ICC COMPENDIUM OF
ANTITRUST DAMAGES ACTIONS

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ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

International Chamber of Commerce
33-43 avenue du Président Wilson
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France

ICC Publication No. KS101E

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Preface

Antitrust laws and antitrust enforcement are essential to safeguard businesses and consumers. They are fundamental to avoid abusive pricing and other anti-competitive business conducts, which are detrimental to trade and investment at national, regional, and global level.

The role of private competition law enforcement in ensuring fair and undistorted market conditions (which used to be limited to the United States for decades) has been pushed to the fore following the adoption by the European Union of Directive 2014/104. The European Directive removes practical obstacles to compensation for all victims of anti-competitive conduct and refines the interplay between private damages actions and public enforcement of the EU competition rules within the region. The transposition of the Directive by the EU Member States into national laws has spurred countries beyond Europe to adjust their private enforcement regimes either by establishing new rules or reinforcing existing ones, making the global business regulatory framework even more complex.

The consequences for businesses, regardless of their sizes and markets, are enormous. Companies involved in anti-competitive behaviours can face heavy fines and sometimes criminal sanctions from the public enforcement of competition law. But with the increasing importance that private enforcement has gained over the last few years, they may find themselves at greater loss due to private legal actions filed against them by victims seeking compensation for damages.

As the institutional private sector partner to businesses, governments, and international organisations, ICC is proud to present the first edition of its *Compendium of Antitrust Damages Actions* (the "Compendium") elaborated by members of its global and diverse network with a view to bring clarity and guidance in this novel area of law and related challenges.

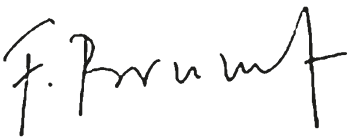
The Compendium purports to help business understand the heightened risks they face of being sued for damages while raising awareness on the trends that will inevitably influence the international antitrust regulatory environment for the long term. These risks have not abated in the context of the COVID-19 pandemic and will continue to hold true as the world grapples to come out of the crisis. The Compendium does not seek to expound private litigation practices across borders. Instead, it aims to profile the legal regime related to antitrust damages actions in a variety of key jurisdictions by providing an overview of the key legal principles that are illustrated by a selection of leading cases across various economic sectors and industries.

With a significant number of court cases, including salient facts and insights on important judgments, the Compendium is a unique tool for all economic actors—antirust experts and non-experts alike—and was designed to address the concerns of both multinational companies and SMEs that may be exposed to, or already involved in, antitrust litigation. It provides details on the method of calculating damages in numerous jurisdictions as well as the amount of damages awarded, to increase companies' understanding and awareness of the issue.

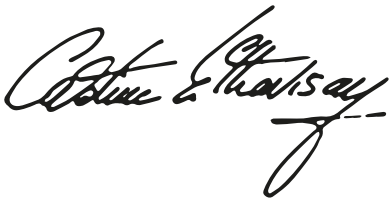
At a time when ICC is mobilising its network and members expertise to accelerate the pandemic recovery, renew the global trading system and drive industry digitalisation, providing business with the most relevant and innovative tools is not only necessary but critical.

We hope that the *ICC Compendium of Antitrust Damages Actions* will help bolster business' ability and confidence to address these new economic challenges.

John W.H. Denton AO
ICC Secretary General



François Brunet
Chair, ICC Task Force on Antitrust Damages Actions



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Acknowledgements

ICC would like to convey its warmest appreciation to a team of dedicated persons whose steadfast commitment and diligence have made the publication of the *ICC Compendium of Antitrust Damages Actions* possible. These persons are François Brunet, Caroline Inthavisay, Pierre Chellet, and Damjeong Cho.

ICC also wishes to thank the authors of the Compendium and to recognise their work and expertise which have been essential to the development of this publication.

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Introduction

Until recently, antitrust law was principally a matter of public enforcement, essentially carried out by competition authorities, in particular, in Europe, Asia, and South America. Claims for damages brought by private parties that have suffered harms following antitrust infringements ("private enforcement"), was available mainly in North America. Although general legal principles of tort laws could have made it possible in most countries across the globe, only a few jurisdictions outside the United States and Canada, like the United Kingdom or the Netherlands, had adopted specific measures to facilitate private enforcement.

In most countries outside North America, private enforcement has long been constrained due to several factors. To begin with, competition law enforcers were struggling to find the right balance between the need to maintain a high level of incentives for leniency programmes and settlement proceedings and the risks entailed by encouraging private antitrust enforcement. First, it was feared that granting full access to all the information held by competition authorities could render less attractive leniency programmes and settlement proceedings, and would thus complicate both antitrust investigations and prosecutions. Second, claimants used to be reluctant to sue cartelists, for a number of reasons: (i) outside North America, commercial judges were generally not awarding generous damages because they did not perceive at that time the importance of free competition and the significant damage to the global welfare that any distortion of competition could cause; (ii) companies feared retaliation from their suppliers; (iii) consumers were often unaware that they had been victim of an anti-competitive price increase, and had difficulty providing supportive evidence of their harm; (iv) finally, the political support to encourage this type of litigation was often lacking.

Over the last ten years, many jurisdictions have adapted their legislative frameworks in order to foster the development of antitrust private claims. Significant changes have occurred worldwide and at a pace that has accelerated dramatically in recent years.

Civil liability rules apply to private enforcement. Claimants have to provide evidence of a competition rules infringement, the harm suffered from such an infringement, the amount of the damages and a causal link between the infringement and the damages. Newly introduced regulations facilitate private antitrust enforcement by making the production of evidence easier, and thus provide harmed parties with incentives to bring private actions.

In the European Union, such a framework was established by Directive 2014/104/EU (the "EU Antitrust Damages Directive"), setting forth (i) common standards for disclosure of evidence, (ii) the legal effect of national competition authority decisions in other EU member states, (iii) limitation periods, (iv) joint liability, (v) passing-on defence, (vi) standing of indirect purchasers, (vii) burden of proof, (viii) quantification of harm, and (ix) consensual dispute resolution. While the legal consequences of Brexit remain unclear, the principles laid down in the EU Antitrust Damages Directive should continue to apply in the United Kingdom.

In parallel to the adoption of the EU Antitrust Damages Directive and to its implementation in the EU Member States, other jurisdictions such as Brazil, Chile, Mexico, South Korea and China have also introduced specific regulations in order to facilitate private antitrust enforcement.

The European legal framework has surely influenced—and will surely continue to influence—the adoption or the evolution of antitrust private enforcement regimes in jurisdictions beyond Europe. In that respect, case law from national courts of the European Union may be of significant value as they all apply the same framework under the supervision of the Court of Justice, which has already released a number of important judgements on these matters. Conversely, judgements awarding antitrust damages outside Europe, will also be of great practical interest for antitrust practitioners in Europe.

Not all jurisdictions have adopted the same rules, and antitrust litigation has become extremely complex. Several issues provide a good illustration of these differences. In particular, punitive or treble damages are not available in all jurisdictions. Rules governing discovery vary from country to country and infringement decisions by competition authorities may or may not have binding effect depending on national law. In some jurisdictions only follow-on actions, which are claims brought after a competition authority has established the infringement, are allowed whereas other jurisdictions also allow stand-alone claims, empowering claimants to challenge anti-competitive behaviours directly before civil and commercial courts. Even within the European Union, some aspects of private enforcement have not been harmonized, such as class actions. The diversity of national procedures therefore entails the necessity for legal practitioners to have an in-depth and "global" understanding of the different legal frameworks, before bringing any case in one or another jurisdiction.

In addition to these procedural and substantive discrepancies, lawyers and companies may also need to take into account the diversity of jurisdictional rules from an international private law standpoint. Indeed, a single anti-competitive behaviour may involve companies from various countries and affect businesses and consumers in different places. As such, national rules on jurisdiction may limit or promote international claims for damages.

Economic players seems to have quickly adjusted their practices to take account of this new legal environment, with a growing number of cases brought before courts in an increasing number of jurisdictions. Surprisingly, a number of local courts have easily followed the trend by granting damages in amounts comparable, to some extent, to those granted in the United States.

Thus, private enforcement has now become an inevitable complement to public antitrust enforcement. Both equally strengthen deterrence and foster compliance with antitrust legislation. Although courts may award significant compensation for damages, private claims may also achieve other remedies. In particular, some jurisdictions allow claimants to ask for cease-and-desist orders or for interim measures.

As a consequence, the risk for businesses and undertakings has considerably increased. Not only the financial risk is higher in civil courts, but firms' strategies and contractual relationships are also put at risks. With this compendium, ICC intends to contribute to a greater awareness by decision-makers of this new legal environment and the correlative higher risks.

The compendium reflects contributions from leading antitrust law specialists from a number of key jurisdictions around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional section highlighting key issues.

In addition to the overview, the compendium provides an unprecedented collection of decisions issued in a wide range of jurisdictions. This database is the essential complement to the overviews and will allow a better understanding of the rules presented in the compendium. Each case summary will provide users with a brief description of the facts of the case and outline the solutions brought by the courts to the issues raised by the case with regard to the topics addressed in the overviews. Rather than performing keyword searches through the common online databases in each jurisdiction, antitrust practitioners and enforcers will have all key decisions at hand. Courts will be able to see what other courts in other jurisdictions have decided on a given issue, which may contribute to a greater consistency and, within the European Union, to enhance integration. This compendium also intends to support competition authorities by giving them a general view on the consequences of their decisions.

By providing decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, ICC hopes to help them navigate through a new, fast-changing legal environment.

Glossary

Appeal: a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

Article 101 TFEU: This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

Article 102 TFEU: This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

Award: a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

Burden of proof: The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

Cartel: Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

Cease-and-desist order: a court's or agency's order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

Claimant: the party who brings a civil suit in a court of law.

Class action: a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identic cases and who have suffered a prejudice from the same tort.

Competition authority: Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

Damages: money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

Defendant: a person sued in a civil proceeding.

Discovery: Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.

Directive 2014/104/EU: European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

Follow-on: A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

Immunity: Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

Infringer: Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

Joint-and-several liability: liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

Leniency: A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

Limitation period: a statutory period after which a lawsuit or prosecution cannot be brought in court.

Passing-on defence: a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff's claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

SME (Small—and Medium-sized Enterprise): categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

Stand-alone action: A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

Standard of proof: In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

Tort: A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.

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For many decades, private enforcement of competition rules was not part of EU law DNA. The Treaty on the Functioning of the European Union ("**TFEU**") primarily entrusted the European Commission (the "**Commission**") with the duty to enforce competition law provisions.[1] As a result, the European system of enforcement has mostly relied on administrative proceedings before dedicated agencies (the Commission and national competition authorities ("**NCA**")). Victims of anti-competitive behaviours would therefore submit complaints to these authorities, expecting them to order appropriate remedies to bring the infringement to an end.

Depending upon the applicable national law, customers, competitors or suppliers could claim damages, ask for a cease-and-desist order, or interim measures. Article 101 (2) TFEU even provided that anti-competitive clauses and agreements should be ruled null and void. However, no unified procedural framework allowed claimants to rely on an effective enforcement of competition law in private litigation. They faced various obstacles from access to evidence to limitation periods. In particular, the relationship between the private claim and the administrative proceedings gave rise to several conflicts. In particular, the Commission and NCAs were concerned that disclosure of their files could undermine the attractiveness of their respective leniency programmes.[2]

In order to fill the gap and to overcome such hurdles, the EU adopted Directive 2014/104/EU[3] (hereinafter the "**Damages Directive**") that sets forth common rules among Member States in order to foster private enforcement.

1. Jurisdiction

Jurisdiction within the EU is governed by the Brussels I recast Regulation.[4] Although it does not specifically address competition law issues, it provides for a common European framework in order to assess jurisdiction in civil and commercial matters. Case law of the Court of Justice of the European Union (hereinafter the "Court of Justice") has enlightened its meaning in competition law related claims.

1 Article 105 TFEU.

2 Adeline Archimbaud, Les programmes de clémence européens et les actions privées de concurrence : Les liaisons dangereuses, September 2020, Concurrences N° 3-2020, Art. N° 95697, www.concurrences.com

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

4 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 OJ L 351, 20.12.2012, p. 1–32.

1.1 Jurisdiction of the Member State where the defendant is domiciled

As a principle, under Article 4 of the Brussels I recast Regulation, courts of the Member State where the defendant is domiciled, shall have jurisdiction to hear the case. In case of plurality of defendants, Article 8 (1) provides that the claim may be brought in the courts of the place where any of the defendant is domiciled (the "anchor defendant"), subject to close connection between the claims. This is particularly relevant in cartel cases, where multiple companies colluded and may then be sued collectively. The Court of Justice has provided guidance for cases where the claimant reaches a settlement with the anchor defendant and withdraws its claim towards him. In such a case, the initially courts seized with the case does not lose jurisdiction, except if it is demonstrated that the settlement was purposely delayed to bring the case before that court.[5]

1.2 Alternative jurisdiction

The Brussels I recast Regulation also provides for alternative *fora* of jurisdiction depending on specific circumstances:

- **When the claim relates to the operations of a branch, agency or other establishment,** the courts of the place where such branch, agency or other establishment is located may have jurisdiction.[6] In competition law related claims, it is necessary to demonstrate that the branch actually participated in some of the actions constituting the infringement.[7]

- **When the claim relates to a contract,** the courts of the place of performance of the obligation may have jurisdiction.[8]

- **The parties may agree to submit their case to the courts of a Member State, which shall have jurisdiction.**[9] This ground may be challenging in competition law claims. Indeed, it is not sure that the parties have been willing to include antitrust infringements in the scope of the clause. Drafting of these provisions is therefore essential. Although the Court of Justice has shown caution when they relate to cartel infringements,[10] it has been more open to these clauses in matters relating to abusive behaviours.[11]

- **When the claim relates to tortious liability,** the courts of the place where the harmful event occurred or may occur may have jurisdiction.[12] In practice, identification of this place may be difficult. In *CDC Hydrogen Peroxide*, the Court of Justice ruled that claimants may choose between:

5 CJEU, Case C-352/13, Judgment of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.

6 Article 7 (5) of the Brussels I recast Regulation.

7 CJEU, Case C-27/17, Judgment of 5 July 2018, AB "*flyLAL-Lithuanian Airlines*", ECLI:EU:C:2018:533.

8 Article 7 (1) of the Brussels I recast Regulation.

9 Article 25 of the Brussels I recast Regulation.

10 CJEU, Case C-352/13, Judgment of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.

11 CJEU, Case C-595/17, Judgment of 24 October 2018, *Apple Sales International*, ECLI:EU:C:2018:854.

12 Article 7 (2) of the Brussels I recast Regulation.

- The place of the causal event leading to the damage. In cartel cases, it is the place where the anti-competitive agreement was concluded.[13] In abuses of dominant position, such place is easily determined as the place where the abusive conduct was implemented.[14]

- The place where the damage materializes for the victim.[15] In *CDC Hydrogene Peroxide*, the Court of Justice ruled that such place could be the statutory seat of the victim. More recently, in *FlyLAL* it refined its assessment and ruled that such place could be the Member State where the affected market is located.[16]

Questions arose regarding indirect purchasers. It was unsure whether their damage could provide basis for jurisdiction. In *Tibor-Trans*, the Court of Justice ruled that indirect customers suffer from additional costs incurred because of artificially high prices. Such damage is direct and may be sufficient to provide jurisdiction.[17]

Finally, the Court of Justice has recently been asked whether rules of the Brussels I recast Regulation would determine territorial jurisdiction within each EU Member State. The case is still pending.[18]

2. Relevant legislation and legal grounds

Litigants may rely on rules stemming from EU law and from national specific provisions.

