportionate, which is why it was set aside.

Finally, the appeal of a self-disclosing airline – which was not sanctioned but was affected by the ban – was partially approved.

TAIWAN



Law and Practice

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Formosa Transnational Attorneys at Law (FT) is one of the largest and most respected law firms in Taiwan and has long been known for its expertise in litigation and arbitration. Three of the founding partners previously served as judges and one served as a prosecutor prior to the establishment of FT in 1974. FT has since become a full-service law firm with a multinational and high-profile client base. With an elite team of more than 80 attorneys, FT assists multinational clients with issues related to and strategies for fundraising, investments and M&A. FT

also counsels clients in corporate and financial matters, as well as bankruptcy and related laws and regulations, including those associated with corporate governance and operations. The firm also provides comprehensive legal services in connection with the establishment of banks, bank branches and representative offices, syndicated loans, guarantees, trusts and all matters related to financing, stock exchanges and securities. FT advises clients on labour law, employment agreements and many other employment-related matters.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Taiwan has two prongs: “administrative litigation” (lawsuits initiated by parties against the regulator’s rulings) and “private enforcement” (lawsuits filed by injured parties against alleged infringers).

Administrative Litigation

The prime focus of Taiwan’s antitrust litigation is administrative litigation, in which individuals/entities request a judicial review of rulings made by the Taiwanese Fair Trade Commission (TFTC), the sole governmental agency with authority to regulate matters within the purview of the Taiwanese Fair Trade Act (TFTA).

Most administrative litigation cases arise from TFTC rulings that impose cease-and-desist orders upon individuals/entities found to have violated the TFTA. Such cease-and-desist orders usually come with fines and orders that compel individuals/entities to take mandatory actions to remedy harms resulting from the violations. Individuals/entities who do not accept these rulings may file administrative lawsuits with competent courts, requesting courts to revoke said rulings.

Another source of administrative litigation cases is TFTC denials of applications for TFTC approval. Under the TFTA, enterprises must apply to the TFTC for advance approval if the enterprises plan to engage in concerted practices. Enterprises must also seek approval under the TFTA for mergers that meet certain criteria, such as market share. Applicants whose applications are denied by the TFTC may seek relief from the competent courts.

Jurisdiction over antitrust administrative lawsuits is determined by the subject matter. If IP matters (such as IP licensing) are the subject of a particular lawsuit, Taiwan’s Intellectual Property and Commercial Court (“IP Court”) will be the court of first instance. For matters that do not involve IP, the Taipei Administrative High Court (“High Court”) will be the venue for the first instance.

Private Enforcement

Private enforcement of antitrust law usually proceeds with civil lawsuits initiated by parties injured by alleged violations. Pursuant to Articles 29–33 of the TFTA, if an enterprise violates any provision of the TFTA and thereby infringes upon the rights and interests of another, the aggrieved party may seek proper remedies from the civil courts. Available remedies include permanent injunctions requiring the infringing parties to cease the infringing activities, as well as compensatory damages.

Ordinary courts have jurisdiction over civil claims sounding in Taiwanese antitrust law. Plaintiffs may go to the IP Court if the subject matter of their claims involves IP issues.

Ready-Mixed Cement Concerted Price Increase Cases

There are some notable active antitrust litigation cases regarding concerted action by the Taiwan Cement Corporation (TCC) and four other cement manufacturers. Article 15, Paragraph 1, of the TFTA prohibits concerted action.

In mid-December 2018, the TCC and four other cement manufacturers notified downstream customers of an increase in ready-mixed concrete prices effective 1 January 2019. The TFTC investigated and found that the joint price increase constituted concerted action because it impacted the equilibrium between supply and demand

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in the ready-mixed concrete market in Tainan City and Kaohsiung City, two major cities in southern Taiwan. Accordingly, the TFTC ordered the five companies to cease their unlawful conduct and imposed administrative fines ranging from TWD1 million to TWD20 million (approximately USD33,000 to USD700,000) on the five companies.

The five companies each initiated administrative lawsuits at the Taipei High Administrative Court seeking to revoke the TFTC's adverse decisions. In 2020, the Taipei High Administrative Court issued judgments holding that, although the five companies certainly appeared to have co-ordinated announcements of price increases, the price increases were economically reasonable. Furthermore, their parallel actions were the result of independent business decisions by each company, which were made in accordance with market competition and in response to the marketing strategies of their competitors. Each of the companies was trying to maximise economic profits. Therefore, the Taipei High Administrative Court concluded that the five companies had not engaged in concerted action under Article 15, Paragraph 1, of the TFTA and accordingly overturned the TFTC's decisions.

The TFTC appealed to the Supreme Administrative Court. In August 2022, the Supreme Administrative Court held that the lower court failed to investigate and explain whether the price increase had been an agreement to act jointly with other companies or an independent business decision based on each company's own economic considerations. Accordingly, the Supreme Administrative Court reversed the lower court's judgments and remanded the cases back to the Taipei High Administrative Court, where they are now pending.

This case will definitely shape how Taiwan antitrust law will be enforced against allegedly concerted actions; it would be prudent to keep posted on this case's further developments.

1.2 Other Developments

Ready-Mixed Cement Concerted Price Increase Cases II

In February 2023, the TFTC issued another decision against the TCC and 17 other cement manufacturers. The TFTC found that, starting in November 2018, the TCC and the other cement manufacturers had agreed to jointly allocate ready-mixed concrete customers in Taoyuan City among themselves to avoid competition with each other since. This agreement was found to have impacted supply and demand in the Taoyuan City ready-mixed concrete market, violating Article 15, Paragraph 1, of the TFTA.

Notably, the TFTC imposed the maximum administrative fine of TWD50 million (approximately USD1.6 million) on the TCC. The TFTC considered a number of factors in deciding to impose the maximum fine, including motivation, impact and previous sanctions history. The TFTC found that the companies were motivated by a shared purpose to avoid competition and raise the price of ready-mixed concrete. In turn, the increased prices had a detrimental impact on the equilibrium between supply and demand in the market. Furthermore, the TFTC took into account the fact that the TCC and two of the other cement manufacturers had been sanctioned by the TFTA for concerted action on numerous previous occasions. They were also some of Taoyuan City's largest companies in terms of the scale of their business from 2019 to 2021. The TCC has filed an administrative lawsuit challenging the TFTC's decision. The High Administrative Court is presently hearing the case.

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2. The Basis for a Claim

2.1 Legal Basis for a Claim

Statutory Legal Basis for Damage Claims

Article 30 of the TFTA provides an express basis for a plaintiff to claim compensatory damages for breach of Taiwanese competition law. Under this provision, if an enterprise violates any provision of the TFTA and thereby infringes upon rights and interests of another, the aggrieved party may go to civil courts to seek compensatory damages.

Injured Parties Required to Establish Elements of Their Claims

Follow-on claims are not available in Taiwan's legal system. Victims (plaintiffs) bear the burden of proof and must establish all the elements for their claims. Even in a situation where the TFTC finds a particular antitrust law violation, the party injured by the violation still has to prove to the courts that the defendant violated the provisions of the TFTA. In other words, the TFTC's rulings do not control the findings of courts in relation to whether an alleged violation has in fact occurred.

2.2 Specialist Courts

No Specialist Competition Courts

There is no specialist competition court or competition judge in Taiwan.

For administrative litigation, the High Court will have jurisdiction over cases where IP issues are not present; the IP Court takes jurisdiction over cases where IP issues are present. For civil claims, while ordinary courts will have jurisdiction, plaintiffs may go to the IP Court if the subject matter of their claims involves IP issues.

Article 7 of the Intellectual Property Case Adjudication Rules deals with the situation where a party mistakenly initiates a civil or administra-

tive action in the IP Court but the IP Court does not have jurisdiction. In this circumstance, the IP Court is required make a ruling which transfers the case to a court with jurisdiction in accordance with Article 28, Paragraph 1, of the Code of Civil Procedure and Article 18 of the Code of Administrative Procedure.

2.3 Decisions of National Competition Authorities

The TFTC's Rulings Do Not Bind Courts

The TFTC's rulings do not bind Taiwanese courts that hear cases where antitrust law issues are present.

In particular, even if the TFTC has issued a ruling that imposes sanctions upon an alleged offender, in a civil lawsuit initiated by a victim of the alleged offender's infringing activities, courts will independently examine the plaintiff's claim without being bound by the TFTC's findings in its ruling.

Likewise, in situations where the TFTC finds no violation of antitrust law provisions, the TFTC's findings do not preclude Taiwanese courts from rendering different decisions.

Similarly, decisions by foreign antitrust regulators do not bind Taiwanese courts.

The TFTC Does Not Intervene in Antitrust Damage Lawsuits

In most cases, the TFTC does not intervene in actions seeking compensatory damages brought by parties injured by violations of antitrust law.

2.4 Burden and Standard of Proof

Administrative Litigation Proceedings

Generally speaking, in administrative litigation proceedings, a party bears the burden of proof regarding the facts that they allege in their favour,

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except either where the law provides otherwise or where the circumstances render it manifestly unfair. In addition, courts will look into the factual matters and request the parties or any other third parties to produce evidentiary materials that the courts deem necessary.

At the same time, the parties may request the courts to investigate factual issues and produce evidence that the parties would like the courts to take into consideration. In addition, the parties may request the courts to order the other parties or any other third parties to produce evidentiary materials that are relevant to the cases.

Civil Proceedings

Plaintiffs in civil proceedings will have to produce evidence that suffices to establish each element required for a tort claim. Tortfeasor defendants will usually not have to establish any facts in relation to the elements required for a tort claim.

In situations where a party of a proceeding raises a “pass-on” defence, the party raising the defence must bear the burden of proof. In other words, that party needs to produce evidence that sufficiently establishes the facts supporting the “pass-on” defence.

2.5 Direct and Indirect Purchasers

Taiwan antitrust law does not specify whether an indirect purchaser may bring a claim for damages against an alleged violator. In other words, there is no provision explicitly preventing an indirect purchaser from bringing a claim for damages against the alleged violator.

Under the tort provisions prescribed in Taiwan’s Civil Code, however, one of the elements for a victim (plaintiff) to establish is causation. An indirect purchaser who does not have direct transactions with the alleged violator will need

to establish that the alleged violation caused the resulting injuries that the indirect purchaser suffered.

2.6 Timetable

Administrative Litigation

It usually takes six months to one and a half years for courts to render first-instance judgments in administrative litigation cases.

In situations where an appeal is filed against a first-instance judgment, it usually takes one to two years for the Administrative Supreme Court to render its final judgment.

Private Enforcement

It usually takes six months to one and a half years for courts to render first-instance judgments in private enforcement cases (civil lawsuits).

The above timetable does not cover the time during which the appellate court and the Supreme Court render their judgments upon appeal.

In situations where there is a parallel investigation by the TFTC, parties may not apply for an order to stay the civil proceedings. This is because Taiwanese courts are not bound by the TFTC’s findings of facts and will make their own decisions on antitrust law issues in civil proceedings.

3. Class/Collective Actions

3.1 Availability

Class actions are available in Taiwan but are limited as follows:

- pursuant to Articles 53 and 54 of the Consumer Protection Act, consumer advocacy associations may file a civil lawsuit with the

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competent court when enterprises materially breach the provisions of the Act; and

- pursuant to Article 28, Paragraph 1, of the Securities Investor and Futures Trader Protection Act, the institution designated by this Act may institute an action in its own name to protect the public interest.

Under the above-mentioned Acts, any of the victims may join a class action lawsuit on an opt-in basis. Meanwhile, a victim who has joined a class action lawsuit may withdraw from the action before the conclusion of the proceedings.

Collective actions are available in Taiwan as well. In accordance with Taiwan's Civil Procedural Code, members of a public interest association may appoint the association as a plaintiff to file a civil action on their behalf.

Taiwanese antitrust law does not provide an ad hoc basis for a class/collective action. It is thus uncertain whether a class/collective action could be brought by indirect purchasers and/or direct purchasers.

3.2 Procedure

Taiwan antitrust law does not provide an ad hoc basis for a class/collective action.

Under the Consumer Protection Act, an association advocating for consumer protection must be approved by regulators before it may bring a class action on behalf of consumers.

Under the Securities Investor and Futures Trader Protection Act, only the institution established in accordance with this Act could bring a class action. This institution is known as the Investors Protection Centre.

Please note that the two types of class action (under the Consumer Protection Act and under the Securities Investor and Futures Trader Protection Act) may not be relevant to antitrust law issues.

3.3 Settlement

The TFTA does not provide an ad hoc basis for a class/collective action.

Nonetheless, pursuant to Article 377, paragraph 1, of Taiwan's Code of Civil Procedure, the court may seek to persuade the parties to settle at any time in the proceeding. In this scenario, there will be judicial involvement in the settlement of a collective action rather than a private settlement occurring outside of the court.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

There is no strike-out/summary judgment available in civil proceedings in Taiwan.

A court hearing a civil lawsuit may dismiss a claim at an earlier stage without looking into the substance of the claim only if the plaintiff fails to fulfil the formal requirements, such as paying the court fees that are due at the moment of filing the lawsuit.

4.2 Jurisdiction/Applicable Law Jurisdiction

Generally speaking, a district court will have proper jurisdiction over a civil lawsuit if defendants have domiciles or residences in the territory subject to the court's jurisdiction.

At the same time, when a civil lawsuit is based on tortious activities, a district court will have

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proper jurisdiction over the lawsuit if the harm or injury occurs within the territory subject to the court's jurisdiction.

Applicable Law

In a civil lawsuit where a foreign element is present (for instance, if any of the parties are foreigners or foreign companies), the courts will determine the applicable law. Generally speaking, the law of the country that is most connected to the subject matter will be the applicable law.

4.3 Limitation Periods

A civil damage claim arising from a violation of the TFTA may be initiated only within one of the two following periods, whichever lapses earlier:

- two years from the date when the injured party becomes aware of the violation and knows the identity of the person liable for the harm; or
- ten years from the date on which the infringing conduct is committed.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

For background, discovery is not available in civil/criminal/administrative litigation proceedings in Taiwan.

Court Order to Produce Materials

A party to civil litigation may file a motion to order the opposing party or a third party to produce specific materials as evidence. In making such a motion, the moving party shall specifically identify the requested materials; overly broad or vague requests will be denied. If the requested materials are relevant to a fact substantially related to the moving party's underlying arguments, the court may grant the motion

and order the requested party (or third party) to produce the requested materials.

Such a court order is different from a search warrant. As such, if the requested party (or third party) disobeys the court order, the court cannot compel the requested party (or third party) to produce the requested materials; however, the court may render a ruling that imposes sanctions upon the requested party (or third party) in certain situations.

Court Order to Preserve Evidence

A party may also file a motion for an evidence-preservation order if there is a possibility that the evidentiary materials under the possession of the opposing party or a third party will be destroyed or altered. The moving party may file the motion before or during litigation proceedings.