In addition to this, EU directives do not, in principle, have a direct effect for individuals. It is the responsibility of the Member States to implement a directive in national law. Therefore, private litigants willing to bring a claim for a competition law infringement need to rely on national rules that implement the Damages Directive. The 28 Member States[19] had until 27 December 2016 to implement this text.

The Damages Directive does not completely harmonize the legal framework for antitrust claims. It simply sets forth common basic principles to ensure that EU competition rules are enforced. The Court of Justice has long ruled that private enforcement of the TFEU provisions on competition is necessary to comply with the principles of equivalence and effectiveness of EU law.[20]

However, Member States retain procedural autonomy. Consequently, national law may differ on punctual issues relating to civil procedure. It is for the parties to analyze relevant national legislation in order to find the appropriate legal grounds, which may relate to several issues

13 CJEU, Case C-352/13, Judgment of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.

14 CJEU, Case C-27/17, Judgment of 5 July 2018, AB "*flyLAL-Lithuanian Airlines*", ECLI:EU:C:2018:533.

15 CJEU, Case C-352/13, Judgment of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.

16 CJEU, Case C-27/17, Judgment of 5 July 2018, AB "*flyLAL-Lithuanian Airlines*", ECLI:EU:C:2018:533.

17 CJEU, Case C-451/18, Judgment of 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft*, ECLI:EU:C:2019:635.

18 CJEU, Case C-30/20, RH v Volvo, pending.

19 The United-Kingdom was still a member of the European Union at the time of the transposition.

20 CJEC, Case C-453/99, Judgment of 20 September 2001, *Courage and Crehan*, ECLI:EU:C:2001:465 and CJEC, Cases C-295/04 to C-298/04, Judgment of 13 July 2006, *Manfredi*, ECLI:EU:C:2006:461.

including (i) emergency proceedings, (ii) interim measures, (iii) cease-and-desist orders, and (iv) collective redress mechanisms.

3. What types of anti-competitive conduct are damages actions available for?

The Damages Directive offers procedural tools in order to submit a claim relating to breaches of EU competition rules laid down in the TFEU.

First, it relates to breaches of Article 101 (1) TFEU, which prohibits anti-competitive agreements and concerted practices. Practitioners not familiar with the EU legal system shall pay attention to the fact that this provision covers both horizontal and vertical agreements. Several behaviours are prohibited under this article, including but not limited to:

- Price-fixing;
- Output limitation;
- Market sharing;
- Exchanges of information between competitors;
- Resale price maintenance;
- Prohibition of passive sales in a selective distribution system;
- Prohibition of online sales in a selective distribution system;

Second, the Damages Directive covers infringements of Article 102 TFEU, which prohibits unilateral behaviours that amount to an abuse of a dominant position. Enforcement of this provision is subject to the prior demonstration that the undertaking in question holds a dominant position. Such circumstances are met when a company holds a significant market power that allows it to act independently from competitors on the market. Dominant position is presumed when the company holds at least a 50% market share.[21] Behaviours which may be qualified as an abuse include *inter alia*:

- Refusal to supply;
- Discrimination;
- Excessive pricing;
- Predatory pricing;
- Tying and bundling;
- Self-preferencing;

The Damages Directive also addresses breaches of corresponding provisions of national law.

21 CJCE, Case C-62/86, Judgment 3 July 1991, *Akzo v Commission*, ECLI:EU:C:1991:286.

Finally, it is worth noting that the Damages Directive does not cover harm that may result from the breach of the EU Merger Control Regulation.[22] Likewise, the Damages Directive does not address failure to comply with State aid provisions of EU law.[23]

4. What forms of relief may a private claimant seek?

EU law essentially ensures two kinds of relief for private claimants.

First, under Article 101 (2) TFEU, anti-competitive agreements shall be deemed null and void. Private parties may therefore directly or indirectly invoke that provision before national courts.

Second, the Damages Directive provides for various procedural and substantive requirements in order to ensure full compensation of the victims of anti-competitive behaviours.

Yet, other forms of remedies may be available subject to national law.

5. Passing-on defence

EU law aims at ensuring full compensation for victims. However, it does not include overcompensation.[24] This means that punitive or treble damages are not available under the Damages Directive. Conversely, it means that national courts shall consider the fact that a victim of anti-competitive overcharge may have passed it on to its own customers. Compensation is limited to the actual loss (including any possible loss of profit).

The Damages Directive provides for a coherent procedural framework in order to assess passing-on, whether it is invoked as a defence (5.1) or as supporting a claim from indirect purchasers (5.2)

5.1 Passing-on defence

Article 13 of the Damages Directive provides that the defendant shall bear the burden to prove that the claimant passed on the overcharge to its own customers. However, the text of the Damages Directive remains silent as to the standard which needs to be met in order to shift the burden of proof.

- Disclosure of evidence

The defendant may request the national court to order the claimant or any third party to disclose relevant information or document to support the passing-on defence.

Article 5 of the Damages Directive, which deals with disclosure of evidence to the claimant, requires a reasoned justification for disclosure to be ordered. Conversely, the Commission

22 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

23 Member States may incur liability for infringement of State aid rules under the *Francovitch* case law (CJEC, Case C-9/90, Judgment of 19 November 1991, *Francovich and Bonifaci v Italy*, ECLI:EU:C:1991:428).

24 Recital 13, Damages Directive.

Guidelines on the assessment of passing-on[25] explain that the defendant requesting disclosure under Article 13 shall make a "*plausible assertion that the overcharge harm has been passed on by the direct purchaser onto the indirect purchaser*".[26] While assessing this assertion, national courts shall pay attention to the facts which are already reasonably available to the defendant.

- Assessment of economic evidence

The Commission Guidelines present relevant quantitative and qualitative evidence that shall be taken into account.

The Commission insists on the fact that econometric analysis is the most accurate way to demonstrate the price effect of passing-on. The Guidelines present various regression methods in order to perform this assessment: (i) comparison between prices across time referred to as "before-during-after approach",[27] (ii) comparison with another geographic market or with a closely related product market referred to as "cross-sectional approach",[28] (iii) comparison across time and across markets referred to as "difference-in-differences approach".[29]

Nevertheless, a fully-fledged econometric study may not always appear to be proportionate in view of the amount of damages claimed. In such cases, the Commission recommends using alternative methods. In particular, it suggests to analyse how previous changes in a company's costs have affected its prices before or after the infringement ("the passing-on rate approach").[30] An economic expert may as well perform a simulation of the effect of the overcharge on the claimant's profit during the infringement ("the simulation approach").[31]

Price effects of the anti-competitive conduct may not be sufficient to assess passing-on. Therefore, the Commission recommends using comparison methods[32] as well as elasticity analysis[33] to consider volume effects.

In any case, the Commission made clear that all cases do not require complex economic assessments. In light of the principle of proportionality, national courts may validly rely on qualitative evidence (internal documents, information relating to the firms or industry at stake) in order to make their assessment of passing-on.[34]

25 Communication from the Commission—Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019, p. 4–43.

26 Ibid. para. 41.

27 Ibid. para. 91-92.

28 Ibid. para. 93-94.

29 Ibid. para. 95-99.

30 Ibid. para. 120-127.

31 Ibid. para. 132-133.

32 Ibid. para. 139-141.

33 Ibid. para. 146.

34 Ibid. para. 155-156.

5.2 Claims from indirect customers

Article 14 of the Damages Directive provides that claimants shall prove the existence and the scope of passing-on when their claim arises from their status of indirect customer of the infringing parties.

The standard of proof is presumed to be met when:

- 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.

However, the presumption may be reversed if the defendant proves that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

In any case, when several claims arise at different levels of the value chain, national courts shall be cautious to equally avoid overcompensation and undercompensation. Therefore, they should take into account other claims related to the same infringement, previous judgments relating to a given infringement, as well as relevant available information.[35]

6. Pre-trial discovery and disclosure, treatment of confidential information

The main achievement of the Damages Directive is to create a common framework for disclosure of evidence in competition law damages claims. In that respect, the Damages Directive distinguishes main principles (6.1) from specific rules that apply to evidence included in the file of a competition authority (6.2)

6.1 Main principles that apply to disclosure of evidence

The Damages Directive sets a standard for a request for disclosure to be granted. The requesting party shall present "*a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*".[36]

While dealing with requests for disclosure, national courts shall apply the principle of proportionality. In particular, they need to take into account (i) available facts and evidence, (ii) the scope and cost of disclosure, and (iii) the confidential nature of information.

The Commission has also adopted a Communication on the protection of confidential information to provide assistance to national courts.[37] The Commission recommends national courts to order disclosure of a non-confidential version of the requested documents. Other methods may include the use of confidentiality rings, or the appointment

35 Article 15 of the Damages Directive.

36 Article 5 (1) of the Damages Directive.

37 Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law 2020/C 242/01, C/2020/4829, OJ C 242, 22.7.2020, p. 1–17.

of experts. During the course of proceedings, national courts may organize *in camera* hearings and ensure publication of a non-confidential version of their judgments. They may also subsequently limit access to court records.

Finally, the Damages Directive clearly states that these rules may not undermine legal professional privilege.

As Member States remain free to adopt wider rules relating to disclosure of evidence, chapters of the compendium relating to national legal frameworks may provide additional relevant information for practitioners.

6.2 Specific rules to disclose evidence included in the file of a competition authority

The Damages Directive creates an ad hoc disclosure regime for evidence included in the file of a competition authority. The purpose of this regime is to ensure consistency between the leniency and settlement programs of competition authorities and the right to full compensation for victims of anti-competitive behaviours.

When dealing with such requests, national courts shall take into account (i) the degree of detail of the request, (ii) the purpose of the request, in particular if it relates to a claim for damages, and (iii) the need to protect effective public enforcement of competition law.

Evidence included in the file of a competition authority enjoy various levels of protection pursuant to Articles 6 and 7 of the Damages Directive:

- **Absolute protection** is granted to leniency statements and settlements submissions. Those documents can never be disclosed in the context of private enforcement and should be regarded as inadmissible by national courts.
- **Temporary protection** is granted to (i) information that was prepared for the administrative proceedings of a competition authority, (ii) information that the competition authority has drawn up and circulated to the parties during the administrative proceedings, and (iii) settlement submissions that have been withdrawn. Those documents cannot be disclosed and must be regarded as inadmissible in private litigation until the administrative proceedings of the competition authority have been closed.
- **Limited protection** is granted to all other information in the file of the competition authority. National courts shall simply ensure that no other party or third party is reasonably able to provide that evidence.

Prior to the entry into force of the Damages Directive, the Court of Justice had tried to strike a balance between the right to full compensation and the attractiveness of leniency and settlement programs. It provided some elements of guidance to national courts in order to assess requests for disclosure. In particular, the Court of Justice ruled that "*it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (…) and to weigh the*

respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency".[38]

The Court of Justice had even rejected the national law provisions which prevented any access to leniency submissions and did not leave any possibility for national courts to weigh up the interests involved. The Court of Justice required that "*refusal [to disclose leniency documents] to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused*".[39]

The relation between these cases and the Damages Directive remains to be tested. In particular, claimants could try to rely on those judgments in order to trump the absolute protection granted to leniency submissions under the Damages Directive.[40]

7. Limitation periods

The limitation periods to lodge a claim is at least five years within the EU.

This period starts to run when (i) the competition law infringement has ceased and, (ii) the claimant knows of :

- the behaviour and the fact that it constitutes an infringement of competition law;
- the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

Finally, limitation period is subject to suspension or interruption when the Commission or an NCA investigates the infringement that supports the claim. The suspension ends at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

The Court of Justice has recently recalled the importance for Member States to draft their limitation periods paying due regard to the principle of effectiveness of EU law. In *Cogeco*, although the Damages Directive was not applicable, the Court of Justice ruled that short limitation periods could not start running when the victim was not aware of the identity of the infringer. It also required limitation periods to be suspended or interrupted from the moment the NCA starts investigating the infringement and until a final decision is issued.[41]

8. Appeal

The Damages Directive does not address the issue of appeal of the final judgment, which is left to national civil procedure law. Likewise, the Damages Directive does not affect the possibility to appeal disclosure orders under national law.[42]

38 CJEU, Case C-360/09, Judgment of 14 June 2011, *Pfleiderer AG*, ECLI:EU:C:2011:389, para. 30.

39 CJEU, Case C-536/11, Judgment of 6 June 2013, *Donau Chemie AG*, ECLI:EU:C:2013:366, para. 47.

40 Luis Ortiz Blanco, *EU Competition Procedure*, 3rd edition, Oxford University Press, Oxford, 2013, para. 6.49.

41 CJEU, Case C-637/17, Judgment of 28 March 2019, *Cogeco Communications Inc.*, ECLI:EU:C:2019:263.

42 Recital no. 19 of the Damages Directive.

9. Class actions and collective representation

The Damages Directive has not created a common collective redress mechanism. The proposed "Collective action" Directive being discussed by the European Parliament and the Council of the EU does not cover competition law claims although this may still change. However, the Commission has issued a recommendation in 2013 on collective redress mechanisms which covers competition related matters.[43] This text is nevertheless not binding on Member States.

However, several collective mechanisms already exist under EU law. In particular, victims may assign their claim to a special purpose vehicle, which gathers various claims in order to seek compensation. Although the validity of this operation is subject to national law, Article 2 (4) of the Damages Directive acknowledges that an action for damages may be brought by a person "*that succeeded in the right of the alleged injured party, including the person that acquired the claim*". In that respect, the Court of Justice ruled that claim assignments shall not have any consequence regarding the jurisdiction of the national court.[44]

Finally, the lack of class action mechanism at the EU level for private litigation does not preclude Member States from adopting specific national procedures. In that respect, chapters of the compendium covering national law may be helpful for companies and their counsels.

10. Key issues

10.1 Probative value of the Commission and NCA decisions

EU law equally allows claimants to bring follow-on and stand-alone actions.

Although stand-alone claims do not call for many comments, follow-on actions require an assessment of the administrative proceedings. The probative value of the final decision depends on the authority which made it:

- Final decisions of the Commission finding an infringement are binding on national courts;[45]
- Final decisions of a Member State's NCA (or review courts) finding an infringement are binding on national courts of this Member State;[46]
- Final decisions of another Member State's NCA (or review courts) finding an infringement must be regarded as *prima facie* evidence of this infringement.[47]

43 Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

44 CJEU, Case C-352/13, Judgment of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.

45 Article 16 (1), Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04.01.2003, p. 1—25.

46 Article 9 (1) of the Damages Directive.

47 Article 9 (2) of the Damages Directive.

A debate arose regarding the probative value of commitment decisions of competition authorities. These decisions express concerns of the Commission or the NCAs regarding legality of some behaviours. However, they do not reach a final conclusion on a possible breach of Article 101 or 102 TFEU. Instead, they simply make commitments submitted by companies binding. These commitments are deemed sufficient to address the initial concerns of the competition authority. In that respect, the Court of Justice ruled in *Gasorba* that commitment decisions could be used in private proceedings before national courts as *prima facie* evidence of an infringement.[48]

10.2 Private enforcement and the corporate veil

EU competition law is addressed to undertakings, which is an autonomous concept of EU law that goes beyond legal personality. As such, an undertaking is any entity engaged in an economic activity, regardless of its legal status. For the purpose of imputability of competition law infringements, a parent company is liable for the infringements of its subsidiary when it exercises decisive influence on the behaviour of the latter, such influence being presumed when the parent company owns 100% of the capital of the subsidiary.[49]

Private enforcement represents a challenge in that respect.

First, restructuring of business structures is likely to question the possibility to claim damages. Indeed, the legal entity which was found to have breached competition law may no longer exist when claimants bring their actions for damages. In such a case, the Court of Justice indicated that civil liability would lie in the companies which (i) acquired and dissolved the infringing legal entity and (ii) pursued its commercial activities.[50]

Second, it remains unsure to what extent a subsidiary, which was not the addressee of the Commission or NCA decision, may be held liable for an infringement of its parents or sister companies. The Court of Justice was asked this question in relation to damages claims brought against members of the Trucks cartel. The case is still pending.[51]

10.3 Civil liability among cartel members

As a matter of principle, the Damages Directive considers all companies that have taken part in a given infringement shall be held jointly and severally liable for the harm caused.[52]

However, the EU legal framework provides for two exceptions.

First, small- and medium-sized enterprises ("SMEs") may not be subject to joint and several liability. SMEs are defined as undertakings which employ less than 250 persons and which have an annual turnover below EUR 50 million, and/or an annual balance sheet total below EUR 43 million.[53] In the context of damages claims, an SME is liable only to its own direct and indirect purchasers when:

48 CJEU, Case C-547/16, Judgment of 23 November 2017, *Gasorba SL*, ECLI:EU:C:2017:891.

49 CJUE, Case C-516/15 P, Judgment of 27 April 2017, *Akzo Nobel v Commission*, ECLI:EU:C:2017:314.

50 CJEU, Case C-724/17, Judgment of 14 March 2019, *Skanska Industrial Solutions Oy*, ECLI:EU:C:2019:204

51 CJEU, Case C-882/19, *Sumal*, pending.

52 Article 11 (1) of the Damages Directive.

53 Article 2 (1) of the Annex to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, C(2003) 1422, OJ L 124, 20.5.2003, p. 36–41.

- Its market share in the relevant market during the infringement period was below 5%;
- Enforcement of joint and several liability towards it would (i) irretrievably jeopardize its economic viability and (ii) cause its assets to lose all their value;
- Its role in the infringement did not involve coercion nor ring-leading;
- It was not previously found to have breached competition law;[54]

Second, the Damages Directive has adapted the regime of liability to take into account the attractiveness of leniency mechanisms. A company which has been granted total immunity from fines during the administrative procedure enjoys some level of protection during subsequent private litigation.

- It is jointly and severally liable only to its direct and indirect purchasers and providers. However, it can also be liable towards any other injured party when the latter cannot obtain full compensation for its damages from the other infringers.[55]
- Contribution of such company in its relations to other infringers is limited to the harm it caused to its own direct or indirect purchasers or providers.[56]
- When the claim is brought by a party which was not a customer or provider of the infringers, contribution of the immunity recipient in its relations to other infringers shall be limited to its relative responsibility for the harm.[57] This rule is, for example, relevant for claims that are based on the umbrella effect.

10.4 Who can be a claimant?

The Court of Justice has been very open to damages claims, as it regards them as a relevant instrument to ensure the effective enforcement of Articles 101 and 102 TFEU. Hence, it has ruled that any person harmed shall have the right to be compensated.[58]

The Court of Justice has therefore refused to limit availability of damages claims to the sole direct and indirect customers. In Kone, it acknowledged the umbrella effect, which is the damage suffered as a result of the general price increase on the relevant affected market, even when the claimant was a customer of a company that did not take part in the cartel.[59]

More recently, the Court of Justice went further and considered that damages claims are not limited to suppliers and customers of the market affected by the cartel. The Court of Justice held that "*any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation*".[60] The case related to a public body which granted subsidies to buyers of the affected market.

54 Article 11 (2) (3) of the Damages Directive.

55 Article 11 (4) of the Damages Directive.

56 Article 11 (5) of the Damages Directive.

57 Article 11 (6) of the Damages Directive.

58 CJEC, Case C-453/99, Judgment of 20 September 2001, *Courage and Crehan*, ECLI:EU:C:2001:465.

59 CJEU, Case C-557/12, Judgment of 5 June 2014, *Kone AG*, ECLI:EU:C:2014:1317.

60 CJEU, Case C-435/18, Judgment of 12 December 2019, *Otis GmbH*, ECLI:EU:C:2019:1069, para. 30.

10.5 Entry into force of the Damages Directive

The issue of entry into force of the Damages Directive remains heavily debated. Article 22 creates two frameworks depending on the nature of the provision at stake, whether it is substantive or procedural.

Substantive provisions may not apply retroactively. Their entry into force depend in each Member State on the date on which implementation measures were adopted. For instance, in Belgium, substantive provisions of the Damages Directive may only apply to infringements committed after 22 June 2017.

However, procedural provisions may apply to all actions for damages brought after 26 December 2014. The Court of Justice acknowledged that "*Member States enjoyed a measure of discretion in deciding, when transposing that directive, whether the national rules intended to transpose the directive's procedural provisions would apply to actions for damages brought after 26 December 2014 but before the date of transposition of that directive or, at the latest, before the expiry of the period prescribed for its transposition.*"[61] A case-by-case analysis is therefore necessary in each Member State. Other chapters of the compendium dedicated to national law of EU Member States may be helpful in that respect.

Although this distinction may seem theoretically appealing, it may be difficult to implement in practice. Knowing whether a provision of the Damages Directive is of substantive of procedural nature is a complex exercise that may also require analysis of relevant provisions of national law.[62]

Methodology for the selection of cases

The Court of Justice does not directly hear cases of private enforcement. It has developed its case law in that area through preliminary rulings under Article 267 TFEU. This mechanism allows national courts from all EU Member States to request the Court of Justice's interpretation of EU law. Consequently, the Court of Justice does not directly rule on the cases but rather provides guidance on specific issues.

Cases presented hereinafter may refer to national proceedings developed in other chapters of this compendium. However, it makes sense to gather them under the European Union chapter as they are binding on all national courts of the EU. They represent the law that can be directly invoked at national level.

61 CJEU, Case C-637/17, Judgment of 28 March 2019, *Cogeco Communications Inc.*, ECLI:EU:C:2019:263, para. 28.

62 Philipp Kirst, The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe (21 October 2019). European Competition Journal (2019, Forthcoming), Available at SSRN: https://ssrn.com/abstract=3478604.

Country: EU (Germany)	
Case Name and Number: CJEU, Case C-360/09, *Pfleiderer AG*, ECLI:EU:C:2011:389	
Date of judgment: 14 June 2011	
Economic activity (NACE Code): F.43.33—Floor and wall covering	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: Pfleiderer AG	**Was pass on raised (yes/no)?** No
Defendants: Bundeskartellamt	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Access to the file of the competition authority • Leniency programme	**Amount of damages initially requested:** N/A
Direct or indirect claims: N/A	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA)—Press Release of 5 February 2008	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

On 21 January 2008, the Bundeskartellamt sanctioned three manufacturers of décor paper and five individuals for their involvement in price-fixing and out-put limitation agreements. Fines amounted to EUR 62 million.

Pfleiderer was a purchaser of décor paper. It requested full access to the Bundeskartellamt file relating to the administrative procedure in order to prepare its claim for damages.

The Bundeskartellamt disclosed a non-confidential version of its decisions.

Pfleiderer renewed its request for full access to the file, including documents submitted within leniency applications.

The Bundeskartellamt refused to release this information and Pfleiderer lodged a complaint within the Local Court of Bonn, which referred the question to the Court of Justice.

Brief summary of judgment

The Court of Justice acknowledged the important role of leniency programs in order to enforce Articles 101 and 102 TFEU. It also considered that companies involved in competition law infringements might be deterred from applying for leniency if their submissions were subsequently disclosed to private claimants.

However, the Court of Justice ruled that private claims are essential in the enforcement of competition law and that any victim shall have the right to full compensation.

While dealing with requests for disclosure of leniency submissions, the Court of Justice considered that "*it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (...) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*".

Country: EU (Austria)	
Case Name and Number: CJEU, Case C-536/11, *Donau Chemie AG*, ECLI:EU:C:2013:366.	
Date of judgment: 6 June 2013	
Economic activity (NACE Code): C.20—Manufacture of chemicals and chemical products	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: VDMT	**Was pass on raised (yes/no)?** No
Defendants: Donau Chemie and Others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Access to the file of the competition authority • Leniency programme	**Amount of damages initially requested:** N/A
Direct or indirect claims: N/A	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) (OLG Wien, 29 Kt 5/09)	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

On 26 March 2010, the Oberlandesgericht Wien sanctioned several companies for infringing Article 101 TFEU on the market for wholesale distribution of printing chemicals. Fines amounted to EUR 1.5 million. Although companies appealed, this decision was upheld.

The VDMT, representing the interests of the printing sector, applied in order to get access to the file of the administrative proceedings. Under Austrian law, such access could only be granted with the prior approval of the parties. However, infringing companies refused the VDMT to have access to this information.

The Higher Regional Court of Vienna referred the matter to the Court of Justice and asked in particular if Austrian law could be compatible with EU law in light of the *Pfleiderer* case.

Brief summary of judgment

The Court of Justice recalled that any victim of anti-competitive harm shall have the right to full compensation. Although Member States retain some discretion in the drafting of procedural law in the absence of harmonization, they should act in accordance with general principles of EU law.

The Court of Justice considered that the matter required to strike a balance between the protection of private claimants on the one hand, and the need to ensure protection of confidential information, business secrets and personal data.

However, the Austrian legislation did not provide for such a balance in individual cases. The possibility for infringing parties to object systematically to requests without giving any reason undermined claimants' right to full compensation.

Turning to the issue of leniency programs and their attractiveness, the Court of Justice acknowledged that they are a useful tool in competition law enforcement.

Nevertheless, a case-by-case analysis is necessary in order to assess requests to disclose leniency submissions. National courts shall weigh up the interests at stake to make their decision:

- The interest of the requesting party in obtaining access to documents to prepare its action for damages. In particular, national courts shall pay attention to alternative solutions for claimants to have access to evidence.
- The actual harmful consequences of such disclosure with regard to public interests or the legitimate interests of other parties. The Court of Justice emphasized that protecting the attractiveness of leniency programs is not an absolute requirement. Refusal to disclose a document may only be justified if there is a circumstantial risk that it would undermine the effectiveness of the leniency programme.

Country: EU	
Case Name and Number: CJEU, Case C-365/012 P, *EnBW Energie Baden-Württemberg AG*, ECLI:EU:C:2014:112	
Date of judgment: 27 February 2014	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: EnBW Energie Baden-Württemberg AG	**Was pass on raised (yes/no)?** No
Defendants: European Commission, Siemens AG, ABB Ltd.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Access to the file of the competition authority • Leniency programme	**Amount of damages initially requested:** N/A
Direct or indirect claims: N/A	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC)—Case COMP/F/38.899—Gas insulated switchgear	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2007, the Commission sanctioned various companies, including Siemens and ABB, for participating in a cartel relating to gas insulated switchgear. Anti-competitive behaviours included bid-rigging, price fixing and market sharing.

EnBW is an energy-distribution company that considered having been harmed by the cartel. Therefore, it requested access to all evidence contained in the file of the Commission on the basis of Regulation no. 1049/2001, which governs public access to EU institutions' documents.

The Commission nevertheless made a decision to deny the request. Based on a global assessment of the categories of documents, it considered that there was no overriding public interest in disclosure.

EnBW applied for an action for annulment before the General Court of the EU, which annulled the Commission decision. It considered that the Commission should have undertaken a specific and individual analysis of the documents.

The Commission appealed the judgment before the Court of Justice.

Brief summary of judgment

The Court of Justice ruled that the Commission may presume that disclosure of documents contained in the file of its proceedings under Article 101 TFEU will, in principle, undermine the protection of the commercial interests of the companies involved as well as the protection of the purpose of investigations.

However, such presumption may be rebutted. In the context of private enforcement of competition law, the claimant shall demonstrate that documents requested are necessary to support its claim. Subject to the weigh-up of interests laid down in *Pfleiderer* and *Donau Chemie*, the Comission may then grant access.

In the case at hand, the Court of Justice considered that the claimant had failed to do so. Therefore, the Commission was not required to perform a specific and individual analysis of each document.

The judgment of the General Court of the EU was set aside, and the Court of Justice partly dismissed the action for annulment brought by EnBW.[1]

1 The Court of Justice also considered that the Commission had failed to provide reasons for its refusal to disclose a category of documents.

Country: EU (Germany)	
Case Name and Number: CJEU, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, ECLI:EU:C:2015:335.	
Date of judgment: 21 May 2015	
Economic activity (NACE Code): C.20.13—Manufacture of other inorganic basic chemicals	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: Cartel Damage Claims (CDC) Hydrogen Peroxide SA, Evonik Degussa GmbH, Chemoxal SA, Edison SpA.	**Was pass on raised (yes/no)?** No
Defendants: EAkzo Nobel NV, Solvay SA/ NV, Kemira Oyj, FMC Foret SA.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/ pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • International jurisdiction • Jurisdiction clause	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Collective	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC)—Case COMP/ F/C.38.620—Hydrogen Peroxide and perborate)	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2006, the Commission sanctioned various companies for participating in a cartel relating to hydrogen peroxide and sodium perborate. The Commission found that infringing

companies had exchanged information, limited production, allocated markets and fixed prices in Belgium, Germany and France from 31 January 1994 to 31 December 2000.