The courts will grant such a motion when it is established that the requested materials are subject to the likelihood of being destroyed, hidden or altered.

An evidence-preservation order is also different from a search warrant. While the courts may request the requested party (or third party) to produce the requested materials, failure to produce the requested materials will result only in court sanctions or in courts' stipulation of a certain fact in the lawsuit proceeding.

The TFTC's Investigation Power

When the TFTC is investigating an alleged violation, it may order the parties under investigation to produce materials that it finds relevant to the violation. Disobedience of this request will result in administrative penalties. The TFTC may also conduct an on-site search and may seize any materials that it finds relevant to any alleged violations.

Any parties that have interests in any of the TFTC's current/past investigations may request the TFTC's approval for access to the materials collected by the TFTC during its investigation. The TFTC will consider whether the requesting party has grounds to have access to the materials.

5.2 Legal Professional Privilege

As noted earlier, there is no discovery in Taiwan's legal system. When a party is requested to produce certain documents that are privileged, the requested party may refuse to obey the production order and explain to the courts the grounds for its refusal. It will be subject to the courts' discretion whether to impose any sanctions in response to a party's refusal to produce.

5.3 Leniency Materials/Settlement Agreements

The TFTC will keep confidential materials that relate to leniency and/or settlement agreement. In particular, the TFTC may reduce sanctions on a member of a concerted action if the member actively reports the concerted action to the TFTC and helps the TFTC to investigate the concerted action. In this situation, the identity of the whistle-blower will be kept confidential.

In the TFTC's history of enforcement of the TFTA, there are two cases where the TFTC settled with the investigated enterprises. The enterprises in these cases were Microsoft and Qualcomm. Except for the published version of the settlement terms, the specific terms and conditions of the settlements for these two cases were protected from disclosure.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness testimony is one of the five types of evidentiary methods under the Taiwan Code of Civil Procedure, the Code of Criminal Procedure, and the Administrative Litigation Act.

Pursuant to Article 302 of the Taiwan Code of Civil Procedure, Article 176-1 of the Code of Criminal Procedure, and Article 142 of the Administrative Litigation Act, every person is under a general duty to testify in a lawsuit proceeding if this person has witnessed a certain set of facts that are relevant to the proceeding. That is, witnesses are required to state their own observations to the court in the trial proceedings as ordered or summoned by the court.

Pursuant to Article 305 of the Taiwan Code of Civil Procedure and Article 143-1 of the Administrative Litigation Act, a witness may, by consent of the parties, make written statements that set forth their testimony.

In most cases, a witness of facts will be subject to direct examination by the party that calls the witness and to cross-examination by the opposing party.

When being called to testify in a lawsuit proceeding, a witness may decline to answer any questions if the witness has proper grounds (such as self-incrimination) to do so. Otherwise, the witness will have to answer questions raised in the direct and/or cross-examination, as well as questions raised by the presiding judge. Failure to give testimony without due cause will result in sanctions.

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6.2 Expert Evidence

Expert opinions are frequently relied upon by courts in antitrust law cases. In particular, when it comes to complicated economic issues or technology issues, courts tend to request institutions with relevant knowledge or experience to render expert opinions.

In most cases, expert opinions are made in the form of a written statement. Authors of these opinions will be called to testify only if the courts consider it necessary.

When testifying in court, an expert witness will be examined and cross-examined by the parties. The expert witness will also have to answer questions raised by the presiding judges.

In some cases, parties will appoint their own experts to produce expert opinions without the court's prior permission. In this situation, the opposing party will usually dispute the qualifications of the expert. It will be subject to the court's discretion whether to accept the opinions made by an expert appointed by one of the parties.

7. Damages

7.1 Assessment of Damages

Article 30 of the TFTA stipulates that an enterprise that violates any of the provisions of the TFTA and thereby infringes upon the rights and interests of another shall be liable for damages arising therefrom. The amount of damages shall be assessed on the basis of actual injury suffered by the victim(s), and then, in practice, the court can possibly take the following factors into consideration:

- the impact of the violation on the related market and industries;

- the degree of severity of the violation;
- the interest(s) acquired by the perpetrator from the violation;
- the duration of the violation; and
- the intent or the degree of negligence of the perpetrator.

Pursuant to Article 31, Paragraph 1, of the TFTA, courts may grant enhanced damages if the victim (plaintiff) has established that the infringer (defendant) committed the violation wilfully. In these circumstances, the court has the discretion to treble the amount of the victim's established loss.

7.2 "Passing-On" Defences

The TFTA does not expressly provide for a pass-on defence. Taiwan's courts have not yet directly addressed whether a pass-on defence will be viable when considering the amount of damages.

7.3 Interest

Pursuant to Article 203; Article 229, Paragraph 2; and Article 233, Paragraph 1, of Taiwan's Civil Code, if an enterprise is found by courts to be liable for compensation of damages to the injured parties, the violating enterprise shall be held by the court to be liable for interest of 5% per annum from a designated date (usually the date that the defendant receives the copy of the plaintiff's complaint) until the full settlement of the compensation.

8. Liability and Contribution

8.1 Joint and Several Liability

Under Taiwanese law, when a tortious activity is committed with the involvement of multiple persons, then those persons will be held jointly and severally liable for the tortious activity.

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While the TFTA allows the TFTC to reduce administrative penalties when a member of a concerted action directly reports to the TFTC and helps the TFTC to investigate the concerted action, such leniency does not prevent this reporting member from being sued by any person injured by a concerted action.

8.2 Contribution

When multiple parties are held jointly and severally liable for a certain tortious activity, the internal share of the joint and several liability will be determined in accordance with the proportion of their contribution to the tortious activity and to the resulting injuries.

In a situation where the parties held jointly and severally liable for a certain tortious activity consider that there is a third party who also caused the same tortious conduct and/or the resulting injuries, the parties may file a lawsuit to request the third party to contribute a certain share of the joint liability.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available in both administrative and civil antitrust litigation.

To obtain an injunction, the moving party will have to establish facts showing that the injunction is needed to prevent the moving party from suffering severe and irreparable harm.

When hearing a motion for injunctive relief, courts will notify the opposing parties and request the opposing parties to make comments on the motion.

Courts usually will render orders upon a motion for injunction within one or two months.

The moving party will be responsible for any injuries that the opposing party suffers due to an injunction in situations where the injunction is later considered ungrounded by courts in ordinary lawsuit proceedings.

9.2 Alternative Dispute Resolution

Alternative dispute resolutions are available but not mandated for antitrust cases. In both civil and administrative lawsuit proceedings, parties may settle the cases with the involvement of courts.

In administrative lawsuit proceedings, where the TFTC is a party, alternative dispute resolution is available only in extremely exceptional cases and is thus de facto unavailable.

10. Funding and Costs

10.1 Litigation Funding

Private litigation funding is prohibited in Taiwan. Public (government-sponsored) funding is available in certain fields as specified by special laws and regulations.

10.2 Costs

Courts will order the losing parties to bear the costs and/or expenses incurred from the lawsuit proceedings.

In most cases, each party will have to bear its own attorney fees. The prevailing party in a third-instance proceeding, however, may request the Supreme Court to order the losing party to reimburse a limited amount of attorney fees for the third-instance proceeding.

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Under Taiwanese law, in a civil lawsuit initiated by a foreign plaintiff (a foreigner or a foreign company) who does not have residence in Taiwan, the defendant in the lawsuit may request the court to order the plaintiff to post a bond of a certain amount sufficient to cover the total amount of the court fees for the second and third instances and any other necessary litigation expenses. The same rule does not apply to administrative litigation.

11. Appeals

11.1 Basis of Appeal

Appeals are available for both administrative litigation and private enforcement.

Administrative Litigation

Any parties who are not satisfied with the judgments by the first-instance court (either the IP Court or the High Court) will be allowed to appeal to the Administrative Supreme Court, whose rulings will be final and conclusive.

The appealing party may only argue issues related to matters of law. The Administrative Supreme Court will not examine the lower courts' findings of facts, except in some extremely exceptional situations.

Private Enforcement

Any parties who are not satisfied with the judgments by the first-instance court (either the IP Court or the High Court) will be allowed to appeal to the appellate court. In a case where the value of the subject matter exceeds TWD1.5 million, the party who does not accept the judgment of the appellate court may file an appeal to the Supreme Court.

At the level of the appellate courts (the second-instance proceedings), both parties may argue issues of fact and law. The appellate courts will examine the lower courts' findings of facts and may render a judgment based on different findings of fact.

At the level of the Supreme Court (the third-instance proceedings), the appellant party may only argue questions of law. The Supreme Court will not examine the appellate courts' findings of facts, except in some extremely exceptional situations.

TURKEY

Law and Practice

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ONaL Attorneys at Law is a Turkish boutique law firm specialised in competition law. As Istanbul connects two continents, the firm connects deep expertise with critical insight to help clients navigate through complex legal issues. Founded by Mr H. Emre Önal, the firm has a fast-growing team, currently consisting of five members. Recognised by both legal communities and businesses for its efficiency in law and

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1. Overview

1.1 Recent Developments in Antitrust Litigation

As the Turkish competition law practice has evolved over the last 25 years since its establishment, antitrust litigation has developed alongside it. Accordingly, as the number of Turkish Competition Board (TCB) decisions has gradually risen over the years, competition law awareness has also increased, as has private antitrust litigation. The courts have recently ruled a significant amount of damages in favour of claimants in major cases, such as the case against Mey/Diageo, the largest alcoholic beverage company in the country.

Together with the legislative change in Law No 4054 in 2020, commitment and settlement mechanisms are introduced to the Turkish competition law practice, which in turn has increased the amount of ongoing private antitrust litigation initiated. With the legislative change, the wording of Article 5 of Law No 4054, regulating individual exemptions, is slightly changed when the mention of TCB is removed from the clause,

enabling the courts to grant individual exemption decisions theoretically. This change reflects the legislative intention to invite the courts to be more active on such decisions and that in the upcoming period, such changes together seem to increase the amount of private antitrust litigation proceedings brought before the courts.

In respect of public litigation, where annulment proceedings were initiated against the TCB's decisions, the Turkish Constitutional Court rendered a milestone judgment this year, which may affect the future of the on-site inspections the TCA conducts. It ruled that on-site inspection conducted without obtaining a judicial decision violated the applicant's right to immunity of residence, protected by the Constitution of 1982. Following a series of antitrust litigation proceedings, and as a result of the individual application made to the highest legal body for constitutional review in Turkey, the Turkish Constitutional Court evaluated that the TCA's on-site inspection authority, set forth in the Law No 4054 on the Protection of Competition (Law No 4054) contradicts with the fundamental right in the Constitution. For more detail, please see the

[Turkey Trends & Developments](#) section of this guide.

1.2 Other Developments

In the recent years, the TCA has gradually become more active in detecting competition law violations. Indeed, this ongoing trend can easily be observed both when the amount of the TCB's decisions imposing administrative monetary fines, and the exponential growth of the on-site inspections conducted, are considered. Not surprisingly, this trend also increases the cases brought before the courts, both in private and public antitrust litigation. Besides, as competition law awareness increases through the country, the number of cases heard increases as well.

Regarding the public antitrust litigation enforcement practice, there have been comparably more developments than on the private side. The TCB has fined various undertakings based on hindering or complicating on-site inspections, and these have been subject to antitrust litigation even before the legislative change introduced to the Turkish competition law in 2020, rendering the TCA's authority broader in scope. The TCB's zero tolerance on deletion of data during on-site inspections manifests itself in the increase in the total amount of monetary fines imposed between 2020 (TRY2.5 million) and 2022 (TRY115 million). As a result, there are various ongoing cases brought before the Turkish Administrative Courts to annul the TCB's relevant decisions.

Amongst such cases, Ankara 2nd Administrative Court's Sahibinden decision [2022/254] constitutes an important example where the standard of proof in the TCB's decision is found to be insufficient. Contrary to the TCB's firm stance on deletion of data during on-site inspections where it does not consider whether the delet-

ed data is related to business, or whether it is retrieved or not; the Court has considered the fact that the company gave explicit instructions for its employees to not delete any data as of the start of the on-site inspection, the TCA's personnel were able to recover the deleted data from a mobile phone of another employee, and that the deleted data was not related to the business. Setting the bar for the standard of proof with respect to the TCB's decisions on hindering or complicating on-site inspections, the Court ruled that there is no concrete information or documents on which the TCB can base its claim, and stayed the execution of the decision. Reflections of the Administrative Court said judgments were observed in the TCB's A101 (*Yeni Mağazacılık*) decision, one of the leading chain supermarkets in Turkey; which ONaL represented. Indeed, even though there was a doubt of data deletion, the TCB had set a high standard of proof and decided not to impose any administrative monetary fine on the undertaking concerned.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The legal basis for a claim for damages is both the general principles of tort (as well as those of contract, in case the violation stems from an agreement) set forth in the Code of Obligations (COO) and the Law No 4054. In fact, based on the tortious acts, there are specific provisions in Law No 4054, which enable the claimant to claim for damages based on the COO.

There aren't any particular rules for follow-on or standalone claims in Turkish competition law practice. Accordingly, it is theoretically possible to initiate a compensation lawsuit without waiting for a TCB decision or filing a complaint to the TCA. Having said that, in practice, to rule on a

case for a claim of damages arising from competition law, the courts either require a TCB decision, or at least a complaint or an application filed before the TCA. Indeed, in its precedents, the Court of Cassation, the last instance for reviewing decisions of the civil courts in Turkey, has ruled that even though the TCB's final decision is not a prerequisite to bring a compensation claim, it will be evaluated as a preliminary issue and the court will wait for the TCB's final decision before ruling on the merits of the claim. Please see **2.3 Decisions of National Competition Authorities** for detailed information.

2.2 Specialist Courts

Currently, there are no specialist competition courts/judges in Turkey. However, the need for such specialised courts, both for the supervision of the TCB's decisions arising from competition violations and for the effective implementation of the Law No 4054, have been frequently discussed between the Turkish academics and practitioners.

As there aren't any specialist competition courts, actions for damages are heard as per the Civil Procedure Law (CPL) and the general competent courts are the civil courts. Having said that, such cases may also fall into private courts' jurisdiction depending on the claimant's legal status and the subject matter of the dispute. For instance, if the claimant qualifies as a "merchant" in an action for damages lawsuit, that case is heard before the commercial courts. In addition, disputes regarding the consumers that are below certain thresholds, may also be brought to the Arbitration Committee for Consumer Problems in accordance with the Consumer Protection Act.

The administrative courts have exclusive jurisdiction for proceedings on public antitrust liti-

gation. Accordingly, investigated parties that violate competition rules may appeal the TCB's final decisions, measures, and administrative monetary fines imposed, but not its interim decisions. Administrative court decisions may be appealed to the regional administrative courts and finally to the Council of State, the highest administrative court in Turkey. In cases where a private enforcement action is brought before a civil court before the final decision of an administrative court, the court may render it as a preliminary issue, waiting for the final judgment of the administrative court.