CDC, a Belgian company, had been assigned claims by 32 companies from 13 Member States which had suffered harm as a result of the cartel. In March 2009, CDC brought an action for damages before courts of Germany, where one of the defendants, Evonik Degussa, had its statutory seat. In September 2009, CDC and Evonik Degussa reached a settlement and CDC withdrew its claim only in relation to this defendant.

The German court asked the Court of Justice to provide guidance in the definition of its jurisdiction.

Brief summary of judgment

First, the Court of Justice addressed the issue of the settlement. Indeed, the German court was not sure that its jurisdiction would remain valid if the claim was withdrawn regarding the anchor defendant. The Court of Justice recalled that a claimant may bring a claim before the court of the place where any of the defendants is domiciled, provided that there is sufficient connexion between the claims. The Court of Justice considered that the withdrawal of the claim following a settlement with the anchor defendant cannot interfere with jurisdiction, unless it is found that, at the time the proceedings were instituted, the claimant and the defendant had colluded to artificially bring the claim before a given court.

Second, the Court of Justice clarified ruled on jurisdiction in competition law claims for damages. Under EU private international law, courts of the place where the harmful event occurred may have jurisdiction. Yet, the definition of the harmful event is not easy. The Court of Justice addressed (i) the place of the causal event, which is the place where the cartel was concluded, and (ii) the place where the damage occurred for each victim, which is the place of their individual statutory seats. The Court of Justice considered that both could be sufficient to establish jurisdiction.

Third, the Court of Justice ruled on jurisdiction clauses. It ruled that a clause which abstractly refers to all disputes arising from contractual relationships does not cover claims in relation to tortious liability for competition law infringements. However, if a jurisdiction clause is drafted in such a way that it explicitly covers competition law infringements, the latter should be applied in the case at hand.

Country: EU (France)	
Case Name and Number: CJEU, Case C-595/17, *Apple Sales International*, ECLI:EU:C:2018:854.	
Date of judgment: 24 October 2018	
Economic activity (NACE Code): G.47.42—Retail sale of telecommunications equipment in specialised stores	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: MJA, acting as liquidator of eBizcuss.com	**Was pass on raised (yes/no)?** No
Defendants: Apple Sales International, Apple Inc., Apple retail France EURL	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Jurisdiction clause	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Stand-alone	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

eBizcuss became an Apple authorized reseller in 2002 pursuant to an agreement which included the following jurisdiction clause: "*This Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple [Sales International] reserves the right to institute*

proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple [Sales International] is occurring."

In 2012, eBizcuss brought an action against Apple before French courts. It alleged unfair competition and abuse of a dominant position.

The first-instance court and the Paris Court of Appeal first denied the claim based on the jurisdiction clause. However, the Cour de Cassation quashed the judgment and reverted it to the Versailles Court of Appeal, which disregarded the clause. Apple appealed to the Cour de Cassation, which asked for guidance from the Court of Justice.

Brief summary of judgment

The Court of Justice distinguished jurisdiction clauses in the context of cartel agreements and in the context of abuse of a dominant position. Although a cartel is not directly linked to the contractual relationship between a cartel member and a third party, abuses of a dominant position may well materialise in such contractual relationship, especially when the dominant company is acting as supplier of the victim.

In any case, the Court of Justice recalled that jurisdiction clauses in the context of competition law claims do not require prior finding of an infringement by a competition authority.

Country: EU (Lithuania)	
Case Name and Number: CJEU, Case C-27/17, AB "flyLAL-Lithuanian Airlines", ECLI:EU:C:2018:533	
Date of judgment: 5 July 2018	
Economic activity (NACE Code): H.51—Air transport	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: flyLAL, ŽIA Valda, VA Reals	**Was pass on raised (yes/no)?** No
Defendants: Air Baltic, Riga Airport	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 57,874,768
Key Legal issues: • International jurisdiction	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) Case no. 897/04/05/9, 22 November 2006	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2006, the Latvian Competition Council found that Riga Airport had abused of its dominant position by applying discriminatory discounts to the benefit of two airlines, including Latvian Air Baltic.

flyLAL was a Lithuanian airline which faced fierce competition from Air Baltic in Lithuania. It suffered from significant financial losses before going into liquidation. In 2008, flyLAL and its shareholders filed a claim for damages against Air Baltic and Riga Airport for the damage caused by predatory pricing.

The Regional Court of Vilnius ordered Air Baltic to pay flyLAL EUR 16,12,094 as damages plus default interest of 6% per annum. The claim was dismissed as regards Riga Airport.

However, during the appeal proceedings, the Vilnius Court of Appeal referred questions to the Court of Justice regarding international jurisdiction in tortious liability cases.

Brief summary of judgment

The Court of Justice confirmed that, for the purpose of establishing international tortious jurisdiction in competition law claims, the claimant may choose either (i) the place of the causal event of the harm, which is the place where the cartel was concluded, or (ii) the place where the damage materialized.

First, the Court of Justice considered that the place where the harmful event occurred could be identified as the place where the loss of income consisting in loss of sales occurred. Such place is identified as the relevant affected market.

Second, the Court of Justice clarified its interpretation of international jurisdiction in tortious claims in the context of Article 102 TFEU. Unlike cartels, which can be concluded and implemented in different places, the causal harmful event for abuses of a dominant position consists in their implementation, that is to say the place where predatory prices were offered and applied.

Third, the Court of Justice assessed the possibility for international jurisdiction to be based on the place where a branch of the dominant undertaking is located. The Court of Justice confirmed that this could be the case only if it is possible to demonstrate that such branch has actually participated in some of the actions constituting the abuse. In particular, national courts shall examine whether the branch actually offered and applied the predatory prices and whether such participation in the abuse was sufficiently significant to be closely linked with the claim.

Country: EU (Hungary)	
Case Name and Number: CJEU, Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft*, ECLI:EU:C:2019:635.	
Date of judgment: 29 July 2019	
Economic activity (NACE Code): C.29.10 — Manufacture of motor vehicles	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: Tibor-Trans	**Was pass on raised (yes/no)?** No
Defendants: DAF Trucks	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • International jurisdiction	**Amount of damages initially requested:** N/A
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC) Case AT.39824 — Trucks	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2016, the Commission found that fifteen trucks manufacturers, including German based DAF Trucks, had colluded to distort competition in the European Economic Area.

Tibor-Trans, a Hungarian national and international freight company, had purchased several trucks to various resellers. It brought an action for damages before Hungarian courts in 2017.

The first-instance court considered that it lacked jurisdiction to hear the case. The Court of Appeal decided to request the Court of Justice to issue a preliminary ruling on the matter.

Brief summary of judgment

The Court of Justice provided guidance as to international jurisdiction in tortious liability cases. As explained in *CDC Hydrogene Peroxyde*, the claimant may choose either (i) the place of the causal event of the harm, which is the place where the cartel was concluded, or (ii) the place where the damage occurred.

The place where the damage occurred may still be difficult to assess in case of indirect purchases. The Court of Justice clarified that damage that is a mere financial consequence of the initial harm may not provide jurisdiction. Yet, it considered that Tibor-Trans, as an indirect purchaser of cartelized products, had suffered from additional costs incurred because of artificially high prices. In the view of the Court of Justice, this is a direct damage, which provides ground for jurisdiction of the place where it happened. Such place could easily be defined as the relevant market affected by the anti-competitive behaviour.

Country: EU (United-Kingdom)	
Case Name and Number: CJEC, Case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465.	
Date of judgment: 20 September 2001	
Economic activity (NACE Code): G.46.34—Wholesale of beverages	
Court: Court of Justice of the European Communities	**Was disclosure process involved?** No
Claimants: Crehan	**Was pass on raised (yes/no)?** No
Defendants: Courage Ltd.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Right to full compensation	**Amount of damages initially requested:** N/A
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Stand-alone	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 1991, Mr Crehan, entered into two 20 years agreements with Inntrepreneur Estates Ltd for the leasing of two pubs. The lease agreement included the obligation for Mr. Crehan to buy beer exclusively from Courage Ltd.

However, Mr Crehan could not compete with independent pubs, which could buy beer at cheaper price from Courage Ltd. As a consequence, he went out of business and Courage Ltd. sued him for unpaid beer deliveries.

Mr. Crehan claimed that the lease agreements were contrary to then Article 101 TFEU and brought a counterclaim for damages. Nevertheless, English law did not provide for the possibility to award damages in case of a breach of competition law.

The Court of Appeal of England and Wales therefore referred the matter to the Court of Justice and sought guidance regarding the compatibility of national law with EU competition law.

Brief summary of judgment

The Court of Justice first recalled that EU Treaties have created a new legal order directly integrated into the legal orders of Member States.

It also stated that competition rules laid down in Articles 101 and 102 TFEU are essential for the functioning of the internal market.

Therefore, national courts shall enforce Article 101 (2) TFEU, which provides for automatic nullity of anti-competitive agreements that breach Article 101 (1) TFEU.

In view of the above, the Court of Justice considered that private litigants could directly invoke Article 101 TFEU before national courts and that the full effectiveness of that provision would be jeopardized if they could not seek compensation for the harm caused by anti-competitive agreements. In addition to this, the Court of Justice regarded private claims as an element to deter companies from infringing competition law.

However, the Court of Justice considered that rules on procedure may be determined by each Member State as long as the matter would not be unified at the EU level. In particular, a claim may be dismissed to prevent unjust enrichment if the claimant bears significant responsibility for the distortion of competition.

Country: EU (Italy)	
Case Name and Number: CJEC, Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461.	
Date of judgment: 13 July 2006	
Economic activity (NACE Code): K.65—Insurance, reinsurance and pension funding, except compulsory social security	
Court: Court of Justice of the European Communities	**Was disclosure process involved?** No
Claimants: Vincenzo Manfredi, Antonio Cannito, Nicolò Tricarico, Pasqualina Murgulo.	**Was pass on raised (yes/no)?** No
Defendants: Lloyd Adriatico Assicurazioni SpA, Fondiaria Sai SpA, Assitalia SpA ('Assitalia').	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Right to full compensation • Limitation periods	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) Case No 8546 (I377) of 28 July 2000	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2000, the Italian Competition Authority ("AGCM") found that various Italian insurance companies had colluded and exchanged information to coordinate their prices on civil liability auto insurance premiums.

Several customers brought actions for compensation before the Giudice di pace di Bitonto. Insurance companies claimed that this court lacked jurisdiction to hear these cases as Italian law appoints the Corte d'appello having territorial jurisdiction. They also claimed that the claims were time-barred.

The Giudice di pace di Bitonto referred the matter to the Court of Justice.

Brief summary of judgment

The Court of Justice provided guidance as to the possibility for private claimants to rely on Article 101 TFEU.

As in *Courage and Crehan*, the Court of Justice ruled that private individuals are entitled to rely on Article 101 (2) TFEU in order to request nullity of agreements that breach Article 101 (1) TFEU.

The judgment also emphasises the importance for Member States to guarantee the right to full compensation for victims of anti-competitive behaviours. National law may provide for procedural rules as long as they comply with the principle of equivalence and the principle of effectiveness. Under the principle of equivalence, national rules for EU competition law claims shall not be less favourable than those governing similar domestic actions. Principle of effectiveness requires that national rules shall not render practically impossible or excessively difficult the exercise of rights conferred by EU law.

Consequently, the Court of Justice ruled that EU law prevents Member States from adopting limitation periods that begin to run from the day on which the anti-competitive agreement was adopted. Indeed, there would be a risk that the limitation period expires before the end of the infringement. Such risk is enhanced if a short limitation period cannot be suspended.

Finally, the Court of Justice clarified the compensable damages. It considered that it includes compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

Country: EU (Portugal)	
Case Name and Number: CJEU, Case C-637/17, *Cogeco Communications Inc.*, ECLI:EU:C:2019:263.	
Date of judgment: 28 March 2019	
Economic activity (NACE Code): J.60.2—Television programming and broadcasting activities	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: Cogeco Communications Inc.	**Was pass on raised (yes/no)?** Yes
Defendants: Sport TV Portugal SA, Controlinveste-SGPS SA, NOS-SGPS SA.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Applicability of the Damages Directive • Limitation periods	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA)—Press release of 20 June 2013	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In June 2013, the Portuguese Competition Authority ("PCA") found that Sport TV Portugal had abused of its dominant position in the market of premium sports TV channels. This behaviour infringed national law and Article 102 TFEU. Consequently, the PCA imposed a fine of EUR 3,730,000. The Competition, Regulation and Supervision Court of Portugal confirmed that decision in part but ruled that Article 102 TFEU was not applicable to the

case as the conduct did not affect trade between Member States. It subsequently reduced the amount of the fine to EUR 2,700,000.

Cogeco is the parent company of Cabovisão, which had entered into a distribution agreement for television with Sport TV Portugal. In 2015, Cogeco brought an action for damages against Sport TV Portugal and its parent companies before the District Court of Lisbon. Cogeco invoked Article 102 TFEU to support its claim.

The defendants claimed that the action for damages was time barred under Portuguese law.

The District Court of Lisbon referred the matter to the Court of Justice. It sought guidance as to the applicability of the Damages Directive and its provisions relating to limitation periods.

Brief summary of judgment

First, the Court of Justice examined whether the Damages Directive could be applied to the case. Article 22 provides that substantial provisions may not enter into force retroactively while procedural provisions may be applicable to actions brought after 26 December 2014. The Court of Justice considered that Member States enjoy a measure of discretion in deciding whether:

- the national rules on procedural provisions would apply to actions for damages brought after 26 December 2014 but before the date of transposition of the Damages Directive; or
- whether the national rules on procedural provisions would apply to actions for damages brought at the latest, before the 27 December 2016, date if expiry for the period of transposition.

The Court of Justice considered the fact that, while implementing the Damages Directive in 2018, Portugal had decided that the substantive provisions would not be retroactively applicable and that the procedural provisions would not be applicable to actions brought before its entry into force.

Consequently, the Court of Justice ruled that the provisions of the Damages Directive were not applicable to the case, as Cogeco had brought its action in 2015.

Second, the Court of Justice assessed whether procedural rules of national law applicable to the case complied with EU law. Under Portuguese law, limitation period of three years began to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable. Such limitation period was not subject to suspension nor interruption. The Court of Justice considered that these rules would undermine the principle of effectiveness of EU competition law. Indeed, they made it nearly impossible for victims to bring an action for damages based on the final decision of the competition authority.

Country: EU (Spain)	
Case Name and Number: CJEU, Case C-547/16, *Gasorba SL*, ECLI:EU:C:2017:891.	
Date of judgment: 23 November 2017	
Economic activity (NACE Code): G.47.30—Retail sale of automotive fuel in specialised stores	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: Gasorba SL, Josefa Rico Gil, Antonio Ferrándiz González	**Was pass on raised (yes/no)?** No
Defendants: Repsol Comercial de Productos Petrolíferos SA	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Commitment decisions and private enforcement	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC)—Case COMP/B-1/38.348—Repsol CPP	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

Repsol, a Spanish oil company, concluded gas stations lease agreements for a duration of 25 years.

The Commission opened an investigation against Repsol and expressed its concerns that the lease agreements could breach Article 101 TFEU and foreclose the market.

Repsol however offered to refrain from concluding long-term exclusivity agreements. The Commission made this commitment binding by way of decision in 2006. This decision did not impose any fine and did not reach any conclusion regarding the compliance of Repsol's conduct with Article 101 TFEU.

In 1993, Mrs. Rico Gil and Mr. Ferrándiz González entered into Repsol's lease agreements for a duration of 25 years. They subsequently set up Gasorba SL, which took over their contractual obligations.

Following the Commission decision, Gasorba SL applied for annulment of the two lease agreements and claimed damages. The Juzgado de lo Mercantil no 4 de Madrid and the Audiencia Provincial de Madrid dismissed the case.

However, the Tribunal Supremo asked the Court of Justice for a preliminary ruling. In particular, it asked the Court of Justice to evaluate the probative value of the commitment decision.

Brief summary of judgment

The Court of Justice considered that EU law requires national courts to take into account the preliminary assessment of the Commission in its commitment decisions. While deciding whether the conduct at stake breaches EU competition law, national courts shall regard the commitment decision as an indication or as *prima facie* evidence.

Country: EU (Finland)	
Case Name and Number: CJEU, Case C-724/17, *Skanska Industrial Solutions Oy*, ECLI:EU:C:2019:204.	
Date of judgment: 14 March 2019	
Economic activity (NACE Code): C.23.6—Manufacture of articles of concrete, cement and plaster	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: City of Vantaa	**Was pass on raised (yes/no)?** Yes
Defendants: Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Corporate veil • Economic unit • Restructuration	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA)—Case no 1198/61/2001	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2004, the Finish Competition Authority found that several companies had participated in a cartel relating to asphalt in Finland between 1994 and 2002. It proposed fines which were ultimately adopted by the Finish Supreme Administrative Court in 2009.

In the meantime, one of the cartel participants, Sata-Asfaltti, went into voluntary liquidation and its business was continued by Skanska, its parent company. Other cartel participants undertook similar internal restructuring.

The City of Vantaa considered itself as a victim of the cartel and brought proceedings against Skanska and other infringing companies. Skanska and two other defendants claimed that the infringement had been committed by a different legal person and that they could not be held liable for the wrongdoings of companies that did no longer exist.

The case went to the Finish Supreme Court, which referred the matter to the Court of Justice.

Brief summary of judgment

The Court of Justice considered that the determination of persons liable for compensation under Article 101 TFEU should be governed by EU law. It considered that the Damages Directive does not provide for rules regarding the notion of undertaking.

Indeed, the Court of Justice recalled that "undertaking" is an autonomous notion of EU law. It refers to any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. This concept goes beyond legal personality. Hence, restructuring of companies does not create a new undertaking in the view of the Court of Justice.

This reasoning had already been firmly established in relation to imposition of administrative fines. The judgment however extends the notion to private enforcement and claims for damages.

The Court of Justice considered that the purpose of EU competition rules would be jeopardized if undertakings could circumvent their liability through internal restructuring. This would undermine the effectiveness of EU law.

Consequently, acquirers of infringing companies must be held liable as they have ensured that infringers were able to continue their economic activities.

Country: EU (Austria)	
Case Name and Number: CJEU, Case C-557/12, *Kone AG*, ECLI:EU:C:2014:1317.	
Date of judgment: 5 June 2014	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: ÖBB-Infrastruktur	**Was pass on raised (yes/no)?** No
Defendants: Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, ThyssenKrupp Aufzüge GmbH	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1,839,239
Key Legal issues: • Umbrella pricing	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC)—Case COMP/E-1/38.823—PO/Elevators and Escalators and (NCA) Case no. 16 Ok 5/08.	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

Follow-on (EC)—Case COMP/E-1/38.823—PO/Elevators and Escalators and (NCA) Case no. 16 Ok 5/08.

In 2007, the Commission found that several elevator and escalator manufacturers had formed a cartel in Belgium, Germany, Luxembourg and the Netherlands. In 2008, the Austrian Courts reached the same finding regarding the Austrian market.

ÖBB-Infrastruktur, a subsidiary of the Austrian Federal Railways, did not purchase elevators and escalators from infringing companies. However, it brought an action for damages before Austrian courts. It considered that the cartel had a general price-increase effect on the market, even for suppliers that were not involved in the infringement ("umbrella effect").

The claim was dismissed in first instance but upheld in appeal. The Austrian Supreme Court subsequently asked the Court of Justice for guidance.

Brief summary of judgment

The Court of Justice acknowledged that companies outside the cartel could set their prices at a higher level than they would have done under normal circumstances.

However, Austrian law prevented a claim to be successful on that ground as it lacked causal link between the author of the wrongdoing and the damage.

The Court of Justice considered that such national legislation would jeopardize the full effectiveness of Article 101 TFEU. Indeed, under EU law any victim of an anti-competitive conduct should have the right to full compensation. The Court of Justice therefore confirmed that umbrella effect could invoked before national courts.

Country: EU (Austria)	
Case Name and Number: CJEU, Case C-435/18, *Otis GmbH*, ECLI:EU:C:2019:1069.	
Date of judgment: 12 December 2019	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Court of Justice of the EU	**Was disclosure process involved?** No
Claimants: The Land Oberösterreich and 14 other entities	**Was pass on raised (yes/no)?** No
Defendants: Otis GmbH, Schindler Liegenschaftsverwaltung GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Kone AG, ThyssenKrupp Aufzüge GmbH	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case was further ruled by national courts.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Key Legal issues: • Compensable damage	**Amount of damages initially requested:** N/A
Direct or indirect claims: Direct claim for compensation of an indirect harm.	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC)—Case COMP/E-1/38.823—PO/Elevators and Escalators and (NCA) Case no. 16 Ok 5/08.	**Name and contact details of lawyer who has drafted summary:** François Brunet, Partner, Hogan Lovells (France, EU) francois.brunet@hoganlovells.com; Pierre Chellet, Academic Assistant, College of Europe, pierre.chellet@coleurope.eu

Brief summary of facts

In 2007, the Commission found that several elevator and escalator manufacturers had formed a cartel in Belgium, Germany, Luxembourg and the Netherlands. In 2008, the Austrian Courts reached the same finding regarding the Austrian market.

In 2010, the Land Oberösterreich and 14 other entities brought actions for damages before the Commercial Court of Vienna. Although the 14 claimants were direct or indirect

purchasers, the Land Oberösterreich had only granted subsidies to those willing to acquire elevators and escalators. It considered that it should be compensated because subsidies granted had been higher than they should have been in the absence of the cartel.

The case reached the Austrian Supreme Court which asked the Court of Justice for guidance.

Brief summary of judgment

The Court of Justice relied on its past judgments to recall the right for any victim of anti-competitive conduct to claim damages. It considered that this shall not be limited to persons acting as suppliers or customers on the affected market.

In particular, the Land Oberösterreich may have been obliged to grant higher subsidies than if that cartel had not existed. It was therefore unable to use the difference more profitably. There is no reason under EU law to deprive it from its right to full compensation on the sole basis that it was not active on the relevant affected market.

AUSTRIA

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Private antitrust litigation has a long tradition in Austria, specifically since 1993 when individual *locus standi* before the Cartel Court was introduced. It is not limited to damages claims. The recent implementation of the EU Directive 2014/104/EU on Antitrust Damages Actions (the "**Directive**") into national law will further facilitate private antitrust damages litigation in Austria.

1. Jurisdiction

Private antitrust damages actions can be brought before Austrian civil courts on the basis of Section 37c (1) of the Austrian Cartel Act ("**KartG**"), the general tort law provisions of the Austrian Civil Code ("**ABGB**") and of the Unfair Competition Act ("**UWG**").

In addition, certain private claims, in particular (i) applications for a declaratory decision that an undertaking has infringed EU or Austrian competition law, and (ii) applications for cease-and-desist orders regarding an infringement of EU or Austrian competition law, may be brought before the Cartel Court by all undertakings that have a legal or economic interest in the decision. However, the Cartel Court does not have jurisdiction to award damages.

2. Relevant legislation and legal grounds

Sections 37a to 37m KartG implement the Directive into national law. Pursuant to Section 37c (1) KartG, any entity that culpably—*i.e.* intentionally or negligently—infringes Articles 101 or 102 TFEU or their Austrian equivalents (Sections 1 and 5 KartG) or equivalent provisions of the national law of a Member State of the European Union or of a Contracting State to the Agreement on the European Economic Area, is obliged to provide compensation for the harm caused by the infringement.

An action for damages resulting from a competition law infringement can also be based on the general tort law provisions of the ABGB. The Austrian Supreme Court confirmed that such an action may be based on Section 1311 ABGB, according to which anyone who intentionally or negligently infringes an act of law that aims to protect somebody or something from harm shall be liable to provide compensation for the harm arising out of this behaviour (Case 4 Ob 46/12m). The Supreme Court found that the prohibitions of restrictive agreements and abuse of dominance under EU and Austrian law qualify as such protective rules within the meaning of Section 1311 ABGB.

In addition, a private antitrust cause of action may also arise on the basis of Section 1 UWG in conjunction with articles 101 or 102 TFEU or their Austrian equivalents (Sections 1 and 5 KartG). According to Section 1 UWG and established case law, a breach of the law which is capable of conferring on the infringer an advantage over its law-abiding competitors constitutes an infringement of Section 1 UWG unless the breach can be justified by a reasonable interpretation of the law. Under the rules of the UWG, claimants may bring actions for injunctions and actions for damages and may have the decision published.

Finally, private antitrust litigation in a broader sense may also arise where one party to an agreement argues that the agreement or part of it is null and void because it infringes competition law.

Ratione temporis application of the Austrian rules implementing the Directive

The provisions of Austrian law which implement the substantive provisions of the Directive apply to the compensation of damages which occurred after 26 December 2016. Some of the rules provided for in the Directive were however already part of Austrian law prior to the implementation of the Directive (e.g. the binding effect of decisions of the competition authority or joint and several liability of joint infringers).

As regards the new rules on limitation periods, which implement the corresponding provisions of the Directive, a specific transitional provision provides that the new rules on limitation apply to claims for antitrust damages which had not yet become time-barred under the old rules on limitation on 26 December 2016 (unless the old rules on limitation are more favourable to the claimant than the new rules).

The provisions of Austrian law which implement the procedural provisions of the Directive, in particular the rules on disclosure of evidence, apply in proceedings on actions for antitrust damages which were initiated after 26 December 2016.

3. What types of anti-competitive conduct are damages actions available for?

In accordance with Section 37a (1) KartG, damages actions are available for infringements of competition law as defined in Section 37b (1) KartG.

These include violations of the prohibition of restrictive agreements (Article 101 TFEU), the prohibition of abuse of a dominant market position (Article 102 TFEU), as well as their Austrian equivalents in Sections 1 and 5 KartG respectively and the prohibition of retaliatory measures (Section 6 KartG). Violations of provisions of the national law of a Member State of the European Union or of a Contracting State to the Agreement on the European Economic Area, which are pursuing the same objectives as Articles 101 and 102 TFEU, are covered as well.

4. What forms of relief may a private claimant seek?

The primary objective of damages actions is compensation for harm caused by an infringement of competition law.

The undertaking that culpably commits a breach of competition law may be required to pay compensation for any harm caused thereby. Section 37c KartG contains the rebuttable presumption that a (horizontal) cartel between competitors causes harm. This standardized reversal of the burden of proof makes it easier for the injured party to assert its claims. As a result, the claimant does not have to demonstrate that it has suffered harm in the first place; it however still has to prove the quantum of harm.

Private claimants can request that the damage caused by an infringement of competition law is compensated; this damage includes positive damage, loss of profits as well as interest (Section 37d (1) KartG). The KartG does not contain rules on the calculation of damages. A civil court deciding on an antitrust damages claim can ask the Cartel Court, the Federal Cartel Attorney and the Federal Competition Authority for assistance in determining the amount of damages.

If several undertakings have infringed competition law through joint behaviour (e.g. in the case of a cartel), they are jointly and severally liable for the resulting damage (see Section 37e KartG). It is not required that they have a joint intention to cause damage.

Special provisions apply to “crown witnesses” (leniency applicants granted immunity from fines) and SMEs in Section 37e KartG. A “crown witness” is only liable to its direct and indirect purchasers and suppliers unless the other injured parties cannot obtain

full compensation from the other undertakings involved in the same infringement of competition law. An SME is only liable to its direct and indirect purchasers and suppliers if (i) its market share in the relevant market was below 5% at any time during the infringement of competition law, (ii) its unlimited liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value, (iii) it has not been the leader of the infringement of competition law and has not coerced other undertakings to participate therein, and (iv) it has not previously been found to have infringed competition law.

5. Passing-on defence

Section 37f KartG provides that the defendant in an action for antitrust damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or parts of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant. Even if the defendant can show that the overcharge was passed on, the claimant may still claim compensation for loss of profits due to the passing-on of the overcharge (e.g. if the claimant's sales to its customers were reduced as a result of the passing-on of the overcharge).

In the case of an action for antitrust damages brought by an indirect purchaser, the law provides for a presumption of passing-on of the overcharge to that indirect purchaser if it has been established that (i) the defendant has committed an infringement of competition law resulting in a price increase for the direct purchaser of the defendant and (ii) the indirect purchaser has purchased the goods and services that were the object of this infringement of competition law. The infringer (defendant) can rebut this presumption by way of *prima facie* evidence.

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

6. Pre-trial discovery and disclosure, treatment of confidential information

Effective rules on the disclosure of evidence in antitrust damages proceedings were only introduced into Austrian law with the provisions implementing the Directive in 2017: Section 37j (2) KartG provides that a party may submit a reasoned request for disclosure of evidence to the court together with, or after having lodged, an action for damages. Apart from requesting disclosure of certain pieces of evidence, a request for disclosure may also cover categories of evidence. The evidence and the categories of evidence need to be defined by the party requesting disclosure as precisely and as narrowly as possible, taking into account the facts and information reasonably available to it.

The court may then order the disclosure of evidence by third parties or the opponent party. The court has to limit a disclosure order to take account of the principle of proportionality, considering the legitimate interests of all parties concerned. An interest to avoid actions for damages caused by an infringement of antitrust law is not relevant for this assessment. The disclosure may also comprise evidence containing confidential information. The confidentiality of the information has to be taken into account by the court when assessing

the proportionality of a disclosure request. If necessary, specific measures to protect confidentiality of such information have to be mandated (e.g. excluding the public from the proceedings).