2.3 Decisions of National Competition Authorities

As per the Turkish Constitution, the courts are bound to apply the laws, and interpreting Law No 4054 is not only at the TCB's exclusive discretion. Accordingly, in theory the courts are not bound by the TCB's decisions. However, in its precedents, the Court of Cassation has ruled that the damaged parties can file a lawsuit right after they are aware a person violated Law No 4054, and in the presence of damage. The court also underlined that the TCB's final decision is required for compensation claims. Accordingly, even if the injured parties can bring action for damages before the civil courts; considering that the TCB's precedents are evaluated as a preliminary issue, a final TCB decision will be sought before ruling on the merits of the case. As a result, considering that cases initiated at the civil courts before the TCB's final decision are usually dismissed/halted and resumed when such decision is finalised, it would be preferable to wait until TCB's decision is finalised to bring an action for damages before the courts.

Theoretically, if the TCA has legal benefit in obtaining the same outcome with the claimant or the defendant, it can intervene in a private

litigation proceeding. However, considering that the civil courts do not rule on the legality of TCB decisions, but instead only rule to compensate damages that stem from competition law violations, there is no legal interest of the TCA to intervene in such proceedings in practice. As regards the administrative proceedings that are initiated to annul TCB decisions, the TCA usually intervenes, as it has an explicit legal benefit in doing so.

2.4 Burden and Standard of Proof

According to the general principles of torts that are applicable to Turkish private antitrust litigation, the burden of proof lies on the claimant seeking compensation based on the allegation that the relevant party's acts violated competition law. Indeed, Articles 49 and 50 of the COO provide that the claimant shall demonstrate that an unlawful act is formed, the defendant is at fault, damage incurred as a result, and a causal link in between.

A more flexible burden of proof regime is foreseen in Law No 4054 for a specific instance laid out in Article 59. Accordingly, if the claimant presents specific evidence (ie, de facto sharing of the market, stability of the market price for a long time or increase in prices within close intervals by the undertakings concerned) demonstrating an impression of an agreement or distortion of competition in the market; proof that the parties are not in a concerted practice shifts to the defendants.

Regarding the pass-on defence, there is no distinction between follow-on and pass-on defences in Turkish competition law, and both are applicable. Even though not specifically recognised in the Turkish legal system, it is practically possible to claim a pass-on defence. However, since the asserting party is bound to demonstrate its

claim, in order to prove that the other party concerned is not injured, the party asserting a pass-on defence may request the commercial books and bills of the other party through the court.

As per the Constitution, the courts shall apply the laws. Accordingly, since the courts are not bound by the TCB's decisions, theoretically it appears as if standalone defences are adopted in the Turkish legal system. However, in practice, the courts generally evaluate the TCB's precedents as a preliminary issue and wait until the TCB issues its final decision.

2.5 Direct and Indirect Purchasers

Even though Law No 4054 provides that injured third parties are able to claim damages, Section 5 of that law does not provide any definition of an injured party who has incurred damage as a result of a competition law violation. Regardless of the purchasers being direct or indirect, anyone who can demonstrate a link between the violation and the damage incurred can bring their claims forward. As a result, there is no distinction between direct or indirect purchasers in terms of bringing claims. Having said that, since qualifying as a "claimant" in private antitrust proceedings requires the establishment of a connection between the competition law violation and presence of damages, indirect purchasers may face difficulties when bringing claims before the courts.

In any case, due to the vagueness of the legislation and the fact that there is no specific definition with regards to an "injured party", it is suggested that the indirect purchasers should also be able to seek damages resulting from competition law violations. On the other hand, some academics also underline that allowing indirect purchasers to pursue private antitrust damages would result in a dramatic rise in legal proceed-

ings, which would then lead to multiple parties making the same claim for the same damage.

2.6 Timetable

Judicial proceedings do not have a definite period from the issuance of a claim through a trial, and the parties do not have any right to accelerate them. However, by not requesting an extension, they may accelerate the proceedings in practice. In practice, legal proceedings take a comparably long time and, including the appeal phases, the total length would generally amount to three years.

As regards administrative proceedings, filing a lawsuit does not automatically stay the execution of the TCB's decision, which is an administrative act itself. However, upon the plaintiff's request, the court may order a stay of execution decision. According to Article 27 of the Code of Administrative Procedure, administrative courts may stay the execution of the decision if the execution of the TCB's decision is likely to cause irreparable damage or damage that is hard to compensate and that such administrative act is explicitly contrary to law.

The party suffering from a competition law violation does not have to wait for the issuance of a TCB decision and can file a lawsuit before the competent court as soon as submitting a complaint to the TCA. However, it is widely accepted that it is preferable for a court to postpone hearing a case that has been filed following an alleged violation of the competition law until the TCB makes its decision and it has become finalised in the event of an appeal, as outlined in **2.3 Decisions of National Competition Authorities**. Therefore, in general, a standalone action will be pending if there is an ongoing competition law inquiry. As a result, the courts frequently grant stay of execution decisions until the TCB

finalises its decision on the alleged violation of competition law.

3. Class/Collective Actions

3.1 Availability

Class actions are not available in the Turkish judicial system. However, even though highly limited in scope, collective actions are set forth in the CPL. Accordingly, associations and other legal entities can have legal standing of their own and file a lawsuit to protect the interests of their members or the people they represent. It is not possible to define the class on a case-by-case basis since the class is already defined as the members of the association or legal entity whose rights have been violated.

As per Article 113 of the CPL, associations and other legal entities may initiate a collective action to “protect the interest of their members”, “to determine their members’ rights”, and “to remove the unlawful situation or prevent any violation in the future”. However, as the statute only permits a “determination of illegality” type of claim, it is not possible to seek compensation through such a course of action. The judgment encompasses all members of the group.

The claimants may opt in in accordance with Article 57(c) of the CPL if their claims share a common legal basis or set of facts. They are also able to opt out if they wish to. Opting out, however, might prevent the right of the claimants from bringing the same complaints again in the future.

3.2 Procedure

There is no certification process, since collective proceedings are not specifically intended for private enforcement of competition law. Only an

association or a legal entity may initiate collective procedures to defend the rights of its members, according to Article 113 of the CPL, as expressed above. As per the same article, the legal entity must comply with its articles of association and not go beyond the bounds imposed by that statute.

3.3 Settlement

Law No 4054 does not mandate collective settlements; however, as a general rule, the opposing parties are allowed to agree on an out-of-court settlement which does not require a judicial oversight to become effective. As per the relevant articles of CPL, parties may settle at any point before the court makes its final judgment and once settled, the lawsuit is effectively terminated.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

The “strike-out” mechanism, which would allow the court to assess the case on its merits during the pre-trial phase, is not provided under the civil procedure rules. The Court starts to consider the merits of the case after the examination phase. In the Turkish legal system, the concept of “summary judgment” does not exist; as a result, the defendant is not permitted to request the disposal of all or part of an action before a thorough trial is conducted.

4.2 Jurisdiction/Applicable Law

Under normal circumstances, if the parties concerned are Turkish, the Turkish courts shall have the jurisdiction to handle the case, and Turkish law applies. As set forth in the CLP, the court having general territorial jurisdiction is the court at the domicile of the defendant or legal person,

when the lawsuit is filed. In matters relating to tort, the CPL further regulates that at lawsuits arising from tort, the court at the place where the tort is committed or the place where damage occurred or, depending on the damage, the court of domicile, has the jurisdiction. In the presence of a contract, the lawsuit can be filed at the court where the contract is performed. Having said that, unless the relevant subject matter is within the Turkish court’s exclusive jurisdiction; ie, employment disputes, consumer contracts etc, contracting parties can choose between the jurisdictions. In addition, such contracting parties can also choose a foreign law as the governing law. However, to choose a foreign law in cases stemming from tort, the Code on International Private and Procedural Law (IPPL) requires the existence of a foreign element such as at least one party not being a Turkish citizen, that a related tort has occurred in another country, execution or performance of the contract is in another country, etc.

If the dispute in question contains a foreign element, IPPL regulates the rules on jurisdiction. Under Article 34 of the IPPL, obligations arising from torts are governed by the law of the country where the tort was committed. If the related damage and the action causing the effect occurred in different countries, the law of the country where the damage occurred applies.

4.3 Limitation Periods

Law No 4054 does not set out any specific rules on the limitations of claims for damages arising from competition law violations. However, the COO specifically defines different limitation periods for disputes arising from contracts and torts. Article 72 of the COO outlines three separate limitation periods for torts that also apply to compensation claims at private antitrust litigation in Turkey: (i) two years after the time the claimant

becomes aware of the damage and the person(s) liable therefor; and (ii) ten years after the date of the infringement. However, if the compensation stems from an act that requires a longer limitation period as per the criminal law, such limitation period shall apply. As regards to competition law violations arising from contracts, Article 146 of the COO foresees a ten-year limitation period.

Having said that, the Court of Cassation has adopted an eight-year limitation period on the basis of the longer limitation periods foreseen in cases where the damage claim stems from an act which requires a longer limitation period as per the criminal law, in tort claims. Considering that the Law No 5326 on Misdemeanours envisages an eight-year limitation period, and the criminal characteristics of the administrative fines imposed by the TCA, in practice, the Court of Cassation has extended the period foreseen in tort claims, by its precedents. In addition, as also set forth by the Court of Cassation's precedents, the limitation period shall start once the complaint is filed to the TCA (see judgments of the 11th Chamber of the Court of Cassation dated 1.07.2019 and numbered 2019/1672 E., 2019/5015 K., dated 30.03.2015 and numbered 2014/13296 E., 2015/4424 K., dated 27.10.2015 and numbered 2015/3450 E., 2015/11139 K).

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Prior to the trial, there are no discovery tools that allow parties to get information about any non-privileged information that is related to their claims or defences. However, in accordance with Article 16 of the CPL, during the preliminary examination hearing the court provides the parties a timeframe of two weeks, which cannot be extended, to present any further evidence.

5.2 Legal Professional Privilege

Attorney-client privilege is not explicitly recognised in the Turkish legal system. It is directly linked to the right to a fair trial under the European Convention on Human Rights (ECHR). The ECHR and other international conventions to which Turkey is a party make this principle applicable.

The provisions of the CPL govern the court's actions during the trial, rather than the TCA's procedural regulations. Accordingly, the Turkish courts must ensure that sufficient safeguards are in place to protect legal privilege, including documents and electronic communications. The claimant has no right to demand the defendant to provide evidence on correspondence between itself and the lawyers.

The parties may request the court to keep confidential documents in the court's secure lockers. According to CPL Article 161/2, examination of, or access to, confidential papers requires the explicit authorisation of the court. The courts have the authority to order any party or third party to submit case-related papers or to seek any such documents from the TCA's file.

5.3 Leniency Materials/Settlement Agreements

There isn't any provision that provides protection of such agreements with competition authorities from disclosure. To the best of the authors' knowledge, neither is there any precedent on this. Still, it would be recommended to request confidentiality for the leniency and settlement agreements for the purpose of the protection of business secrets. Please see **5.2 Legal Professional Privilege** for more information.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

In the Turkish private law, as per regulated under the CLP, the general principle is that the judge cannot obtain evidence *ex officio*, but instead the parties shall bring the evidence of any nature – ie, e-mails, WhatsApp correspondence, witness statements, etc. Accordingly, the witnesses of facts submitted by the parties are relied on, however since they are regarded as “discretionary” evidence, the courts are not bound by such statements.

Turkish courts accept both written and oral witness statements; when a judge directly questions a witness during a cross-examination; no third party is permitted. During the proceedings however, the attorneys of the parties are free to ask questions of the witness as long as they don’t disrupt the courtroom’s order – which as per Article 152 of the CPL – they can only do so through the judge.

6.2 Expert Evidence

Similar to witness statements, expert evidence is allowed, but it is regarded as “discretionary” evidence. Depending on the court’s discretion, an appointed expert informs the court about the subject at hand and provides the findings of their research verbally or in writing. Experts may be chosen from the court’s registry of sworn experts and appointed by the court, typically *ex officio* and occasionally at the request of the parties. The parties are also able to offer expert opinions. However, the court generally tends to rely on the reports of court-appointed experts.

7. Damages

7.1 Assessment of Damages

The damage incurred as a result of a competition law violation can be demonstrated by any evidence, depending on the case at hand, since the general principles of tort set forth in the COO apply. However, Article 58 of Law No 4054 sets forth a calculation method specific for cartel cases.

Indeed, as per the relevant clause, the injured parties may claim the difference between the price they paid and the price they would have paid if the competition had not been restricted. The same article also sets forth that, in the calculation of the damage incurred by the competitors, all profits that such undertakings expect to obtain will be calculated by considering the balance sheets of the previous years. Assessment of damage suffered by competitors is based on the profit that is deprived. Therefore, the calculation of the losses of the undertakings is based on the difference between the current amount of the undertakings’ assets and the amount they would have reached if the competition had not been restricted.

As outlined above in **2.1 Legal Basis for a Claim**, Law No 4054 sets forth a distinctive provision of the rule of triple damages. Accordingly, if the damage is caused by the “agreements” or “decisions” or “severe negligence” of the undertakings concerned, the judge may, upon the request of the injured parties, award compensation for up to three times the material damage suffered, or the profits obtained or likely to be obtained by those who caused the damage. When the wording of the clause is observed, it is seen that such request of triple compensation is at the judge’s discretion since it is explicitly regulated that the

judge “may” award such compensation at the party’s request.

7.2 “Passing-On” Defences

Please see 2.4 Burden and Standard of Proof.

7.3 Interest

As of the date of the relevant violation, damages resulting from competition law violations may be subject to interest claims. Direct default interest shall apply to such a request, but not contractual interest since there is no contract between the parties in tort. Default interest is determined by Law No 3095 on Legal Interest and Default Interest, which is applied by reference of Article 88/1 of the COO.

8. Liability and Contribution

8.1 Joint and Several Liability

Article 57 of Law No 4054 stipulates that the parties who violated the competition law are jointly and severally liable if the damage results from the behaviour of multiple persons. In other words, the party who suffered losses has the right to seek compensation from any defendant – individually or collectively. In parallel with the provision of Law No 4054, Article 61 of the COO sets out that if more than one person causes damage together or is responsible for the same damage for various reasons, the provisions on joint and several liability shall prevail.

There is no rule that makes an exception for leniency applicants for potential private damages claims.

8.2 Contribution

As explained in 8.1 Joint and Several Liability, the claimant may recover full damages from any of the defendants, and not against every per-

son contributing to the damages caused. As per Article 62 of the COO, in allocating the compensation among the jointly and severally liable persons responsible for the same damage, all circumstances and conditions, in particular the gravity of the fault attributable to each of them and the intensity of the danger created by them, shall be taken into account.

The person who pays more than his share of the compensation shall have the right of recourse against the other jointly and severally liable party for the excess payment and shall be subrogated to the rights of the injured party. Hence, the courts will decide whether a defendant has paid more than their part of the injury, so that it may recover partial reimbursement from the other defendants. If the defendant has the right to recourse, then the court will also determine the amount for which each defendant is liable. In establishing these sums, the court considers the degree of severity of the fault committed by each defendant and its eventual effect.

9. Other Remedies

9.1 Injunctions

Pursuant to the provisions set forth in Articles 389–399 of the CPL, an injunctive relief may be granted in cases where it is concerned that obtaining the right will become significantly difficult or completely impossible due to a change in the current situation, or that an inconvenience or serious damage will arise due to delay. With this method, the legislature ensures that the existing situation does not change to the detriment of the parties until the decision on the dispute is rendered.

As a general rule, an injunctive relief can be obtained by addressing the request to the court.

The party who will file a lawsuit may request an interim injunction before the lawsuit is filed, or together with the lawsuit petition. Subsequent to the filing of a lawsuit, both parties may request an interim injunction, provided that they have legal interest.

If there is a possibility of damage to the requestor or in the intervening period in the event that the other party is notified (for example, if there is a risk that the other party may make attempts to neutralise the measure), the interim injunction may be ruled without notifying the other party or holding a hearing. The judge may decide to hold a hearing if they are in doubt as regards the request of the requestor and especially if there is no risk of the other party's behaviour that would make the measure ineffective.

Pursuant to Article 397/2 of the CPL, the injunctive relief shall continue until the finalisation of the final judgment. However, the court may also rule that the interim injunction will be withdrawn, in its decision on the merits.

9.2 Alternative Dispute Resolution

Turkish law has undergone some changes in recent years to support alternative dispute resolution mechanisms including arbitration and mediation. Arbitration proceedings are admissible on the condition that parties have agreed to an arbitration clause. Alternative dispute resolution can be utilised to save time in resolving conflicts.

As there hasn't been a precedent issued to date, it is still unclear whether alternative dispute resolution is an option for follow-on or standalone claims. The current public interest in competition law violations leads to the necessity for precedent, noting that the TCA has exclusive author-

ity over enforcement subjects such as granting exemptions or merger controls.

10. Funding and Costs

10.1 Litigation Funding

In Turkey, there are no rules that forbid other parties from funding legal proceedings. Although uncommon in practice, it is theoretically possible to file an action funded by a third party to minimise the associated financial risks.

10.2 Costs

Third-party funders are not accountable for the fees incurred by other parties since only the parties to the case may be held liable for the costs incurred as a result of the lawsuit initiated.

11. Appeals

11.1 Basis of Appeal

An appeal against the ruling of the civil court of first instance may be made based on substantive, factual or procedural issues. The CPL allows for appealing the first instance court decisions to the Regional Courts of Appeal and ultimately to the Court of Cassation. However, one can file an appeal based on errors of law, fact or process before the Regional Court of Appeal.

On the other hand, the TCB's final decisions, measures and fines can be challenged before the administrative courts, while interim decisions cannot be subject to annulment proceedings. The competent court of the first instance against the TCB's decisions is the Ankara administrative court. The judgments might be appealed to the Ankara Regional Administrative Court, while the Council of State is the final degree in appeals.

Trends and Developments

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ONaL Attorneys at Law is a Turkish boutique law firm specialised in competition law. As Istanbul connects two continents, the firm connects deep expertise with critical insight to help clients navigate through complex legal issues. Founded by Mr H. Emre Önal, the firm has a fast-growing team, currently consisting of five members. Recognised by both legal communities and businesses for its efficiency in law and

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TURKEY TRENDS AND DEVELOPMENTS

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Constitutional Court Rules On-Site Inspections Require a Judicial Decision – What’s Next?

To date, the Turkish Competition Authority (TCA) has been conducting on-site inspections in accordance with Law No 4054 on the Protection of Competition (“Law No 4054”), which does not require a judicial decision to conduct an on-site inspection unless it is hindered or there is a possibility of hinder. In its decision published in June 2023 (the “Ford Otosan Decision” or “Decision”), the Turkish Constitutional Court (the “Constitutional Court”) – the highest legal body for constitutional review in Turkey – ruled, inter alia, that the on-site inspection conducted in the company’s workplace that has a private element, without a judicial decision, violated the applicant’s right to immunity of residence, protected by the Constitution of 1982 (the “Constitution”). In the individual application decision, the Constitutional Court ruled that the applicant’s fundamental right is violated, and that such violation stems from the fact that the on-site inspection authority of the TCA in Article 15 of Law No 4054, is not regulated in compliance with the additional constitutional guarantee set forth at Article 21(1) of the Constitution. Considering that the Constitutional Court’s decisions, among others, bind the administrative authorities, the Decision stirs a hot topic discussion on what comes next in the TCA’s on-site inspections.

Background

The TCA’s broad, on-site inspection powers have been occupying the Turkish competition law agenda for a while now. Especially after the amendment of Law No 4054 and the subsequent publication of the Guidelines on Examination of Digital Data during On-Site Inspections in 2020, the TCA hasn’t been abstaining from using its wide authorities when conducting on-site inspections. Indeed, the last three years have

seen a truly accelerated growth in the Turkish Competition Board (TCB) decisions imposing monetary fines on the grounds of hindering or complicating on-site inspections; approximately 40 decisions have been published in such period, equivalent to the number of decisions published in its 20 years of practice.

Equipped with a broad range of powers, the authority of the TCA has been subject to a long-standing debate between practitioners and academics in Turkey; this was already brought to the Constitutional Court’s attention before the milestone Ford Otosan Decision, and the Constitutional Court published its decision in March 2023, (dated 8 February 2023 and numbered E: 2020/67, K: 2022/139), where it examined the constitutionality of the phrases in Article 15 of the Law No 4054, that grants the TCA the right to obtain copies and physical samples of an undertaking’s books, data and documents kept in the physical/electronic environment and the information systems of the undertaking. In the action for annulment case where, among others, the constitutionality of laws or the provisions thereof were challenged, the Constitutional Court conducted an abstract review, the relevant phrase was evaluated within the right to privacy and the Constitutional Court did not establish any unconstitutionality in the phrase at Article 15/a(a). Having said that, two of the dissenting opinions gave a hint of the upcoming Ford Otosan Decision, where members of the Constitutional Court considered workplaces within the concept of residence and stated that Article 15 of the Law No 4054 violated the right to immunity of residence so long as it did not require a prior judicial decision to be obtained. A month later, the highly controversial Ford Otosan Decision, which brings more clarity to the constitutionality of the TCA’s on-site inspections, was published.

The applicant, Ford Otomotiv Sanayi (“Ford Otosan”), a leading automotive manufacturing company that is jointly controlled by Ford Motor Company and Koç Holding A.Ş., one of the largest private enterprises in Turkey, was a party to the TCB’s full-fledged investigation carried out in 2011 on exchange of competitively sensitive information, which involved many other undertakings in the same sector. Within the scope of the preliminary investigation carried out, the TCA conducted an on-site inspection at Ford Otosan in 2009, where documents were obtained through the computers of company personnel. As a result of the investigation, the decision-making body of the TCA, the TCB, applied an administrative monetary fine on Ford Otosan. The TCB’s decision was brought to the administrative judiciary, where, after a series of proceedings, the Plenary Session of the Chambers for Administrative Cases of the Council of State eventually ruled that the relevant chamber’s decision approving the TCB’s decision was in line with the law. In 2019, the company filed an individual application to the Constitutional Court, an exceptional remedy foreseen in the Turkish Constitutional regime, which can be exercised by individuals whose fundamental rights and freedoms that are protected by the European Convention of Human Rights and guaranteed under the Constitution, are violated.

Summary of the Judgment

The critical factor that led to the establishment of the TCA’s on-site inspections without a judicial award of unconstitutionality, was based on the definition of the “residence” concept and the fact that a residence is rendered immune from being entered, searched or the property seized therein; unless specific circumstances outlined in the Constitution aren’t met. Indeed, Article 21 of the Constitution explicitly sets forth that the residence of an individual shall not be violated

unless a decision is duly given by a judge on the grounds of national security, public order, prevention of crime, protection of public health and morals or protection of the rights and freedoms of others; or unless there exists a written order of an agency authorised by law in cases where there is an imminent delay. The same clause also requires that, in cases where delay is prejudicial, the decision of the authorised agency shall be submitted to the approval of a judge within 24 hours, who then renders a decision within 48 hours; otherwise seizure shall be automatically removed. On the other hand, Article 15 of the Law No 4054, which grants the TCA the authority to conduct on-site inspections only requires a judge’s decision in cases where the on-site inspection is hindered or there is a possibility of hinder.

At the outset, the Constitutional Court started its evaluation by elaborating on the concept of residence; setting forth that such concept is generally defined as a physically designated place where private and family life flourishes, and it also encompasses workplaces. In this concept, the Constitutional Court evaluated an office where a person performs their profession, a registered office of an undertaking operated by a private person; finding that registered offices, branch offices of legal persons, and other workplaces are within this scope. At the same time, it underlined that the public areas of workplaces which do not encompass a private element, are open-door and public, and may not be assessed within the concept of a residence. Having said that, the Constitutional Court also emphasised that the parts of the undertakings where the management works of the undertakings are carried out and areas such as workrooms, which are not freely accessible to everyone, are also considered as residences. Interpreting on-site inspections within the concept of “search”, the

Constitutional Court held that several fundamental rights, including the right to immunity of residence, privacy and right to integrity of the person, are restricted by such measure. As a result, considering that the on-site inspections take place in the registered office, branch and premises of undertakings, the Constitutional Court ruled that the on-site inspection authority of the TCA that is fully compliant with the Law No 4054 interferes with the right to immunity of residence.

In the second phase of its evaluation, the Constitutional Court analysed whether the interference with the right to immunity of residence, by conducting on-site inspections pursuant to Article 15 of Law No 4054, constitutes a violation. Taking into account that the on-site inspections usually take place at an undertaking's registered offices, branch offices, and facilities which are evaluated within the term "residence"; Article 13 of the Constitution, the general rule on the restrictions to fundamental rights and freedoms which stipulates that they can only be restricted by law which shall not conflict with the letter and spirit of the Constitution, was referred to. Having said that, the Constitutional Court ruled that the clause granting the TCA's personnel the authority to conduct on-site inspections without a Constitutional Court decision violates the special guarantee provided in the Constitution. In addition, it was underlined that although Article 21 of the Constitution renders a decision of an authority authorised by law suffice in cases with imminent delay, Article 15 of the Law No 4054 does not render TCB's on-site inspection decision exclusive to such cases. Lastly, the Constitutional Court also set forth that even if for a moment it is accepted that the TCB's decisions to conduct on-site inspection is limited to cases with imminent delay, the fact that the same clause does not require the submission of such

decision to the approval of a judge, is not compatible with the additional guarantee in Article 21 of the Constitution.

As a result, the Constitutional Court concluded that the on-site inspection carried out without a judge's decision, since the on-site inspection was not hindered, constitutes an interference with the right to immunity of residence, which violates the Constitution. Bound by the ultra petita prohibition in the individual application mechanism, the Constitutional Court did not rule on compensation for this violation. However, the Constitutional Court set forth that, in order to prevent future violations, Article 15 of Law No 4054 should be reviewed, and that a copy of the decision should be sent to the Turkish Grand National Assembly, the legislative body of the Turkish Republic, for its knowledge and assessment.

Evaluation of the Judgment

Amongst the discussions the Ford Otosan Decision triggers, the question of which parts of a workplace should be considered within the concept of residence is one of the controversial debates. Further emphasising the "private" component in its individual application of precedents on the right to immunity of residence, even though the Constitutional Court has slightly altered its interpretation of the workplace, the question still remains on how to evaluate meeting rooms where most of the on-site inspections are being conducted nowadays, which do not have a private element compared to the rooms where management operates, or to the ones where lockers and belongings of a company's employees located. Indeed, in 2023, the Constitutional Court explicitly stated that the public areas of workplaces which do not encompass a private element, that are open-door and public may not be assessed within the concept of a

residence. However, the question arises on how to evaluate the meeting rooms where most of the on-site inspections are currently conducted. In earlier on-site inspections, the case handlers entered the rooms of the company's personnel, searching drawers and agendas of persons. However, with the wave of digitalisation, nearly all the documents and data are being stored in laptops, mobile phones, and electronic environments, and the TCA's personnel run inspections on such devices, without the need to enter to the rooms of the employees, or conduct searches in personnel lockers. Indeed, when the TCA's personnel arrive at a company's premises to conduct an on-site inspection in practice, they are mostly hosted in the meeting rooms, where the chosen personnel whose devices will be inspected, accompany them. Considering that such meeting rooms do not contain a privacy element, as opposed to the parts of the undertakings where the management works are carried out and workrooms that are not freely accessible to everyone, legitimacy of considering meeting rooms within the scope of residence is very debatable.

Another discussion arises around whether the TCA's on-site inspections can and should be considered within the scope of the right to immunity of residence, and the conditions stipulated in Article 21 of the Constitution are met. Indeed, the article cumulatively sets forth that, for the right to immunity of residence to be violated, a residence shall be entered, searched or the property shall be seized therein. Accordingly, in order to claim unconstitutionality of the TCA's authority, the case handlers should not only enter a workplace but also should "search" the place and "seize" the property therein. The Constitutional Court evaluates the TCA's on-site inspection within the scope of "search", a protection measure stipulated within the Crimi-

nal Procedure Law No 5271, aimed at arresting the suspect or accused or obtaining criminal evidence. However, whether it is appropriate to apply a protection measure in the Criminal Procedure Law to an act that is subject to an administrative sanction foreseen in Misdemeanours Law No 5326, remains a debatable question. Besides, even though the Constitutional Court comprehensively evaluates the concept of search by analogy; whether the act conducted during the on-site inspections falls within such specific measure directed towards natural persons, that is conducted by a law enforcement officer as a police officer, or military police is also controversial. On the other hand, whether the act of "seizure" is present when the TCA's personnel obtain copies of an undertaking's data and documents kept in the electronic environment and the information systems remains another vague subject. Indeed, such term is defined as the process where the power of disposition of a possessor on a property is removed without its consent, with the aim of preventing crime or danger; or due to such property being subject to confiscation. Even though there is a specific provision on the protective measure of search, copy and seizure on computers, computer programs and logs stipulated in the Criminal Procedure Law, it seems that the Constitutional Court has again comprehensively interpreted this concept which, in its essence, is aimed at reaching material truth within criminal proceedings. Besides, questions arise on other areas of law; ie, implications of the Decision on tax inspectors, and confiscations within the scope of the Bankruptcy and Enforcement Law, all of which are automatic processes that require no judicial decision in practice.