Moreover, the party being ordered to disclose evidence may request that certain pieces of evidence are only disclosed to the court by invoking a legal obligation of secrecy (e.g. legal professional privilege) or any other right to refuse to give evidence (Section 157 (1) no. 2-5 Austrian Criminal Procedure Act).

Documents which are part of files of competition authorities may also be disclosed upon application. However, certain documents can only be disclosed once the competition authority has completed its proceedings (Section 37k (3) KartG). Leniency statements and settlement submissions are not subject to disclosure (Section 37k (4) KartG).

So far, there is no published case law applying the new rules on disclosure of evidence.

Apart from these new rules on disclosure of evidence after proceedings in antitrust damages claims have been filed, general Austrian civil procedural law does not allow for (pre-trial) discovery as found in Anglo-American legal systems. Rather, each party has to substantiate the facts favourable to its legal position by putting forward evidence, including private expert opinions. The court can, and in most cases will, also appoint an expert to produce a report on questions which require specific economic knowledge (e.g. on the quantification of harm).

7. Limitation periods

The limitation period in Austria is five years, starting from the date on which the injured party becomes aware, or can reasonably be expected to know (i) the identity of the infringer, (ii) the damage it suffered and (iii) the behaviour concerned as well as the fact that it constitutes an infringement of competition law (Section 37h KartG).

In any case, the claim for compensation becomes time barred ten years after the date of the occurrence of the damage.

However, the limitation periods referred to above shall not begin to run before the infringement of competition law has ceased.

Also, the limitation periods are suspended for the duration of proceedings before the European Commission or any national competition authority in the EU related to an infringement of competition law. The suspension ends one year after the closure of the competition authority's investigation or the final decision of the respective competition authority. On-going settlement negotiations also suspend the limitation period.

8. Appeal

District courts are the courts of first instance for cases with a maximum amount in dispute of EUR 15,000. Regional courts have jurisdiction for first instance rulings on all legal matters not assigned to district courts. The respective regional courts as court of second instance decide appeals against decisions of the district courts.

Appeal decisions may be challenged before the Austrian Supreme Court if the case at hand involves a significant legal issue. "Significance" refers to one of the following scenarios:

- the respective decision deviates from earlier Supreme Court case law;
- the legal question at hand is novel; or
- there are diverging decisions from the Supreme Court regarding the matter under consideration.

Also, usually an appeal to the Supreme Court requires that the dispute value in the respective case exceeds EUR 30,000, or the dispute value exceeds EUR 5,000 and the first appellate court grants a right to an appeal (*i.e.* if the appellate court agrees that the question at hand is significant, as per the above).

9. Class actions and collective representation

Austrian law does not provide for collective actions or class actions in the strict sense of the term. The Austrian Code of Civil Procedure provides for the possibility for proceedings to be joined if (i) these proceedings have been brought individually by several claimants, (ii) against the same defendant, (iii) are pending before the same court and (iv) the joinder of proceedings is likely to lead to an acceleration of the proceedings or a reduction of procedural costs (joinder of proceedings under section 187 of the ZPO).

Due to the absence of a genuine collective action, or class action in the strict sense, the Austrian legal practice has developed a mechanism that has been (unofficially) labelled as 'class action Austrian style'. In these cases, the injured parties (mostly consumers) assign their claims to a legal entity that is willing to act as a claimant, typically a trade or consumer association or a special purpose vehicle in the form of a limited liability company or an association (*Verein*), which then brings an ordinary (two party) lawsuit over the assigned claims (theoretically also a natural person could act as the claimant to which the claims of the other potential claimants are assigned). The monetary benefits are redistributed among the class. The Austrian Supreme Court confirmed the legal admissibility of these lawsuits under the condition that all claims are essentially based on the same grounds (see for example OGH, 27 February 2013, Case 6 Ob 224/12b, where the Supreme Court also confirmed the legality of third party funding of such Austrian-style class actions).

10. Key issues

The focus of the Austrian Supreme Court's case law in the area of antitrust damages so far was on the issues of jurisdiction, limitation, the requirements of a sufficiently substantiated claim, burden of proof, passing-on and the standing of indirect purchasers (decisions of lower courts in civil matters are usually not publicly available). As regards limitation, the Supreme Court took a very claimant-friendly position already before the implementation of the Directive.

The Austrian Supreme Court also dealt with the question of umbrella pricing effects and asked for a preliminary ruling of the CJEU on this point which has become relevant for antitrust damage claims across the European Union (CJEU, Case C-557/12, *Kone et al.*).

There is yet no case law of the Supreme Court on the new rules on disclosure of evidence which implement the Directive. As disclosure of evidence is a novelty to the Austrian system of civil procedure, guidance by the Supreme Court and appellate courts will be needed in order to establish a uniform practice in the application of these rules by the courts of first instance.

Methodology for the selection of cases

The following case selection includes the most relevant decisions of the Austrian Supreme Court in the field of antitrust damages. It does not attempt to be exhaustive. Decisions of lower courts in civil matters are usually not publicly available.

Country: Austria	
Case Name and Number: Case 7 Ob 127/10t; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20100714_OGH0002_0070OB00127_10T0000_000	
Date of judgment: 14 July 2010	
Economic activity (NACE Code): M.74.90—Other professional, scientific and technical activities n.e.c.	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Various lawyers, acting in their capacity as private owners of elevators	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. The claims were withdrawn.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Substantiation of damage claim	**Amount of damages initially requested:** EUR 16,367
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** No. Claims were withdrawn.
Individual or collective claims? Collective (the claimant was assigned with the claim of another customer of the cartelists).	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to decision by Supreme Cartel Court in OGH 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

A price-fixing cartel was agreed in Austria for the markets of new elevator-systems and maintenance during the years of 1992 and 2005. Due to these price-fixing agreements, damages occurred whenever an elevator-system was sold or maintenance work was carried out. The damages differed over the years due to different percentage-point price increases. In this case, one customer of the cartelists assigned his claim to another customer who then jointly filed the damage claims. The claims were based on different acquisitions of elevators for different construction projects.

Brief summary of judgment

The Austrian Supreme Court had to evaluate whether the two claims can be jointly filed pursuant to Section 55 (1) Court Jurisdictional Act. The court concluded that the fact that the damage claims arise out of the same cartel was not sufficient to establish a sufficient factual and legal connection between the claims as required by Section 55 (1) Court Jurisdictional Act.

It held that a permissible joinder requires the claims to be *de facto* or *de jure* connected. A relevant *de facto* connection exists, if the claims can all be derived from the same facts, *i.e.* if the factual submission required for a claim is sufficient to also be able to decide on the other asserted claims without additional submissions being required. For a *de jure* connection to be at stake, the claims must be derived from the same contract or from the same legal norm and have a direct economic connection with one another. However, such a connection does not exist if each of the several claims can take a completely different route (legally or factually); in such a case, each claim is to be assessed separately without a joinder being possible.

Country: Austria	
Case Name and Number: Case 3 Ob 1/12m; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20120515_OGH0002_0030OB00001_12M0000_000	
Date of judgment: 15 May 2012	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: UNIQA	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Final and binding decision of the Supreme Court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Passing-on	**Amount of damages initially requested:** EUR 146,905
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claims was rejected.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

A price-fixing cartel was agreed in Austria for the markets of new elevator-systems and maintenance during the years of 1992 and 2005. Due to these price-fixing agreements, damages occurred whenever an elevator-system was sold or maintenance work was carried out. The damages differed over the years due to different percentage-point price increases.

Brief summary of judgment

In its appeal to the Austrian Supreme Court, the claimant argued that the lower court established insurmountable obstacles to claim damages : first, it found that the substantiation of a damage claim was a matter of individual assessment by the court and therefore did not fall under the scope of review by the Supreme Court (for lack of legal question of general interest). Second, it held found that the burden of proof and the substantiation of the claim were to be separated. Since the lower court held that claims were not sufficiently substantiated and the Austrian Supreme Court did not raise any concern about this conclusion, the appeal was rejected.

Country: Austria	
Case Name and Number: Case 4 Ob 46/12m; "Bankomatvertrag"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20120802_OGH0002_0040OB00046_12M0000_000	
Date of judgment: 2 August 2012	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: HOBEX	**Was pass on raised (yes/no)?** Yes
Defendants: Various Austrian Banks	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Settled.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Admissibility of findings of foregoing cartel proceedings, if defendant was not a party to it	**Amount of damages initially requested:** EUR 8,498,174
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** The case has been settled.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 4/07	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In a price-fixing cartel, the operator of a credit card system and the banks (being shareholders of the operator) issuing the credit cards agreed (i) on high and anti-competitive interchange fees and (ii) that the banks must charge the same interchange fees to the operator's competitors. One of those competitors filed claims against the banks for

damages through (i) increased interchange fees and (ii) loss of prospective profits resulting from the cartel and abuse of market dominant position. The banks were not party to the cartel proceedings against the operator.

Brief summary of judgment

The Austrian Supreme Court found that while the defendants were not parties to the foregoing cartel proceedings against the operator, the findings of the cartel proceedings were still to be taken into account in the follow-on damages proceedings. Also, the court ruled that while the claimant was within the scope of potentially damaged persons, it had to be assessed whether the damage was caused to the claimant or to the claimant's principal and, in the latter case, whether the damage was passed on to the claimant. The court ruled that even if the claimant was not the direct purchaser, the damage was in any event passed on to it by claimant's principal on the basis of their contractual relationship which was already established when the damage occurred.

Country: Austria	
Case Name and Number: Case 5 Ob 39/11p; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20120214_OGH0002_0050OB00039_11P0000_000	
Date of judgment: 14 August 2012	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court (Cartel Court of Appeals)	**Was disclosure process involved?** No
Claimants: Salzburger Landeskliniken	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Interim ruling; case again pending before first instance court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Place of jurisdiction	**Amount of damages initially requested:** EUR 977,165
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Collective (the claimants both sued in their own interest, as well as in the interest of other parties which transferred their claims to the claimants).	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in Case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

This case was all about jurisdiction because the claimant's objective was to sue all defendants in front of the same court. The reasoning behind this objective was that according to the claimant all cartel members are under joint and several liability and can therefore be sued before the same court.

Brief summary of judgment

First, the Austrian Supreme Court held that due to the fact that cartel members are jointly and severally liable for the harm caused by their joint infringement of competition law, all cartel members may be jointly sued, pursuant to Section 93 (1) Court Jurisdictional Act and Section 11 (1) Code of Civil Procedure, in the court for the place where any of them has its seat. Second, as regards international jurisdiction, the court found that, pursuant to Art 6 (1) of the Brussels-I Regulation (now Art 8 (1) of the Brussels-I recast Regulation), the German parent company of one of the Austrian cartel members can also be sued in the court of the place where its Austrian wholly-owned subsidiary had its seat.

Country: Austria	
Case Name and Number: Case 7 Ob 48/12b; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20121017_OGH0002_0070OB00048_12B0000_000	
Date of judgment: 17 October 2012	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court (Cartel Court of Appeals)	**Was disclosure process involved?** Yes (action by stages / Stufenklage)
Claimants: ÖBB (Austrian public rail operator)	**Was pass on raised (yes/no)?** Yes
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Interim ruling; case again pending before first instance court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Passing-on of overcharges; standing of indirect purchasers	**Amount of damages initially requested:** EUR 8,134,344
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

ÖBB was allegedly affected by the elevator cartel because of damages incurred due to the higher prices for elevator systems in its railway stations. However, ÖBB did not purchase them directly; rather, Stadt Wien purchased them and sold them to ÖBB. Therefore, it was questionable whether ÖBB could claim damages directly from the cartel participants.

Brief summary of judgment

The Austrian Supreme Court found that in general only parties that were directly damaged by anti-competitive prices could claim damages; parties that were only damaged indirectly were entitled to claim damages only if the damage of the former was economically incurred by the latter (*Drittschadensliquidation; Schadensüberwälzung*). The claimant argued that this was the case here. The entire cartel overcharge was allegedly passed on to the claimant. The Austrian Supreme Court admitted this argument and held that the action therefore was not inconclusive. The action by stages was another relevant aspect in the case because the claimant required documents of the defendants in order to further elaborate on the passing-on effects and to substantiate the claims for damages.

Country: Austria	
Case Name and Number: Case 4 Ob 168/12b; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130212_OGH0002_0040OB00168_12B0000_000	
Date of judgment: 12 February 2013	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Former owner of a competitor	**Was pass on raised (yes/no)?** Yes
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Final and binding decision of the Supreme Court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Loss of prospective profits of a competitor of the cartel participants	**Amount of damages initially requested:** EUR 23 million
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claim was rejected.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In this case, a claimant filed a motion to claim damages because the limited liability company—which he was the only shareholder of the closed business. He argued that since his company (which was a competitor of the cartel participants) suffered from competitive disadvantages, a loss of prospective profits amounting up to EUR 23 million was incurred.

Brief summary of judgment

The Austrian Supreme Court held that it is the claimant's responsibility to specify and substantiate claims properly; it is not enough to claim a certain amount of prospective profits that were allegedly lost due to antitrust law violations without specifying them precisely. Furthermore, the claimant of these claims could only be the limited liability company because, if at all, it was the company that had suffered from competitive disadvantages. However, the company had been removed from the company register, and therefore, had no standing. Moreover, the claim was not subrogated to the claimant from the limited liability company. As a result, the appeal was rejected.

Country: Austria	
Case Name and Number: Case 6 Ob 186/12i; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20131216_OGH0002_0060OB00186_12I0000_000	
Date of judgment: 16 December 2013	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Stadt Wien	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Interim ruling; case still pending before first instance court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Limitation of action	**Amount of damages initially requested:** EUR 76,027,935
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Collective (the claimants both sued in their own interest, as well as in the interest of other parties which transferred their claims to the claimants).	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

This judgment deals with the question of the limitation of an action for damages. The specific provision on limitation in the Cartel Act (Section 37a (4) KartG) was not applicable at the time of the proceedings. Hence, ordinary civil law and its rules on limitation had to be applied. The defendants argued that damages could not be claimed due to limitation.

Brief summary of judgment

Under Austrian civil law, Section 1489 ABGB governs the limitation of damage claims. It states that the limitation period begins to run when the damaged party becomes aware of the identity of the infringer and the damage. With regards to follow-on cartel damages, the Austrian Supreme Court referred to another judgment (case 4 Ob 46/12m) in which it had found that the limitation period started to run at the time of the publication of the final decision on the violation of antitrust law issued by the Austrian Supreme Court. The court held that media coverage on the cartel did not provide sufficient knowledge in order to trigger the beginning of the limitation period.