Practical Takeaways

As a result of this landmark decision of the Constitutional Court, which is binding upon the administrative authorities, legislative, execu-

tive, and judicial organs under the Turkish constitutional regime, the TCA should not conduct on-site inspections without a judicial decision authorising it to do so. Accordingly, until the relevant clause of Law No 4054 is amended, a judge's decision is necessary for the TCA to carry out its special authority. Having said that, there is a possibility that, contrary the Ford Otosan Decision, the TCA may continue its established practice and conduct on-site inspections without a judicial decision, which would still be compliant with Article 15 of Law No 4054. Alternatively, the TCB may obtain a judicial decision that would render such on-site inspection both in compliance with the Constitutional Court's Decision and Law No 4054.

In cases where the TCB does not obtain a judicial decision when conducting an on-site inspection, there are a couple of options for the companies at whose workplace the on-site inspection will be carried out. In light of the Constitutional Court's Ford Otosan Decision, the undertaking may assert that such inspection to be carried out is unconstitutional and decide not to let the TCA's personnel in. However, this may result in an administrative monetary fine amounting to 0.015% of the company's turnover generated in the previous fiscal year. This decision of the TCB can be the subject of an annulment case in the administrative Constitutional Courts, where the Constitutional Court shall decide to annul the relevant case based on the Constitutional Court's decision, which is binding upon judicial organs. Having said that, while the undertakings concerned shall wait until the TCB publishes its decision on the investigation, the monetary fine

imposed shall be also paid until the annulment case is concluded. Alternatively, if the TCA's personnel are allowed to enter, it is recommended to cite the Constitutional Court's decision, stating that a judicial decision is necessary as per the precedent, on the on-site inspection minutes. Even though such on-site inspection minutes cannot be subject to an annulment case on their own, it is still possible to apply to the TCA based on Article 10 of the Administrative Procedure Law No 2577, which states that individuals may apply to the administrative authorities to perform an act or action which might be subject to an administrative action. Unless such request is responded to within 30 days, at the end of such period, the TCA's silence shall be deemed as a refusal and the undertakings concerned can then proceed to file an action against the decision, with the characteristics of an executive proceeding. As a result, during the annulment case before the Administrative Court, undertakings may request the removal of the evidence obtained as a result of the on-site inspection carried out without a judicial decision, which renders such inspection and the documents obtained unlawful.

It is still not crystal clear which approach the TCA will adopt going forward. However, it is certain that the Ford Otosan Decision marks a milestone regarding on-site inspections carried out according to Law No 4054, concluding that, without obtaining a judicial decision, such examinations lack adequate safeguards within the context of a fundamental right protected by the Constitution.



Law and Practice

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Clifford Chance US is a global antitrust powerhouse that serves clients by handling the most complex matters in all the key hubs of Europe, Asia-Pacific, and the Americas. The practice consists of over 185 attorneys who provide seamless and integrated advice to domestic and multinational clients. The US practice is led by seasoned professionals whose extensive experience in private practice, in-house, and high-ranking government positions enables them to tackle cutting-edge issues. They advise clients across the full range of contentious and non-contentious matters, covering mergers, joint

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C L I F F O R D
C H A N C E

1. Overview

1.1 Recent Developments in Antitrust Litigation

In recent years, US antitrust authorities and private plaintiffs have aggressively challenged proposed mergers in an array of industries ranging from tech to healthcare. They have also pursued major monopolisation cases against Big Tech companies in litigation that will shape competition in the US for years to come. For more detail, see [USA Trends & Developments](#).

1.2 Other Developments

US authorities have signalled that certain emerging market trends may face increasing antitrust scrutiny in the near future, including co-ordination among competitors to achieve environmental, social, and governance (ESG) initiatives and the use of artificial intelligence (AI). Meanwhile, even as US authorities have become increasingly aggressive, the US Supreme Court has recognised new avenues for defendants to push back. For more detail, see [USA Trends & Developments](#).

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Section 4 of the Clayton Act authorises damages suits in federal court by “any person” – which includes corporations and other legal entities – “who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” (15 USC Sections 7; 15[a]). The federal antitrust laws underlying private damages claims include, perhaps most prominently, Section 1 of the Sherman Antitrust Act (prohibiting concerted action that unreasonably restrains trade), and Section 2 (prohibiting single-firm conduct that harms consumers by unreasonably excluding

competitors from a market). State antitrust laws vary, but broadly confer private rights of action on a similar basis.

The Clayton Act allows litigants to pursue damages claims that follow on from parallel scrutiny by federal law enforcement and standalone claims. Standalone claims – brought by private litigants in the absence of any governmental action against the defendants – are common in US practice. News that antitrust authorities are investigating potential anti-competitive conduct commonly prompts private litigants to quickly initiate parallel damages actions, usually while the underlying investigation remains pending.

2.2 Specialist Courts

Most federal competition matters are resolved in the US federal courts, which have exclusive jurisdiction over federal antitrust claims. An exception is the administrative adjudicatory process carried out by the Federal Trade Commission (FTC) (see **2.3 Decisions of National Competition Authorities**). The Clayton Act accords plaintiffs wide latitude in choosing a venue (that is, the US federal district court in which they file suit). Venue is proper under the Clayton Act in any federal district where the defendant “resides or is found or has an agent”, or “transacts business” (15 USC Sections 15[a], 22). The parties may request, or the court may on its own decide, “for the convenience of parties and witnesses” or “in the interest of justice”, to transfer a federal antitrust litigation to a different federal district where the case “might have been brought” or to any district to which “all parties have consented” (28 USC Section 1404[a]). Different claimants may file parallel antitrust complaints in differing federal districts. When this occurs, the parties may request that the Judicial Panel on Multidistrict Litigation consolidate claims – involving “common questions of fact” – into a

single federal district for co-ordinated pre-trial proceedings (28 USC Section 1407[a]).

Antitrust claims made under state law may also be heard in federal court if:

- they supplement a federal claim (28 USC Section 1367);
- the parties reside in different jurisdictions (28 USC Section 1332[a]); or
- they meet the requirements of the Class Action Fairness Act of 2005, which significantly expanded the federal courts' authority to resolve large class actions even if pursued under state law (28 USC Section 1332[d]).

2.3 Decisions of National Competition Authorities

The federal antitrust enforcement agencies retain discretion over their enforcement decisions, but those decisions are generally subject to judicial review in some form. The FTC, as an independent administrative agency, possesses the statutory authority to adjudicate civil claims of "unfair competition" before the agency's own administrative law judges in trial-type proceedings. Decisions by FTC administrative judges are automatically reviewed by the FTC commissioners, and a losing defendant may appeal the commission's decision to the federal appeals courts.

Pursuing Enforcement Actions

By contrast, the US Department of Justice, Antitrust Division (the "Division"), as a law enforcement agency, lacks the authority to adjudicate its own disputes, and instead must pursue enforcement actions exclusively in the federal courts. The courts likewise retain oversight of Division settlements of these cases before trial. When the Division concludes a civil antitrust investigation or litigation by settlement (known as a consent decree), the Antitrust Procedures and Penalties

Act obliges the Division to file a complaint and proposed settlement materials in federal court and seek judicial approval of the settlement's terms. However, the court's review is limited to ensuring the settlement is in the "public interest" (15 USC Section 16).

This has traditionally been interpreted as a highly deferential standard of review, but a recent decision has reaffirmed that the court's review is not simply a "rubberstamp" for the government's proposed resolution. By contrast, a criminal antitrust prosecution – which, as a matter of policy, the Division uses to target only "hardcore" per se competition offences – is overseen in its initial stages by a federal grand jury, which decides whether there is "probable cause" to believe a crime was committed, justifying the issuance of an indictment. In general, most criminal antitrust defendants plead guilty rather than stand trial. In that circumstance, the trial court has discretion to accept or reject the Division's recommended sentence.

Consequences of Federal Antitrust Enforcement Actions

A federal antitrust enforcement action can have important consequences on a parallel private litigation. For example, a final judgment or decree against a defendant in a federal antitrust enforcement action can serve as prima facie evidence against that defendant in related private litigation (15 USC Section 16[a]). In addition, the Division periodically intervenes in civil antitrust litigation to request a stay of discovery where the Division believes the exchange of evidence between the parties could undermine the Division's ongoing criminal investigation of one or more defendants. Finally, the Division may intervene in private antitrust litigation as an amicus curiae to offer its views on the application of the antitrust laws to a given complaint.

2.4 Burden and Standard of Proof

Section 4 of the Clayton Act requires a plaintiff to prove that the defendant(s) violated the antitrust laws and that the plaintiff has been “injured in his business or property” – that is, suffered economic loss – “by reason of” that violation (15 USC Section 15). Plaintiffs in federal antitrust cases must prove each element of their claim by a “preponderance of the evidence”, meaning they must establish through direct or circumstantial evidence that a fact is more likely than not true.

The US Supreme Court has articulated important “limiting contours” on the right of private plaintiffs to recover treble damages (ie, three times their actual damages) under the Clayton Act, embodied in the requirement that plaintiffs establish the element of “antitrust standing”, which tests whether a particular plaintiff is the appropriate party to recover damages for an established antitrust violation. First, antitrust plaintiffs must demonstrate that they have suffered an “antitrust injury”, that is, an injury “of the type the antitrust laws were intended to prevent.” (*Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477 [1977]). For example, a retailer that loses its distribution agreement with a manufacturer for refusing to conspire with other retailers to rig bids to sell the manufacturer’s products has not suffered antitrust injury. This is because the retailer’s harm (lost profits) does not “flow... from that which makes bid-rigging unlawful” under the antitrust laws (ie, higher prices to consumers) (*Gatt Communications, Inc v PMC Associates, LLC*, 711 F.3d 68 [2d Cir 2013]).

Plaintiffs must also establish they are “efficient enforcers of the antitrust laws”, an inquiry that assesses (among other things) the “directness” of the link between the asserted conduct and injury, and the existence of other “more direct” victims (*Associated General Contractors of Cali-*

fornia, Inc v Cal State Council of Carpenters, 459 US 519 [1983]). These elements are not part of the government’s burden in proving an antitrust violation.

2.5 Direct and Indirect Purchasers

The US Supreme Court has ruled that “indirect purchasers” – consumers who do not purchase directly from defendants, but to whom the direct purchaser has passed on the overcharge caused by the defendants’ conspiracy – generally lack standing to pursue damages claims under the federal antitrust laws (*Illinois Brick Co v Illinois*, 431 US 720 [1977]). This decision is rooted in concerns for judicial economy and the challenges in apportioning damages passed from direct to indirect purchasers (and the threat that those challenges could lead to duplicative recovery).

There are exceptions to this rule, including when the direct purchaser is a party to the conspiracy. Further, since the Supreme Court announced the bar on federal indirect purchaser claims, most states have enacted what are known as *Illinois Brick* repealer statutes sanctioning those claims under state law. As a result, antitrust defendants may be forced to litigate in a single federal court against both direct purchasers under federal law and indirect purchasers under various state laws.

Though there have been calls for Congress to overturn the *Illinois Brick* rule, it has not done so. And the US Supreme Court affirmed *Illinois Brick*’s bar on damages suits by indirect purchasers in 2019 – the Court’s first application of the rule to a digital market (*Apple Inc v Pepper*, 139 S Ct 1514 [2019]).

2.6 Timetable

The duration of federal antitrust litigation varies dramatically. Most cases are dismissed or

resolved before trial. Cases can be dismissed at the pleadings stage with reasonable speed, though claimants may be permitted to replead their allegations, and may appeal dismissal. Cases that survive the dismissal stage can go on for years, as the parties exchange evidence, retain experts, dispute class certification (see **3.2 Procedure**) and seek summary judgment before trial (see **4.1 Strike-Out/Summary Judgment**).

Private antitrust litigation is not automatically suspended (or “stayed”) during a parallel investigation by federal antitrust authorities. The litigants can seek stays of antitrust litigation for reasons common to most federal court litigation, including to raise “interlocutory” appeals of issues that do not finally resolve the case (see **11.1 Basis of Appeal**).

3. Class/Collective Actions

3.1 Availability

Class actions are at the heart of private antitrust litigation in the USA. Class litigation proceeds on an “opt-out” basis: members of a “certified” class are included in the resolution of the claim unless they affirmatively opt to be excluded.

3.2 Procedure

Any plaintiff suing under the federal antitrust laws may seek to pursue their claims on behalf of a putative class of parties whose injuries at the hands of defendants involve the same set of concerns. To maintain a class, a plaintiff must move for “class certification”, establishing by a preponderance of the evidence that the class complies with the requirements of US Federal Rule of Civil Procedure 23. This class-certification review involves a “rigorous analysis” that “will frequently entail overlap with the merits of the plaintiff’s underlying claim”. (Comcast Corp

v Behrend, 569 US 27, 34 [2013]). To begin with, a plaintiff must affirmatively demonstrate that:

- the class is so “numerous” that simple “joinder” of each class member’s individual complaints into a single litigation would be “impracticable”;
- the class members present questions of law or fact in “common” with one another (ie, that they have suffered the same injury);
- the lead plaintiff’s claims are “typical” of those of the class; and
- the lead plaintiff will “fairly and adequately protect the interests of the class” (Fed R Civ P 23[a]).

In addition to those “prerequisites”, a plaintiff must also establish that the putative class meets one of several enumerated bases for certification. Most antitrust class actions seek to proceed on the showing that both common questions of law or fact “predominate” over questions affecting individual members and a class action is “superior” to alternative methods of “fairly and efficiently adjudicating the controversy” (Fed R Civ P 23[b][3]).

3.3 Settlement

The federal courts encourage parties to settle their disputes rather than litigate and, outside of the class-action setting, parties may stipulate to voluntary dismissal without disclosing the terms of settlement (Fed R Civ P 41[a][1][A][ii]). But because the resolution of a class action has binding effect on absent class members who have not opted out, the courts play a significant, multi-stage role in reviewing and approving settlement (or voluntary dismissal) of class claims. This process is to ensure that the resolution fairly and adequately protects the rights of all class-members (Fed R Civ P 23[e]). The rationales for these protections are that the lead plaintiff (and

its counsel) may accept a settlement that is too small to appropriately compensate the class, and/or fail to take adequate steps to notify class members (hoping to keep whatever funds are not distributed to the class). The settling litigants – though adversaries normally – must work together to jointly pursue and defend to the court the contours of the proposed settlement.