Country: Austria	
Case Name and Number: Case 6 Ob 47/14a; "Aufzugskartell"	
https://rdb.manz.at/document/ris.just.JJT_20140515_OGH0002_0060OB00047_14A0000_000	
Date of judgment: 15 May 2014	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Stadt Wien	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Interim ruling; case again pending before first instance court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Action for declaratory ruling	**Amount of damages initially requested:** EUR 76,027,935
Direct or indirect claims: Direct	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Collective (the claimants both sued in their own interest, as well as in the interest of other parties which transferred their claims to the claimants).	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In this case, the claimants brought an action for a declaratory judgment. The appeal court was of the view that there was no jurisprudence of the Austrian Supreme Court as to

whether or not damages that cannot be quantified yet can be the subject matter of an action for a declaratory judgment in order to avoid that claims become time-barred.

Brief summary of judgment

The Austrian Supreme Court referred to a judgment of the Higher Regional Court of Vienna (in case 16 Ok 5/08) in which it was found that there is no sufficient legal interest in bringing an action for a declaratory judgment if claims are already due. In this case, the Austrian Supreme Court had held that an action for a declaratory judgment is not admissible if an action for payment can already be brought (even if it is difficult to quantify the damage). This jurisprudence was also applied to the facts of the case at hand.

Country: Austria	
Case Name and Number: Case 8 Ob 81/13i; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20140526_OGH0002_0080OB00081_13I0000_000	
Date of judgment: 26 May 2014	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Vienna Insurance Group	**Was pass on raised (yes/no)?** Yes
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. The proceedings have been discontinued.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Substantiation of damage claims • Admissibility of the appeal	**Amount of damages initially requested:** EUR 928,493
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** Case has been settled.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

This case is a damages case following the Austrian elevator & escalator cartel decision. In this case passing-on defence issues were raised.

Brief summary of judgment

The claimant argued that violations of cartel law resulted in higher prices paid for elevators and maintenance work between 1985 and 2005. The defendant, on the other hand, argued that not only the substantiation of the claims was inaccurate but also that the alleged damages were passed-on to the tenants of the claimant. The Austrian Supreme Court held that the appeal was not admissible. It found that the separate claims could not be summed up for lack of legal or factual context and that the claims did therefore not reach the value threshold for a ruling of the Supreme Court. Moreover, the court made clear that burden of proof and conclusiveness of the action are two separate concepts that need to be distinguished. Regarding the passing-on defence issues, the court held that claimants that were damaged only indirectly shall have a legal right to sue: If there has been a contractual obligation between the directly and indirectly damaged party and damages were passed on to the latter, this party could claim damages from the cartel participants.

Country: Austria	
Case Name and Number: Case Eg: Case 7 Ob 121/14s; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20141029_OGH0002_0070OB00121_14S0000_000	
Date of judgment: 29 October 2014	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: ÖBB	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Interim ruling; case again pending before first instance court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Umbrella claims • Preliminary ruling	**Amount of damages initially requested:** EUR 8,134,344
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** N/A
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

This case related to umbrella pricing claims that allegedly arose as a consequence of the elevator cartel; the claimant argued that he had incurred damages due to the fact that all market participants in the elevator industry that had not been part of the cartel had increased prices as well.

Brief summary of judgment

The Austrian Supreme Court asked the CJEU whether the claimants can sue for damages against participants of the cartel even if the claimant acquired the goods and services from a non-cartel participant who allegedly increased its own price due to the increased market price. The CJEU held that a claimant that has been damaged by such umbrella pricing effects can generally claim damages from the cartel participants if it is proven that the umbrella pricing effects can result from the cartel on the specific market (Case C-557/12, 5 June 2014, *Kone AG*). In other words, it must be clear from the circumstances that umbrella pricing effects can be a likely consequence of the cartel. Therefore, the Austrian Supreme Court held that the case needs further elaboration, especially on the scope of the umbrella pricing effects, and referred the case back to the court of first instance.

Country: Austria	
Case Name and Number: Case 4 Ob 95/15x; "Aufzugskartell"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20150616_OGH0002_0040OB00095_15X0000_000	
Date of judgment: 16 June 2015	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Former owner of a competitor	**Was pass on raised (yes/no)?** No
Defendants: Elevator companies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Final and binding decision of the Supreme Court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Substantiation of damage claims by a competitor (who did not participate in the cartel) • Loss of prospective profits	**Amount of damages initially requested:** EUR 26,137,290
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claim was rejected.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to Supreme Cartel Court decision in case 16 Ok 8/08	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

A customer allocation system was agreed in Austria on the markets for new elevator-systems and maintenance during the years 2002—2005 (fined period). Due to these arrangements, allegedly damages occurred whenever an elevator-system was sold or maintenance work was carried out.

Brief summary of judgment

In this case damages were claimed as "lump sums"; specifically, the claimant argued that due to the cartel (in which he was not involved) he incurred a loss of prospective profits because he was not able to do as much maintenance work as he would have been able to do under normal competition. The Austrian Supreme Court held that these claims were unspecified because damages were not listed properly/conclusively, and sometimes, were contradictory. Therefore, the appeal was rejected.

Country: Austria	
Case Name and Number: Case 4 Ob 120/16z; "LIBOR"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20160830_OGH0002_0040OB00120_16Z0000_000	
Date of judgment: 30 August 2016	
Economic activity (NACE Code): K.64.30—Trusts, funds and similar financial entities	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Private Consumer	**Was pass on raised (yes/no)?** No
Defendants: RBS	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. The claims were withdrawn.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Damage claims due to illegal manipulation of the LIBOR place of jurisdiction	**Amount of damages initially requested:** N/A
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claims were withdrawn.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to (EC) case AT. 39924 Swiss Franc Interest Rate Derivatives	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In 2015, XY filed an action against RBS seeking damages incurred due to higher interest payments because of an unlawful manipulation of the LIBOR in CHF during May 2008 and July 2009. Due to these manipulations, the claimant supposedly suffered losses because of higher interest payments resulting from interest rate adjustments. The defendant, seated

outside Austria, objected to the jurisdiction of the court and argued that the claimant, which was seated in Austria, is only affected indirectly by the defendant's violation of antitrust law.

Brief summary of judgment

The judgment mainly dealt with the question of jurisdiction according to the Brussels I Regulation. Referring to case law of the CJEU (*i.e.* C-352/13, CDC Hydrogen Peroxide SA and C-189/08 Zuid-Chemie) the Austrian Supreme Court held that claimants suing for damages incurred by a violation of antitrust law could sue either in the courts of the place where the cartel was actually established or in the courts of the place where the claimant is domiciled. The Supreme Court found that the same reasoning is applicable to claimants who are only affected indirectly by the violation of antitrust law.

Country: Austria	
Case Name and Number: Case 4 Ob 131/16t; "LIBOR"	
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20160830_OGH0002_0040OB00131_16T0000_000	
Date of judgment: 30 August 2016	
Economic activity (NACE Code): K.64.30—Trusts, funds and similar financial entities	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Private Consumer	**Was pass on raised (yes/no)?** No
Defendants: RBS	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. The claims were withdrawn.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Damage claims due to illegal manipulation of the LIBOR place of jurisdiction	**Amount of damages initially requested:** N/A
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claims were withdrawn.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to (EC) case AT. 39924 Swiss Franc Interest Rate Derivatives	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In 2016, XY filed its action against RBS seeking damages incurred due to higher interest payments because of an unlawful manipulation of the LIBOR in CHF in May 2008 and July 2009. Due to these manipulations, the claimant supposedly suffered losses because of higher interest payments resulting from interest rate adjustments. The defendant objected

to the jurisdiction of the court and argued that the claimant is only affected indirectly by the defendant's violation of antitrust law.

Brief summary of judgment

The Austrian Supreme Court reiterated the main arguments of its judgment in case 4 Ob 120/16z (listed above). The judgment mainly dealt with the question of jurisdiction according to the Brussels I-Regulation. The Austrian Supreme Court held that according to case law of the CJEU, claimants of cartel damages who are directly affected by the cartel are given the possibility to sue either in the courts of the place where the cartel was actually established or in the courts of the place where the claimant is domiciled. The Austrian Supreme Court held that this conclusion shall also be applicable to claimants who are affected indirectly only.

Country: Austria	
Case Name and Number: Case 1 Ob 104/16z; ""LIBOR""	
https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160927_OGH0002_0010OB00104_16Z0000_000/JJT_20160927_OGH0002_0010OB00104_16Z0000_000.pdf	
Date of judgment: 27 September 2016	
Economic activity (NACE Code): K.64.30—Trusts, funds and similar financial entities	
Court: Austrian Supreme Court	**Was disclosure process involved?** No
Claimants: Private Consumer	**Was pass on raised (yes/no)?** No
Defendants: RBS	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Final and binding decision of the Supreme Court.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Key Legal issues: • Place of jurisdiction	**Amount of damages initially requested:** N/A
Direct or indirect claims: Indirect	**Is the dispute likely to be settled privately?** No. Claims was rejected.
Individual or collective claims? Individual	**Method of calculation of damages:** N/A
Follow-on (EC or NCA?) or stand-alone? Follow-on to (EC) case AT. 39924 Swiss Franc Interest Rate Derivatives	**Name and contact details of lawyer who has drafted summary:** Stefanie Stegbauer, Counsel, Schoenherr Rechtsanwälte, s.stegbauer@schoenherr.eu

Brief summary of facts

In 2016, XY filed its action against RBS seeking damages incurred due to higher interest payments because of an unlawful manipulation of the LIBOR. The interest rate of the claimant's credit was fixed to the LIBOR. Due to these manipulations, the claimant supposedly suffered losses because of higher interest payments resulting from interest rate adjustments. The defendant objected to the jurisdiction of the court as it had its seat in the UK and its Austrian branch had not been involved in the illicit behaviour.

Brief summary of judgment

The Austrian Supreme Court reiterated the main arguments of its judgments in cases 4 Ob 120/16z and 4 Ob 131/16t (listed above). The judgment only dealt with the question of jurisdiction according to the Brussels I-Regulation. The Austrian Supreme Court held that according to case law of the CJEU, claimants of cartel damages who are directly affected by the cartel are given the possibility to sue either in the courts of the place where the cartel was actually established or in the courts of the place where the claimant is domiciled. The Austrian Supreme Court held that this conclusion shall also be applicable to claimants who are affected indirectly only. Thus, the international jurisdiction of the Austrian courts was confirmed. However, the claim was rejected since the claimant chose the wrong domestic court(s), *i.e.* courts which were not affiliated to the place where the claimant was domiciled.

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In Belgium, private enforcement of competition law has been underdeveloped for a long time. The first relatively modern procedure was set out in the Law on Trade Practices of 14 July 1991[1] (Article 25). This procedure enabled claimants to obtain a cease-and-desist order against traders for acts of unfair competition. However, there was no specific legal basis for bringing actions for damages for breach of competition law. Damages claims were based on general provisions such as those for contractual claims for damages (Article 1142 and following of the Belgian Civil Code, "**BCC**") and claims on the basis of tort (Article 1382 BCC). Since the adoption of the Act on Actions for Damages for infringements of the competition law provisions of 6 June 2017 ("**Belgian Damages Act**"),[2] implementing Directive 2014/104/EU ("**Damages Directive**"), private enforcement of Belgian—and European—competition law before the Belgian national courts have become increasingly popular. The Belgian Damages Act entered into force on 22 June 2017 and introduced important changes to the Belgian system intended to encourage private enforcement actions. The Belgian Damages Act also contains a few rules that differ from the Damages Directive: (i) the voluntary compensation of damage by a cartel participant can be taken into account by the Belgian Competition Authority ("**BCA**") when calculating the cartel fine, and (ii) the definition of a cartel which also covers hub-and-spoke cartels.

1. Jurisdiction

Under the Belgian competition law system, infringements of national or European competition law are handled by the BCA, which is the relevant authority for public enforcement of competition law, whereas the national courts are in charge of private enforcement.

There are no specialised competition law courts. Accordingly, the courts of first instance or the commercial courts have jurisdiction, in accordance with the general rules of civil procedure. This does not apply to class actions, for which the Courts of Brussels have exclusive jurisdiction.[3]

1 "Wet betreffende de handelspraktijken, de voorlichting en bescherming van de consument/Loi sur les pratiques du commerce et sur l'information et la protection du consommateur".

2 The Act was published in the Belgian Official Gazette on 12 June 2017, p. 63596.

3 Article XVII.35 of the Belgian Code of Economic Law (CEL).

2. Relevant legislation and legal grounds

In Belgium, natural or legal persons which have suffered harm as a result of a violation of competition law can claim damages before the national courts, on the basis of the general regime concerning contractual liability (Articles 1142 *et seq* BCC) and extra contractual liability (Articles 1382 *et seq* BCC).

To be valid, a claim for damages must be based both on an infringement of Belgian or European competition law (which constitutes irrefutable evidence of fault) as well as on the relevant tort law provisions. Under tort law, a person has to compensate for the damage caused by its fault (implying a tortious action) (Article 1382 BCC) or by its negligence (Article 1383 BCC). To obtain compensation, the claimant must demonstrate the existence of:

- a fault;
- a damage; and
- a causal link between the fault and the damage.

Fault is quite easy to demonstrate. Fault or negligence can lie (i) in the infringement of any statutory rule or (ii) in not complying with a duty of care. An infringement of Belgian or European competition law constitutes accordingly irrefutable evidence of fault. However, it is in principle not necessary that the BCA (or the European Commission) has previously adopted a decision establishing an infringement for the claim to be admitted. This is different for class actions, which can only be follow-on actions.

Prior to the adoption of the Belgian Damages Act, victims of competition law infringements could also bring private damage claims as a tort claim on the basis of Article 1382 BCC, *i.e.* the general provisions of Belgian law on tort liability. With the entry into force of the Belgian Damages Act a number of new procedural and substantive rules regarding actions for damages for competition law breaches were introduced.[4] The main modifications include:

- a (rebuttable) presumption that cartels cause harm;
- the irrefutable establishment of infringement if such was held in a final decision of the BCA;
- the *prima facie* establishment of infringement if such was held in a final decision of other NCAs;
- new disclosure rules to facilitate access to evidence;
- the availability of passing-on defence;
- a rebuttable presumption of the passing-on of overcharges for indirect purchasers;
- the codification of joint and several liability and specific contribution rules; and
- a broader scope of the class actions regime.

4 Title 3 "The action for damages for infringements of competition law" of Book XVII of the CEL

These rules apply as a *lex specialis* to private enforcement actions. In a subsidiary order, the ordinary procedural rules on tort are applicable (Article XVII.71§2 Code of Economic Law: "**CEL**").

Both direct and indirect customers are entitled to bring private enforcement actions.

Temporal application

The substantive rules of the Belgian Damages Act (i.e regarding the presumption of harm and liability) apply to competition law infringements committed after 22 June 2017. The procedural rules (*i.e.* regarding the evidence and effect of decisions) apply to all actions introduced after 26 December 2014, even when they concern competition law infringements that occurred before 22 June 2017.