First, the parties must obtain the court’s preliminary approval of the proposed settlement by demonstrating both that it would likely be considered fair and adequate under a full review and that it would apply to a class that would satisfy the standards for class certification (see **3.2 Procedure**). Next, the parties must provide notice “in a reasonable manner” to “all class members who would be bound” by the proposed settlement. This notice must allow class members to object to the proposed settlement (on their own or on behalf of others). The court may also require that members of previously certified classes have another chance to opt out. Finally, the court must hold a “fairness hearing” to consider whether the settlement is “fair, reasonable, and adequate”, assessing factors that include:

- the complexity, expense, and likely duration of the litigation;
- the reaction of class members to the proposed settlement;
- the risks of establishing liability and damages; and
- a comparison of the settlement fund to the best possible recovery in light of the risks of litigation (*City of Detroit v Grinnell Corp*, 495 F.2d 448 [2d Cir 1974], abrogated on other grounds by *Goldberger v Integrated Resources, Inc*, 209 F.3d 43 [2d Cir 2000]).

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Most private antitrust actions in federal court do not reach trial, but instead are either dismissed or settled at pre-trial breakpoints. Early in the case, defendants can seek to have a case dismissed on the grounds of a plaintiff’s failure to plead sufficient factual allegations to support key elements of an antitrust claim. Defendants raise these challenges as a matter of course in most federal litigation, including in claims brought under the antitrust laws. Defendants can raise a number of pleading defects, including that:

- the claim is untimely;
- defendants are not subject to the court’s jurisdiction;
- the pleading fails to plausibly allege a claim upon which relief can be granted; or
- the plaintiffs lack standing to sue in court (Fed R Civ P 12).

Courts take these threshold challenges seriously, particularly in light of the significant costs and burdens of discovery in antitrust class actions. In 2007, the Supreme Court clarified that to survive dismissal and proceed to discovery, antitrust plaintiffs must plead a claim that is at least plausible on its face, as opposed to relying on conclusory statements suggesting an antitrust violation is merely possible (*Bell Atlantic Corp v Twombly*, 550 US 544 [2007]). Because defendants generally cannot recover costs for successfully dismissing an antitrust claim, there is comparatively little disincentive for class plaintiffs to plead even a speculative claim on a contingency basis, in hopes that the complaint survives dismissal and opens the door to discovery.

Summary Judgments

At the end of discovery and before trial, plaintiffs and defendants can ask the court to grant summary judgment on all or part of the claims. Summary judgment requires the moving party to show that, with the evidence gathered, “there is no genuine dispute as to any material fact” relating to a claim or defence, obviating the need to put that question to the fact-finder at trial (Fed R Civ P 56[a]). Courts evaluate these motions by considering the evidence in the light most favourable to the opposing party and drawing all reasonable inferences in that party’s favour.

To overcome summary judgment in the antitrust conspiracy context, plaintiffs must present evidence that “tends to exclude the possibility that the alleged conspirators acted independently” (*Matsushita Elec Indus Co v Zenith Radio Corp*, 475 US 574 [1986]). For example, a court may grant summary judgment for defendants in a conspiracy case where there is no direct (or “smoking gun”) evidence of a conspiracy, and the evidence suggests the alleged conspiracy would have been economically irrational (eg, *Anderson News, LLC v American Media, Inc*, 899 F.3d 87 [2d Cir 2018]).

4.2 Jurisdiction/Applicable Law

In addition to the venue requirements of the Clayton Act (see 2.2 **Specialist Courts**), plaintiffs must establish that both the defendant(s) and the conduct complained of are subject to the jurisdiction of the US courts. These requirements include both personal and subject matter jurisdiction.

Personal Jurisdiction

Personal jurisdiction assesses the court’s power to hear cases against particular defendants. As a matter of constitutional due process, the federal courts can only impose liability on defendants

that have sufficient “minimum contacts” with the forum state. Depending on the strength of a defendant’s forum contacts, personal jurisdiction can be general (all-purpose) or specific (conduct-linked). For corporations, in all but the most “exceptional” cases, general jurisdiction will exist only if the defendant is headquartered or incorporated in the forum (*Daimler AG v Bauman*, 571 US 117 [2014]).

Specific jurisdiction, which is narrower, is appropriate only for claims that “arise out of or relate to” a foreign defendant’s own purposeful contacts with the forum itself (and not just contacts with parties that reside in the forum) (*Walden v Fiore*, 571 US 277 [2014]). Plaintiffs must also have suffered an injury in the forum, although injury alone is not enough (*Bristol-Myers Squibb v Superior Court of California, San Francisco County*, 582 US 255 [2017]). The Supreme Court has recently reiterated that specific jurisdiction requires a “strong relationship among the defendant, the forum, and the litigation” (*Ford Motor Company v Montana Eighth Judicial District Court*, 141 S Ct 1017 [2021]).

Subject Matter Jurisdiction

By contrast, subject matter jurisdiction is the power of the court to hear a given type of claim. In the antitrust context, as courts and litigants grapple with the practical realities of increasingly global supply chains and cross-border finance, this question is frequently considered in terms of the territorial limitations applied to the Sherman Act’s bar on conspiracies that restrain trade. The US Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the territorial reach of US antitrust law to domestic or import commerce, and places foreign or export conduct beyond the reach of US courts unless that conduct has a “direct, substantial, and reasonably foreseeable

effect” on US commerce and that effect “gives rise to” a US antitrust claim (15 USC Section 6a).

Whether the causal nexus between foreign conduct and domestic effect is sufficiently direct will depend on the facts and circumstances, including the structure of the market and the relationships of the parties. Appeals courts presently disagree on whether the FTAIA’s directness prong requires that the US effect follow as the “immediate consequence” of the foreign antitrust conduct or whether the domestic effect must only bear a “reasonably proximate causal nexus” to that conduct (Compare *United States v Hui Hsiung*, 778 F.3d 738 [9th Cir 2015] [“immediate consequence”], with *Lotes Co v Hon Hai Precision Industries Co*, 753 F.3d 395 [2d Cir 2014] [“reasonably proximate causal nexus”]). But, however the test is expressed, the appeals courts generally appear to agree that the wholly-foreign price fixing and sale of components included in goods sold to US consumers can have a direct effect on US commerce.

4.3 Limitation Periods

A private litigant may pursue a claim for damages under the federal antitrust laws within four years after the cause of action has “accrued” (15 USC Section 15b). An antitrust claim accrues when the defendants’ offending conduct causes the claimant to suffer a non-speculative injury. In the case of an ongoing conspiracy, the limitations period runs from each new “overt act” in furtherance of the conspiracy that inflicts new and accumulating injury on the plaintiff (*Zenith Radio Corp v Hazeltine Research*, 401 US 321 [1971]). In rare cases, the theory of “fraudulent concealment” may equitably “toll” (ie, pause) the limitations period where defendants have taken affirmative actions to prevent a plaintiff from learning of their cause of action.

The limitations period can also be tolled for other statutory reasons, such as a pending government action for the same conduct (15 USC Section 16[i]). In addition, the statute of limitations for a plaintiff who opts out of a purported class action remains tolled during pendency of the class claim (*American Pipe & Construction Co v Utah*, 414 US 538 [1974]). In 2018, the Supreme Court clarified that this rule applies only to opt-out plaintiffs who seek to pursue damages claims on their own behalf, and not to plaintiffs who seek to re-assert class claims after a prior class has failed to achieve certification for the same issues (*China Agritech v Resh*, 138 S Ct 1800 [2018]).

Limitations periods under state antitrust laws vary from as few as one year to as many as six years, with four years being the most common. A small handful of states do not specify a limitations period for antitrust claims.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

The exchange of evidence between parties in federal antitrust litigation is governed by the general rules for discovery in federal court. Those rules contain a permissive standard for what evidence parties may request: “any non-privileged matter that is relevant to any party’s claim or defense”, whether or not that information would ultimately be admissible at trial (Fed R Civ P 26[b][1]). Parties may request production of documents and electronically stored information, written responses to questions and requests for admissions, as well as depositions of witnesses of fact or corporate representatives. Non-US litigants may, in some circumstances, need to provide disclosure that would not be permitted under their own country’s laws.

In addition, litigants may serve subpoenas seeking discovery from non-litigants.

Under these standards, discovery in US federal litigation is, in general, more burdensome, costly, and time-consuming than in many other jurisdictions. In the antitrust context, discovery can be particularly costly and time-consuming, as large putative classes of plaintiffs raise a variety of complex issues. That said, there are important constraints on the scope of discovery. Since 2015, the federal rules have limited permissible discovery to relevant information that is “proportional to the needs of the case” (Fed R Civ P 26[b][1]). Parties may resist discovery requests on a variety of grounds, including that the requested materials fail the relevance standard or that compliance would be unduly burdensome under the circumstances.

In addition, the Supreme Court – recognising the practical risk that the burdens of antitrust discovery can push defendants to settle even “anaemic” cases – has instructed lower courts to take seriously their gatekeeping function at the motion to dismiss stage (see **4.1 Strike-Out/Summary Judgment**). In 2007, the Supreme Court clarified that to survive a motion to dismiss an antitrust claim on the pleadings, plaintiffs must set forth specific facts (accepted as true) “plausibly suggesting (not merely consistent with) agreement” (*Bell Atlantic Corp v Twombly*, 550 US 544 [2007]). This decision has raised the bar on what plaintiffs must allege, frequently before being permitted to request discovery from defendants.

5.2 Legal Professional Privilege

The attorney-client privilege protects from the discovery process, confidential communications between an attorney and client made for the primary purpose of seeking or providing legal

advice. In the corporate setting, the attorney-client privilege extends to communications between attorneys and those employees who “will possess the information needed by the corporation’s lawyers” in order to provide sound legal advice, as well as to those employees who “will put into effect” that advice (*Upjohn Co v United States*, 449 US 383 [1981]). Importantly, in-house counsel communications may be protected by attorney-client privilege under US law. Furthermore, the privilege protects attorney-client communications made with a business purpose, so long as at least “one of the significant purposes” of the communication was obtaining or providing legal advice (see *Kellogg Brown & Root, Inc*, 756 F.3d 754 [DC Cir 2014]).

Internal corporate communications that do not include attorneys may sometimes remain subject to the privilege, including where those communications reflect an attorney’s legal advice or where a non-attorney – such as in a compliance or internal audit role – is gathering facts at the direction of an attorney for the purpose of facilitating the attorney’s provision of legal advice to the company.

Limitations (and Exceptions to Those Limitations) to the Scope of Privilege

There are some important limitations on the scope of the privilege protection. For example, only the substance of legal advice (or of a request for advice) is protected. The fact of an attorney-client communication is not protected. Nor are underlying materials or information shared between attorney and client for the purpose of giving or receiving advice protected by the privilege. In addition, a party generally waives privilege protection by failing to maintain the confidentiality of legal advice, including by sharing that advice with third parties. There is no exception to this waiver for voluntary disclosure

of privileged communications to the government (though, importantly, the US antitrust authorities do not demand an investigative target hand over privileged materials to be seen as co-operative in a government investigation). And the privilege does not protect attorney-client communications made for the purpose of committing or furthering a crime or fraud (*United States v Zolin*, 491 US 554 [1989]).

The “common interest” protection – an exception to the rule that sharing legal advice with third parties results in a privilege waiver – safeguards against the compelled disclosure of communications between parties and their respective counsel when aligned in a common legal interest. There is some disagreement among the federal appeals courts as to whether the common interest protection is limited to communications between parties when threatened by litigation; a number of appeals courts recognise it applies to the “full range of communications otherwise protected by the attorney-client privilege” without regard to whether litigation is threatened (*United States v BDO Seidman, LLP*, 492 F.3d 806 [7th Cir 2007] [agreeing with at least five sister circuits that the threat of litigation is not required for the common interest protection to apply]; but see *Santa Fe Int’l Corp*, 272 F.3d 705 [5th Cir 2001] [finding that the protection only applies where there is the threat of litigation]). In federal antitrust litigation, co-defendants regularly invoke the common interest protection to share materials and collaborate on defence strategy. Frequently, co-defendants will sign a joint defence agreement formalising that arrangement (but this step is not strictly required for the common interest protection to apply).

A related protection arises under the “work-product” doctrine, which shields from disclosure materials “prepared in anticipation of litigation”

(Fed R Civ P 26[b][3]). It protects both “documents and tangible things” and the “mental impressions, conclusions, opinions, or legal theories of a party’s attorney”. The work product doctrine is not an absolute bar to compulsory disclosure of qualifying materials. Rather, an adversary may ask the court to compel disclosure of work product by showing that the requesting party has a “substantial need” for the materials in order to prepare its case and that the party cannot, without “undue hardship”, obtain through “other means” the “substantial equivalent” of the requested materials (Fed R Civ P 26[b][3][A]). In practical terms, however, this is a very challenging standard to meet.

5.3 Leniency Materials/Settlement Agreements

As described in 2.3 **Decisions of National Competition Authorities**, agreements to settle most forms of enforcement proceedings by the US federal antitrust authorities are typically made public in the course of a federal court’s review of the proposed resolution. One exception to this general rule is for parties who qualify for leniency pursuant to the Department of Justice, Antitrust Division’s Corporate Leniency Policy. The Leniency Programme, a centrepiece of the Division’s criminal cartel enforcement efforts for more than 25 years, accords immunity from criminal antitrust prosecution to corporations that report their role in a per se antitrust violation at an early stage and meet certain other conditions, including co-operating fully with the Division’s prosecutions of co-conspirators and making restitution to injured parties.

To encourage applicants to come forward, Division policy is to treat as confidential the identity of leniency applicants and the materials they provide. The Division acknowledges it will disclose the identity of a leniency applicant if

ordered to do so by a court. But such an order would be unusual. While at least one appeals court has held that the Division must disclose leniency agreements pursuant to requests under the US Freedom of Information Act (FOIA), that court also recognised that details within those materials identifying a leniency recipient could be exempt from FOIA disclosure (*Stolt-Nielsen Transportation Group Ltd v United States*, 534 F.3d 728 [DC Cir 2008]).

That said, a conditional leniency recipient will likely identify itself to plaintiffs in follow-on civil litigation, in an effort to fulfil its restitution obligation under the Leniency Policy by co-operating with plaintiffs and earning the resulting de-trebling of damages available under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA).

In addition, public companies may face other legal obligations, such as under the securities laws, to disclose their status as the recipient of leniency.

On 4 April 2022, the Division updated its Leniency Policy. This update imposed a number of more stringent obligations on leniency applicants while giving the Department of Justice more discretion as to when to award leniency. These additional obligations include:

- “prompt” reporting upon internal discovery of the activity;
- best efforts to remediate (in addition to providing restitution); and
- best efforts to improve compliance programmes to mitigate future risks.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Litigants in US federal court may rely on, and compel, testimony from witnesses of fact both before and during trial. Prior to trial, the principal tool for gathering the compulsory testimony of a witness is the deposition, in which the requesting litigant compels the witness to attend an in-person interview to provide sworn testimony in front of a judicial officer. Parties can also request that opposing parties respond to written questions, called interrogatories. In either case, the court may compel the witness to respond under threat of sanction. During trial, judges generally prefer live testimony so that the factfinder can evaluate the witness’s credibility and so that the opposing party can cross-examine the witness. Deposition testimony may be admitted into evidence to contradict or impeach testimony given during trial, or in some cases, if a witness is unavailable to testify in court.

6.2 Expert Evidence

The rules governing federal court litigation, including antitrust claims, permit parties to rely on expert evidence both before and during trial. In the antitrust context, the parties nearly always rely on one or more experts to establish (or challenge) key issues, including:

- whether a purported class of plaintiffs satisfies the requirements for certification;
- the appropriate contours of the relevant product market;
- a party’s market power (or lack thereof); and
- the proper measure of damages.

Expert evidence will generally take the form of a written report prepared and signed by the expert (which must be provided to the opposing party

prior to trial) as well as in-person testimony (Fed R Civ P 26[a][2]).

An expert's testimony is admissible as evidence only if the court determines that:

- the expert's specialised knowledge will assist the fact-finder;
- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the expert has reliably applied these principles and methods to the facts of the case.

This assessment requires the court to scrutinise the expert's particular methods and their degree of acceptance in the relevant field (See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 [1993]; Fed R Evid 702). Before or during trial, parties can challenge the admissibility of opposing expert testimony or dispute the validity of that testimony. Parties may depose opposing experts, cross-examine them at trial, and seek to introduce evidence that purports to conflict with an expert's conclusions.

7. Damages

7.1 Assessment of Damages

The Clayton Act does not provide for punitive damages. Instead, plaintiffs who suffer antitrust injury may recover treble damages. For consumer plaintiffs injured by a price-fixing or a market-division cartel, common measures of damages include the amount of the overcharge caused by the conspiracy, measured by identifying the price they would have paid but for the restraint. For competitor plaintiffs injured by a monopolist's exclusionary conduct, a common measure of damages is the plaintiff's resulting lost profits.

As with the other elements of a civil antitrust action, plaintiffs must establish the value of their injury by a preponderance of the evidence standard. The Clayton Act permits damages assessments to be made "in the aggregate" according to "statistical or sampling methods" accepted by the court (15 USC Section 15d). In practice, antitrust plaintiffs nearly always rely on an expert to quantify damages according to an accepted model. Plaintiffs must also prove that the damages were not caused by separate and independent factors (ie, they are required to disaggregate the losses caused by the alleged antitrust violation).

A statutory exception to the treble damages rule exists for defendants who successfully receive leniency from prosecution under the Division's Leniency Policy. Under ACPERA, leniency recipients who provide "satisfactory co-operation" to plaintiffs in follow-on civil litigation may have their damages limited to actual damages, rather than treble damages. Courts have not assessed with any precision what constitutes a defendant's satisfactory co-operation, but defendants can expect that to receive what is known as ACPERA credit they will need to provide evidence to plaintiffs in support of their antitrust claims.

7.2 "Passing-On" Defences

As set forth in 2.5 **Direct and Indirect Purchasers**, indirect purchasers lack "standing" to pursue damages claims under the federal antitrust laws. The corollary to this rule is the further limitation that defendants in federal antitrust litigation cannot escape liability by establishing that direct purchasers passed on to indirect purchasers some or all of an anti-competitive overcharge (*Hanover Shoe v United Shoe Mach*, 392 US 481 [1968]). But several state antitrust laws authorising antitrust claims by indirect purchasers

provide that courts should take steps to avoid duplicative recovery, including by apportioning damages between direct and indirect purchasers.

7.3 Interest

Section 4 of the Clayton Act enables plaintiffs to recover interest on damages awards. Pre-judgment interest awards are discretionary: a federal district court may award interest on actual damages – but not for the full treble damages available under the antitrust laws – for any period from the date of service of the plaintiff’s pleading to the date of judgment, when just in the circumstances. That standard considers whether defendants acted intentionally to delay resolution of the proceedings (15 USC Section 15[a]).

By contrast, post-judgment interest is mandatory: the court must award interest on a damages award until defendant(s) transfer the funds to the plaintiff(s). The interest – at a rate equal to the weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of the judgment – is calculated from the date of the entry of judgment and is compounded annually (28 USC Section 1961). Each state’s antitrust laws provide for post-judgment interest; the law on pre-judgment interest varies from state to state.

8. Liability and Contribution

8.1 Joint and Several Liability

US antitrust law follows the common law tort principle of joint and several liability, which means each defendant can be responsible for paying the entire damage award for the conspiracy as a whole (not just for damages to purchasers with whom a given defendant transacted).

But, as discussed in **5.3 Leniency Materials/Settlement Agreements** and **7.1 Assessment of Damages**, successful recipients of leniency from Division antitrust prosecution that provide “satisfactory co-operation” to follow-on litigants may have their civil damages claim limited to actual damages under ACPERA. Such a defendant will not be liable to plaintiffs on a joint-and-several basis for the harm from the entire conspiracy but will, instead, be held liable only for its own harm to the plaintiffs.

8.2 Contribution

The US Supreme Court has ruled that a defendant found jointly and severally liable under the federal antitrust laws for treble damages, costs, and attorneys’ fees has no right to seek contribution from co-conspirators for their share of the damages award (*Texas Industries Inc v Radcliffe Materials, Inc*, 451 US 630 [1981]). Rather, a single defendant may have to pay the entire damages award for three times the harm caused by the entire conspiracy. A court may subtract from the damages calculation any settlement other defendants have paid to resolve the litigation, but those settlement amounts are likely to reflect a discount to the settling defendants.

This dynamic can create pressure on defendants to settle before trial by exposing non-settling defendants to the risk of bearing a disproportionate share of liability for their role in a multi-party conspiracy. Courts do not permit co-defendants to agree to indemnify each other for liability but have generally upheld agreements between them to pay a proportionate share of any judgment based on, eg, each defendant’s market share.

9. Other Remedies

9.1 Injunctions

The Clayton Act permits private plaintiffs to sue for injunctive relief against any “threatened loss or damage by a violation of the antitrust laws.” (15 USC Section 26.) To obtain injunctive relief, a plaintiff must show that:

- it has suffered irreparable injury that cannot be compensated for by other remedies, such as monetary damages;
- the balance of hardships between the plaintiff and defendant favour an injunction; and
- the injunction is in the public interest (*eBay Inc v MercExchange, LLC*, 547 US 388 [2006]).

The Clayton Act also allows plaintiffs to seek interim relief – in the form of a preliminary injunction that can be obtained prior to trial – if the plaintiff is able to show a “likelihood of success on the merits” of its claim (*North American Soccer League, LLC v US Soccer Fed’n, Inc*, 883 F.3d 32 [2d Cir 2018]). A preliminary injunction requires a hearing and notice to the opposing party (although in exceptional circumstances parties can seek a temporary restraining order without such notice or a hearing) (*Fed R Civ P* 65). The party seeking a preliminary injunction must post a security bond to compensate the opposing party if the injunction is found to have been unwarranted. Notably, the bar on damages claims by indirect purchasers under the federal antitrust laws does not extend to claims for injunctive relief.

9.2 Alternative Dispute Resolution

Alternative dispute resolution is available in antitrust litigation on similar bases as it is in other federal court litigation. Federal judicial policy favours arbitration, as a matter of contract

between parties. While courts cannot compel parties to arbitrate their disputes in the absence of an agreement between them to do so, courts will rigorously enforce arbitration agreements according to their terms. In recent years, the US Supreme Court has applied this principle to arbitration agreements in boilerplate consumer contracts, in ways that have important consequences to private antitrust litigants. The Court has held that parties may not be compelled to arbitrate on a class-wide basis, in the absence of an agreement to do so (*Stolt-Nielsen SA v AnimalFeeds Int’l Corp*, 559 US 662 [2010]). A year later, the Court invalidated state laws seeking to bar enforcement of class arbitration waivers in consumer agreements (*AT&T Mobility LLC v Concepcion*, 563 US 333 [2011]).

These rulings could make it more challenging for consumers to pursue class-wide recovery under the antitrust laws. Indeed, most recently, the Supreme Court affirmed – in the antitrust context – that contractual waiver of class arbitration is enforceable even if the cost of individually arbitrating exceeds a claimant’s potential for recovery (*American Express Co v Italian Colors Restaurant*, 570 US 228 [2013]).

10. Funding and Costs

10.1 Litigation Funding

Litigation funding is a developing industry in the US and is perhaps less evolved here than in other jurisdictions. Litigation funding may be available to support civil litigation under the antitrust laws. But funding arrangements may be at risk of challenge under the laws of at least some states, barring “champerty” (the practice of acquiring an interest in pursuing a third party’s cause of action, in exchange for a portion of the proceeds if litigation succeeds) (eg, *Boling v*

Prospect Funding Holdings LLC, 771 Fed Appx 562 [6th Cir 2019]).

Regardless, counsel for plaintiffs pursuing anti-trust litigation under federal or state laws on a class-wide basis will likely act for plaintiffs on a contingency basis, receiving compensation only from the proceeds of any recovery to the class.

10.2 Costs

Section 4 of the Clayton Act provides that plaintiffs “shall recover” the costs associated with successfully litigating their claim, including “a reasonable attorney’s fee” (15 USC Section 15[a]). In the normal course, plaintiffs’ lawyers acting for a purported class work on contingency and seek to recover a percentage of any court-approved class settlement before trial. By contrast, defendants have no general statutory right to recover their costs of successfully defending a federal antitrust litigation. The lone means of recovering defence costs is for the court to impose monetary sanctions on plaintiffs under the federal rules, for example, based on a finding that plaintiffs (or their attorneys) have asserted frivolous claims or arguments (Fed R Civ P 11).

Sanctions – particularly significant monetary penalties – are exceedingly rare, and an unreliable source of recovery of defence costs. The unavailability of defence costs to serve as a headwind on speculative antitrust claims is one reason the courts take seriously their gatekeeper role in assessing defendants’ threshold challenges to the sufficiency of an antitrust complaint.

In the normal course, courts will not order a litigant to post security for its opponent’s litigation costs. The exception is that parties seeking preliminary injunctive relief must provide a security in an amount sufficient to pay the costs

and damages sustained if the party is found to have been wrongfully enjoined or restrained (Fed R Civ P 65).

11. Appeals

11.1 Basis of Appeal

A litigant adversely affected by a decision of a federal district court may seek to appeal that decision to an intermediate federal court of appeals. Parties may generally appeal a lower court’s conclusions of law according to a de novo standard, under which the appeals court will analyse the legal question without deferring to the district court’s analysis. While an appellant may also challenge a lower court’s findings of fact, the appeals court will apply a far more deferential standard of review, generally leaving fact conclusions undisturbed unless clearly erroneous.

Whether, and when, a party may challenge a district court decision can take on great significance, particularly in complex litigation such as an antitrust class action. A party generally has the right to appeal “final decisions of the district courts” (28 USC Section 1291). A decision is “final” if it “ends the litigation on the merits” (Catlin v United States, 324 US 229 [1945]). The policy of the “final judgment rule” is intended to promote efficiency and limit delay, by seeking to ensure that, where possible, all challenges to lower court decisions are resolved in a single appeal.

By contrast, only in limited circumstances will courts permit appeals of interlocutory orders that do not finally resolve the dispute. In general, interlocutory appeals are reserved for “controlling questions of law” about which there is “substantial ground for difference of opinion” and

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resolution of which would “materially advance the ultimate termination of the litigation” (28 USC Section 1292[b]). The federal rules authorise – but do not require – interlocutory appeal of a decision on class certification (Fed R Civ P 23[f]). Parties who lose on appeal may petition the US Supreme Court for final review of the appellate decision. Supreme Court review is discretionary, and as a practical matter, is rarely granted.

Trends and Developments

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Clifford Chance US is a global antitrust powerhouse that serves clients by handling the most complex matters in all the key hubs of Europe, Asia-Pacific, and the Americas. The practice consists of over 185 attorneys who provide seamless and integrated advice to domestic and multinational clients. The US practice is led by seasoned professionals whose extensive experience in private practice, in-house, and high-ranking government positions enables them to tackle cutting-edge issues. They advise clients across the full range of contentious and non-contentious matters, covering mergers, joint

ventures, civil and criminal investigations, class action litigation, compliance, and broader antitrust and regulatory matters. The firm handles complex, multinational mergers and investigations that require an understanding of issues in multiple jurisdictions, and provides clients with a structured, co-ordinated, multi-jurisdictional response. It also represents clients in civil and criminal litigation and international arbitration, including in high-profile Second Request investigations and cartel and competition law violations.

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C L I F F O R D
C H A N C E

Current Antitrust Litigation Developments and Cases of Interest in the USA

Aggressive merger challenges

Both the Department of Justice, Antitrust Division (DOJ) and Federal Trade Commission (FTC) have been aggressive in challenging proposed mergers that they believe run afoul of the anti-trust laws. While they have enjoyed some success, they have largely been on the wrong side of federal district court decisions.

Microsoft–Activision

In January 2022, Microsoft announced it would be acquiring Activision Blizzard, a game development company and creator of the Call of Duty series, for USD68.7 billion. The transaction would result in Microsoft becoming the third largest gaming company in the world behind Tencent and Sony. The FTC sought to enjoin the acquisition, alleging that Microsoft could harm competition in the gaming console market by making Call of Duty exclusive to Microsoft platforms. The FTC also alleged that the transaction would substantially lessen competition in the video game library subscription and cloud gaming markets. In July 2023, a federal district court in California denied the FTC’s request for a preliminary injunction, relying in part on Microsoft’s commitment to make Call of Duty available through ten-year agreements with rival gaming platforms, only some of which previously had access to the franchise. The deal has not yet closed, as the parties continue to negotiate with the UK’s Competition and Markets Authority (CMA) on remedies. See below (**Private lawsuits against mergers**) for discussion of a challenge to the merger raised by private plaintiffs.

Meta–Within

In October 2021, Meta agreed to purchase Within Unlimited, a developer of a virtual reality (VR) fitness app. The FTC sought a preliminary

injunction in federal court against the transaction, arguing that Meta’s current and potential apps exerted a competitive constraint on the VR fitness app market. In January 2023, a federal court judge in California ruled in favour of the defendants, rejecting the agency’s request for a preliminary injunction while holding that the FTC had failed to show that it was “reasonably probable” that Meta would have entered the market. Following the ruling, the parties closed their transaction, and the FTC dismissed its administrative case. See below (**Looking ahead**) for further discussion of this ruling’s impact on future FTC challenges.

UnitedHealth–Change

In February 2022, the DOJ sued in the District Court for the District of Columbia to block the merger of UnitedHealth Group (“United”) with Change Healthcare. United is America’s largest health insurer, while Change is a leading technology provider. The DOJ argued that the transaction was anti-competitive because, among other reasons, it would allow United to access and misuse competitively sensitive information from other health insurance companies. United argued that it had a strong incentive to safeguard and not misuse data from rival insurers. Following a trial in August 2022, the court denied the government’s request to enjoin the transaction, finding that the DOJ did not prove that United was likely to misuse rival payers’ data.

Penguin Random House–Simon & Schuster

In November 2020, Penguin Random House announced it proposed to acquire one of its largest rivals, Simon & Schuster, for USD2.2 billion. The DOJ filed suit to block the merger, alleging harm to the market for the acquisition of publishing rights to anticipated top-selling books. Following a thirteen-day trial in August 2022, a federal judge blocked the deal, finding

that the DOJ had shown that the merger would likely harm authors under a monopsony-based theory of harm to competition.

Intercontinental Exchange–Black Knight

In May 2022, Intercontinental Exchange (ICE) announced a deal to acquire Black Knight for USD13.1 billion. The FTC filed suit to block the deal in March 2023, alleging that the deal would harm competition in the home mortgage loan origination systems market.

In the hopes of quelling antitrust concerns, ICE and Black Knight agreed to sell two business units of Black Knight in March and July 2023. As of August 2023, the FTC is analysing the implications of the proposed divestitures and whether to enter a consent decree with the parties.

Amgen–Horizon Therapeutics

In May 2023, the FTC sued to block Amgen, a leading biopharmaceutical company, from acquiring Horizon Therapeutics. Horizon manufactures Tepezza, the only FDA-approved treatment for thyroid eye disease, and Krystexxa, the only FDA-approved treatment for chronic refractory gout. The FTC has argued that the acquisition, if consummated, would allow Amgen to bundle its own “blockbuster” portfolio drugs with Tepezza and Krystexxa, thus entrenching Horizon’s monopoly while hindering future entrants. While the defendants have offered to enter an agreement with the FTC not to bundle their products, the Commission has rejected this offer, arguing that behavioural remedies are disfavoured due to the high costs of monitoring and enforcement. A hearing on the FTC’s motion for a preliminary injunction hearing is scheduled for September 2023.

Other notable merger litigation

In March 2021, US Sugar Corporation announced it was acquiring Imperial Sugar Company. The DOJ sought to block the acquisition, alleging that the transaction would leave only two significant sugar producers in the area that stretches from Mississippi to Delaware. A federal court in Delaware ruled against the DOJ in September 2022, holding that the government had improperly excluded sugar distributors from its proposed product market. A federal appellate court affirmed the lower court in July 2023.

In September 2021, the DOJ and seven state attorneys general challenged a joint venture between American Airlines and JetBlue, the Northeast Alliance. A preliminary injunction was entered in May 2023 by a federal court in Massachusetts, finding the Alliance diminished competition in the domestic market for air travel. In July 2023, the Northeast Alliance was terminated.

In September 2022, ASSA ABLOY announced it would acquire Spectrum Brands’ Hardware and Home Improvement Division. The DOJ sued to block the acquisition, arguing that the transaction would harm competition and that the parties’ proposed divestiture package was insufficient to remedy those harms. Soon after trial began in April 2023, the parties reached a settlement, which required ASSA ABLOY to divest multiple assets related to its premium mechanical door hardware and smart lock businesses.

Private lawsuits against mergers

Private plaintiffs, rather than government enforcers, have brought several recent lawsuits seeking to block or unwind mergers. These types of private lawsuits are rarely successful. But in two ongoing cases, private challenges to mergers have overcome motions to dismiss by the merging parties.

The first suit is a challenge to the consummated merger of Charles Schwab and TD Ameritrade, which previously operated two competing retail brokerage services. The plaintiffs are seeking to represent a class of retail investors and obtain both damages and equitable relief, including a complete divestiture of TD Ameritrade from the merged entity. Although the merger was announced in 2019 and completed in 2020, plaintiffs did not bring suit until June 2022. The defendants originally moved to dismiss the complaint on several grounds, including that the suit was time-barred under the doctrine of laches and that divestiture would be inappropriate. The district court denied the motion to dismiss but cautioned the plaintiffs that “divestiture is an extraordinary remedy” that “courts have been reluctant to order... at the behest of a private plaintiff after consummation of the allegedly anti-competitive merger.” As of August 2023, the litigation remains ongoing.

The second suit is a challenge to Microsoft’s acquisition of Activision Blizzard. Plaintiffs brought a complaint in federal court in December 2022, alleging harm to competition in at least five different markets. The district court dismissed the original complaint and denied the plaintiffs’ motion for a preliminary injunction, holding that the plaintiffs had not alleged a reasonable probability of anti-competitive effects arising from the acquisition in any relevant market. But the judge later allowed part of the plaintiffs’ amended complaint to proceed, finding that the plaintiffs had sufficiently alleged harm to competition from the merger’s vertical components (but not from its horizontal components). As of August 2023, the litigation remains ongoing.

Additional ongoing merger challenges by private plaintiffs include a challenge to Kroger’s proposed merger with Albertsons and JetBlue’s

proposed merger with Spirit Airlines. The FTC is investigating the former transaction, while the DOJ has filed suit to block the latter. As of August 2023, the private challenges remain ongoing.

Big tech conduct cases

Cases challenging Big Tech conduct continue to march forward, with several new ones being added to the mix in the past year.

Google

In October 2020, the DOJ and 11 states sued Google for using restrictive contracts with Android phone manufacturers and Apple to monopolise the markets for general search services and search advertising. In December 2020, 38 states expanded on these theories, suing Google for unlawfully thwarting competitive threats from other search portals, such as voice-powered search and specialised search providers. Trial commenced on 12 September 2023.

Enforcers have also sued Google for anti-competitive practices in ad tech markets. In December 2020, ten states sued Google for inflating advertising costs and using various anti-competitive practices to suppress competition from rival exchanges. The case has since taken a detour, as the parties fight over proper venue: after first being consolidated with related cases in New York, the litigation was transferred back to Texas in response to the recently enacted State Antitrust Enforcement Venue Act. The case now sits in limbo as the parties contest whether the Act should apply retroactively. Meanwhile, in January 2023, the DOJ brought its own long-awaited case challenging Google’s anti-competitive practices in ad tech markets, joined by 18 states.

A coalition of 36 states (and Washington, DC) has also challenged Google for its Android and Google Play practices, alleging that Google has used contractual and technical restrictions to monopolise Android app distribution and in-app payments. That case and related private claims continue to proceed in California court.

Meta

In December 2020, the FTC and 48 states and territories filed parallel complaints against Meta for monopolising the purported market for personal social networking services by acquiring Instagram and WhatsApp and adopting policies that hindered competitors' access to Facebook's platforms. After a judge initially threw out both cases, the FTC amended its complaint and survived a subsequent motion to dismiss. Trial is expected to commence in 2024. The states did not fare as well, ultimately failing to convince an appellate court to overturn the district court's dismissal of their case.

Apple

In August 2020, Epic Games sued Apple, alleging that Apple's restrictions on third-party app distribution and in-app payments constituted monopolistic behaviour in both markets. In September 2021, the trial court held that Apple's in-app payment anti-steering provisions were anti-competitive under state law but rejected Epic's other claims. The Ninth Circuit affirmed the lower court's decision in April 2023, prompting both parties to seek Supreme Court review.

In the meantime, private plaintiff class actions against Apple are still underway, including the long-running case *In re Apple iPhone Antitrust Litigation*, a matter that began in 2011 and has already had one appeal go all the way to the Supreme Court. As of publication, the trial court is considering whether to certify the class – a

key decision that will have major ramifications on whether the case proceeds, with potential ripple effects on similar class action litigation.

Sports litigation

Several sets of plaintiffs are currently challenging the Supreme Court's antitrust exemption for professional baseball, first established in 1922. In *Cangrejeros de Santurce Baseball Club, LLC v Liga de Beisbol Profesional de Puerto Rico, Inc.*, one of multiple cases in federal court in Puerto Rico, the court held that the antitrust exemption applied not only to Major League Baseball (MLB) but to all of professional baseball, including the defendants' league in Puerto Rico. Meanwhile, in *Nostalgic Partners LLC v The Office of the Commissioner of Baseball*, an appellate court rejected a challenge brought by minor league teams challenging MLB's 2020 decision to shrink its farm league system from 160 to 120 teams. The appellate court affirmed that the baseball exemption remained valid based on Supreme Court precedent and required dismissal of the suit. The Second Circuit did not address the district court's holding that the plaintiffs had otherwise stated a claim under the antitrust laws.

In the world of golf, all eyes are on how the DOJ will handle the PGA Tour and LIV Golf's recently announced combination. In August 2022, several LIV golfers filed suit against the PGA Tour, later joined by LIV Golf, alleging that the PGA deployed anti-competitive practices with the hope of driving LIV Golf out of business. In June 2023, the parties announced they would drop all pending litigation against one another and merge their commercial operations under common ownership. The PGA has indicated that it believes traditional antitrust merger review is not necessary because the deal is not a merger. Nonetheless, the deal seems poised to receive DOJ scrutiny.

Finally, several proceedings involving collegiate athletics are ongoing. Many of these proceedings follow in the wake of the Supreme Court's 2021 decision overturning National Collegiate Athletic Association (NCAA) restrictions on education-related benefits for student-athletes. In April 2023, a group of current and former college athletes sued the NCAA and its five major conferences, alleging they were denied education-related payments unanimously allowed by the Supreme Court. A case has been brought against the Ivy League and its colleges based on the League's policy against athletic scholarships. In a federal court in California, a group of Division I student-athletes are seeking class certification for past name, image, and likeness compensation. The NCAA, in conjunction with the Power 5 athletic conferences, have argued that the individuals comprising the putative class are not sufficiently similar to be certified as a single class. A separate set of plaintiffs in another district court in California have challenged NCAA policies limiting the number and compensation of college athletics coaches. In July, the court denied the NCAA's motion to dismiss. As of August 2023, these cases remain pending.

Labour market litigation

The DOJ has continued to face difficulties in its efforts to address alleged no-poach and wage-fixing agreements through criminal prosecutions.

In March and April 2023, the DOJ received its third and fourth consecutive losses attempting to criminally prosecute labour market antitrust cases before a jury. Both cases involved charges against competing employers who had allegedly agreed to fix wages or allocate employees. In indicting these individuals, the DOJ alleged that these agreements were per se illegal violations of Section 1 of the Sherman Act. In both cases, the DOJ succeeded in overcoming pre-trial chal-

lenges by the defendants to the indictment but failed to secure convictions at trial.

In the former case, the DOJ charged four managers of home healthcare agencies with wage-fixing and allocating a labour market through no-hire agreements. At trial, the defendants argued that they had discussed making an agreement to set wages but never actually reached an agreement. After each side rested, the jury found for the defendants.

In the latter case, the DOJ charged a group of aerospace executives with an illegal agreement to restrict the hiring and recruiting of engineers and other skilled-labour employees. Immediately following the close of the government's case-in-chief, the defendants moved jointly for acquittal. The court granted the defendants' motion, holding that even assuming the defendants had made an agreement to restrict hiring that "constrain[ed]" job applicants "to some degree", the agreement did not "allocate the market for engineers or other skilled labourers from the supplier companies... to any meaningful extent", and thus was "not a market allocation agreement as a matter of law".

In a separate set of labour market prosecutions, the DOJ reached a set of non-trial dispositions with defendants. The DOJ had charged a health-care staffing company and one of its employees with scheming to suppress the wages of school nurses. The company reached a plea agreement with the DOJ and was sentenced in October 2022 to a fine of USD62,000 and restitution of USD72,000. The employee entered into a pre-trial diversion agreement with the DOJ requiring him to perform community service in lieu of prosecution.

As of August 2023, the DOJ has one remaining labour-market prosecution, in which the DOJ has alleged that a healthcare staffing executive has conspired with others to fix nurses' wages. Trial is scheduled to take place in 2024.

Looking ahead

An even more aggressive FTC: targeting reduction of potential competition

Even though the FTC lost its bid for a preliminary injunction against Meta's acquisition of Within and ultimately withdrew its challenge (see discussion above), FTC officials have described the judge's decision as a victory for the FTC. The FTC's rationale for this characterisation is that the judge's opinion accepted the FTC's theory that reducing or eliminating actual or perceived potential competition is a valid theory of competitive harm under US antitrust laws. The FTC has long held this position (and included it in the 2010 Horizontal Merger Guidelines) but has had difficulty establishing precedent for it in court. Commission officials have said that the decision paves the way for future challenges of deals between companies that are not current competitors.

Antitrust enforcement focus: environmental, social, and governance (ESG)

US antitrust enforcers have also signaled that they will scrutinise – and, if appropriate, bring litigation against – anti-competitive conduct even where it furthers ESG initiatives. In recent hearings, US Senators expressed concern that collective action relating to ESG initiatives may constitute co-ordinated conduct that reduces competition. In response, leaders of both the FTC and the DOJ made clear that ESG commitments would not save conduct from antitrust scrutiny – whether in the form of co-ordination among competitors or merger activity. FTC Chair Lina Khan doubled down on this position

in a December 2022 article published in the Wall Street Journal. State enforcers from conservative states have issued similar warnings, including a recent letter from 21 states to various asset managers warning that ESG investing initiatives are not immune from antitrust laws and that the states may pursue legal action against them.

Antitrust enforcement focus: artificial intelligence

As generative artificial intelligence (AI) technology has proliferated in recent months, the FTC has warned companies that it is closely scrutinising conduct that may harm competition in this critical emerging field. To provide transparency on areas of concern, the FTC issued guidance in June 2023 identifying key potential anti-competitive conduct that it is monitoring, including using control over key inputs and adjacent markets to establish and maintain monopoly power, implementing anti-competitive bundling and tying strategies, and maintaining an anti-competitive policy of self-preferencing. The FTC likely will continue its focus on technology companies and expand its investigations into generative AI.

A counterbalance: Supreme Court validates process for constitutional challenges to the FTC

In April 2023, the Supreme Court held in *Axon Enterprise v FTC* that defendants can bring constitutional challenges in federal district court to the structure of the FTC without first going through the FTC's administrative appeal process. This decision is important given the FTC's track record in its administrative courts – as the defendants argued before the Court, the Commission's administrative process has resulted in a near perfect success record for the FTC. Historically, defendants have had little recourse against this process in federal courts – they were only allowed to seek appellate review after a final

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Commission decision (which can take years after the Commission first opens an investigation). As of August 2023, the case has been stayed while the parties consider a resolution of the matter.

Many defendants are now including constitutional challenges when answering FTC complaints. For example, Illumina is challenging the FTC's April 2023 decision to unwind the company's acquisition of Grail after finding that the transaction reduces competition for blood-based tests that provide for early screening of multiple types of cancer. As part of its appeal, Illumina plans to argue that the agency's administrative process violates constitutional due-process and equal-protection rights. As of August 2023, the appeal remains pending.

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