3. What types of anti-competitive conduct are damages actions available for?

Pursuant to Article I.22 CEL, the specific rules concerning private actions laid down in the Belgian Damages Act are applicable to private damages claims for infringements of the European antitrust provisions (*i.e.* articles 101 or 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and their equivalent under Belgian law (namely, Articles IV.1 or IV.2 CEL). Nevertheless, taking into account the limited scope of application of the *lex specialis*, claimants can still bring damages actions for competition law infringements under the common provisions of Belgian law as well. In that case the regular procedural and substantial (tort) rules will apply.

4. What forms of relief may a private claimant seek?

According to the Belgian Damages Act, the purpose of damage actions is for the victims to obtain compensation. Exemplary or punitive damages are, thus, not available in Belgium and cannot be awarded by Belgian courts.

In accordance with Belgian tort rules, compensatory damages cover the actual loss, including lost profits, plus interest. In other words, the victims must be restored into the situation in which they were before the infringement occurred or into the situation that would have existed without the infringement.

In principle, except for the (rebuttable) presumption of harm applicable in cartel cases,[5] the extent of the loss has to be fully demonstrated by the applicant. This requires the application of theories of harm under competition law, such as the calculation of the "but-for prices". Article 962 of the Belgian Judicial Code allows the courts to appoint experts. The courts can do so *ex officio* or with the consent of the parties. The parties can also produce their own expert reports. It is common that experts are used in complex damage litigations. Moreover, the courts can ask the BCA for assistance in the quantification of the damages.[6] It still remains to be seen how keen the BCA will be to involve itself in disputes between private parties.

5 *Supra*.

6 Article IV.77 CEL *juncto* Article 962 Judicial Code.

The fact that the infringers may have paid a fine in the context of public enforcement is not relevant to determine the damages. However, according to Article IV.70§1 CEL, introduced by the Belgian Damages Act, it is possible for the BCA to take into account financial compensation paid by an infringer in the context of a consensual settlement of private enforcement actions, as a mitigating circumstance in the calculation of the fine. In order to avoid abuse of this rule, such voluntary compensation should take place prior to the BCA's decision to impose a fine.

With respect to interests, Article XVII.72 CEL specifically entitles claimants to interest on the damages awarded in court. Compensatory interest accrues from the date the damages were incurred until the moment of final payment. As a general rule, courts apply the legal interest rate which is determined by governmental decree and published in the Belgian Official Gazette.[7]

Apart from damages actions, claimants can also seek the following remedies:

- Interim measures: a claimant may request the competent court to grant interim measures in summary proceedings when there is a risk of serious and irreparable damage. Such measure is temporary and is not binding on the court that will hear the case on the merits. The burden of proof is on the claimant, who must demonstrate that the requested interim measures are necessary, that he holds a *prima facie* claim and that the relief is appropriate in the situation at hand (articles 19§3 and 584 of the Judicial Code).

- Actions for a cease-and-desist order (Articles XVII.1 to XVII.13 and XVII.27 CEL). These rules deal with a specific procedure to obtain cease-and-desist orders from the president of the commercial court that has jurisdiction in cases relating to unfair trade practices. Under Belgian law, competition law infringements are considered unfair trade practices in the sense of Article VI.104 CEL.

- Nullity of contractual clauses (Article 1108 BCC). Under this provision, parties do no longer have to comply with the invalidated clauses or contract and will be entitled to damages from the other party.

- Declaratory judgment (Article 18 Belgian Judicial Code). This is a declaration that a given practice does not constitute a competition law infringement. The alleged infringer must establish that its rights are seriously jeopardised and that a declaratory judgment would eliminate the threat.

The general Belgian tort law rules provide that all persons that contributed to the wrongdoing and the harm caused by that wrongdoing, are jointly and severally liable. Article XVII.86§1 CEL as inserted by the Belgian Damages Act, reiterates this view. According to this provision, companies that have infringed competition law shall be jointly and severally liable for the harm caused, although two types of parties cannot be held jointly and severally liable:

- (Effective) immunity recipients (Article XVII.86§3 CEL).

- Small—and medium-sized enterprises (SMEs), which only have to pay damages for the harm caused to their own (direct or indirect) customers.

7 In 2019 and 2018 the legal interest date was 2%.

- SMEs must satisfy a number of (cumulative) conditions:
  - The SME had a market share below 5M(at any time during the infringement).
  - The application of the normal rules of joint and several liability would permanently jeopardise the economic viability of the SME and cause its assets to lose all their value.
  - The SME was not a leader or coercer of the anti-competitive activity and it is not a persistent offender (Article XVII.86§2 CEL).

Still, if a claimant is unable to obtain full compensation from the other infringers (for example, due to insolvency), the immunity recipient or SME will still be fully liable in accordance with Article XVII.86§2 and Article XVII.86§3 CEL.

5. Passing-on defence

The Belgian Damages Act introduced the passing-on defence in Articles XVII.83 et seq ELC. This principle accepts the defendant's right to demonstrate that the claimant has reduced its actual loss, by passing-on (in whole or in part) the overcharge[8] to subsequent clients. The burden of proving that the overcharge was passed on, will be on the defendant that invokes the defence. Article XVII.84 CEL clarifies that the passing-on defence can obviously not be invoked against end customer. In addition, the passing-on defence is not available in the context of class actions.

The Damages Act also introduces a rebuttable presumption that suppliers pass on overcharges—at least partially. Indirect purchasers can rely on this presumption if three conditions are met:

- The defendant infringed competition law.
- The infringement resulted in an overcharge for the direct purchaser.
- 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.

As this presumption is rebuttable, the burden of proof shifts back to the indirect purchaser if the defendant brings credible evidence that the overcharge was not or was only partially passed on to the indirect purchaser (Article XVII.84 CEL).

8 The overcharge is defined as the difference between the price actually paid and the price which would otherwise have been paid in the absence of the infringement of competition law (Article I.22, § 17, CEL).

6. Pre-trial discovery and disclosure, treatment of confidential information

Pre-trial discovery

Belgian procedural law does not provide for a specific discovery procedure for competition law cases. Hence, there is no pre-trial discovery process and the general rules of the judicial code apply.

Evidence held by other parties or third parties

Parties may request Belgian courts to order the production of documents (Articles 877 to 882-bis of the Judicial Code) at any stage of the proceedings. Under certain conditions, the courts may order a party to produce a document. To this end, the claimant must demonstrate:

- that a party to the proceedings or a third party is in possession of a document that could prove a fact that is decisive for the dispute or for the final decision.
- that there are serious, precise and concurring reasons to suspect that the third party in question has the document.

However, even if these conditions are fulfilled, the courts still have discretion to decide whether or not the document has to be produced. In this context, they have to find a balance between various factors, including the relevance of the evidence, the legality of a refusal based on confidentiality reasons and the arguments in favour of delivering an "order to produce evidence". In practice, courts apply the conditions to produce documents in a strict way in order to protect business confidentiality.

The Belgian Damages Act also offers the possibility for a court to order document production and specifies under which circumstances a private party could obtain access to evidence from another party. The requesting party must describe the (categories of) documents as precisely and narrowly as possible and the court must, then, balance the legitimate interests of the parties (including, for instance, the right to obtain compensation, the costs of disclosure or the existence of commercially sensitive information in the requested documents) (Article XVII.74 CEL).

Evidence held by the BCA

Finally, the Belgian Damages Act introduced the possibility to request and obtain evidence from the file of the BCA. This possibility is subject to two main conditions. First, courts must confirm that no (third) party is reasonably able to provide the requested evidence (Article XVII.77§2, juncto IV.45§2, Article IV.46 CEL) and secondly, that the request satisfies the proportionality principle. Regarding the latter, they must take into account:

- whether the disclosure request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to the competition authority or held in the file thereof.
- whether the disclosure request is related to an action for damages.

- the need to guarantee the effectiveness of public competition law enforcement (Article XVII.78§1 CEL).

Confidentiality of the evidence in the BCA's file

Certain categories of evidence from the BCA's file enjoy additional protection against discovery.

1) Belgian Courts may only order the disclosure of so-called "grey-list" information, after the BCA has issued a decision or alternatively, has terminated the proceedings. "Grey-list information" includes:

   - information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
   - information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
   - settlement submissions that have been withdrawn. (Article XVII.79§1 CEL, Belgian courts may only order the disclosure of this information). Such submissions may contain information that is useful for third parties that want to substantiate a claim for damages.

2) Belgian courts cannot order the disclosure of so-called "black-list information", namely:

   - leniency corporate statements; and
   - settlement submissions (Article XVII.79§2).

Evidence covered by the blacklist, obtained only through access to the file of the BCA, cannot be included in the file of an action for damages. Following a similar reasoning, evidence included in the grey list can only be used from the moment the BCA has closed its proceedings. If these rules are violated and such evidence is submitted, the documentation in question will be considered inadmissible (Article XVII.80§1 and Article XVII.80§2 CEL).

Evidence which is not covered by the black or the grey list but has been obtained solely through access to the file of a competition authority, can only be validly submitted in private damage claims by the person who succeeded in obtaining the evidence (Article XVII.80§3 CEL).

The disclosure of other categories of evidence is in principle allowed, although the national judge retains discretion and determines on a case-by-case basis whether a certain document has to be submitted.

Finally, from a more general perspective, under the Belgian Damages Act, courts are required to take appropriate measures to ensure the protection of confidential information (for instance by removing commercially sensitive passages in documents, restricting the persons allowed to get access to information and publishing summarised/non-confidential versions of decisions).

7. Limitation Periods

In Belgium, Articles 2262 *et seq* BCC set out the principles concerning limitation periods which apply before the national courts.

The BCC provides that claims in tort are time-barred:

- Five years after the day on which the claimant became (or should reasonably have become) aware of the damage and the identity of the person responsible for this damage (*i.e.* the relative limitation period).
- Twenty years after the date on which the fact, action or negligence that caused the damage occurred (*i.e.* the absolute limitation period).

Article XVII.90§1 CEL refers to the common limitation periods provided in the BCC and specifies that the relative limitation period of five years starts to run after the competition law violation has ceased and the claimant is aware (or should reasonably have been aware) of the infringement, the harm that was suffered and the identity of the party which caused the damage.

The limitation period is interrupted if the competition authority starts investigations or proceedings concerning the infringement in question. The interruption ends when the authority adopts a final infringement decision or terminates the investigations or proceedings in any other way the BCA (Article XVII.90§2 CEL).

The limitation period is suspended during any proceedings aiming at the amicable resolutions of disputes (excluding arbitration). This suspension applies to parties involved in the amicable dispute resolution. The suspension is limited to a maximum two-year period since the beginning of the proceedings (Article XVII.91 CEL).

8. Appeal

The judgment s of the court of first instance and of the commercial court in private enforcement actions can be appealed before the relevant Court of Appeal, on both factual and legal grounds, according to the general principles of procedural law. As a general principle, judgment s rendered in first instance are immediately enforceable.

Decisions of the Court of Appeal can be appealed on questions of law and formal requirements before the Supreme Court.

9. Class actions and collective representation

In Belgium, there are three types of collective proceedings:

- actions for collective redress (class actions);
- actions of collective interest; and
- collective (related) actions.

Actions for collective redress (class actions)

The possibility to bring an action for collective redress for a number of violations of Belgian and EU rules was introduced in March 2014 and entered into force on 1 September 2014. Actions for collective redress are only admitted for alleged infringements by a company of its contractual obligations or of specifically enumerated Belgian and European provisions (Article XVII.36§1 and Article XVII.37 CEL). The common element of these provisions is that they concern consumer protection. The list of contractual obligations includes provisions relating to *inter alia* credit services, (retail) market practices, product safety and intellectual property.

On 6 June 2017, the Belgian legislature extended the scope of application of actions for collective redress in order to cover violations of competition law (Article XVII.36.1° CEL juncto Article XVII.37.1° (a) and 33° CEL). On the basis of these provision, groups of consumers (and since 1 June 2018 also groups of SMEs) represented by non-profit organisations or public bodies, are entitled to bring class actions. In order to exercise this right, consumer associations and public interest groups have to comply with all legal conditions to act as a group representative (Article XVII.39 CEL). A group representative can be:

- an association for the defence of consumer interests that has legal personality and is represented on the Consumer Council; or
- an association of at least three years' standing which is approved by the Minister for the Economy and is not permanently operated for the purpose of financial gain; or
- the Consumer Mediation Service where it (the Mediation Service) is seeking to negotiate a collective redress agreement with the defendant businesses.

The group representative bringing the action must specify in the request for collective redress its choice for an opt-in or opt-out system and the reasons for this choice, within two months from the submission of the request (Section 1, Article XVII.42 CEL). As a general rule, the courts take a decision on the admissibility of the action within two months from its submission and its decision will indicate whether the applicable system will be "opt-in" or "opt-out", as well as the period within which consumers must exercise their option rights (from thirty days to three months) (Section 2, Article XVII.43 CEL). However, opt-in systems are compulsory for:

- consumers who have no habitual residence in Belgium (Section 2, Article XVII.48 CEL); and
- actions for physical or moral collective damage (Section 2, Article XVII.43 CEL).

When an opt-out system has been admitted, claimants who have not exercised their right to opt-out can still opt-out of a settlement if they can demonstrate that they were not reasonably aware of the court's decision on the admissibility of the collective redress action as brought by the group representative (Section 4, Article XVII.49 CEL).

Actions for collective redress are generally regulated by the same provisions of Book XVII, Title 3 CEL, as individual damage actions. There are, however, two exceptions:

- Defendants cannot invoke the passing-on defence.

- The usual rule that the court can suspend the proceedings for a period of two years in case the parties engage in consensual dispute resolution, is not applicable. (Article XVII.70 CEL juncto Articles XVII.83 and XVII.89 CEL).

Actions of collective interest

On the basis of specific legislation, an organisation or a group of people, may seek injunctive relief against practices that harm the general interests of consumers or of the members of such organisation. While these organisations cannot claim damages for their members, they may seek compensation for their own damage to the extent that their own personal interests were harmed.

Collective (related) actions

If different private enforcement actions are started by different claimants but concerning a comparable body of facts, the Belgian courts can join such individual claims in order to save resources. In other words, the related actions are handled by the court jointly, although formally they remain individual actions (Articles 30 and 701 of the Judicial Code).

Methodology for the selection of cases

In Belgium, the decisions and case law of the national courts are only published in legal journals. In addition, only selected cases are published. Therefore, there is a general lack of information as regards the use of damages claims in court, the amounts claimed, and main obstacles for a successful claims for damages for competition law infringements in Belgium.

The following cases were selected on the basis of a review relevant legal journals.

Country: Belgium	
Case Name and Number: Review Toepassingen van Communicatie BVBA / De Schepper J. and Raad voor de Mededinging (15-2-2008)	
Date of judgment: 15 February 2008	
Economic activity (NACE Code): M.71.1.1 — Architectural activities	
Court: Court of Appeal, Gent	**Was pass on raised (yes/no)?** No
Claimants: Claimant (not named)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: De Schepper (association of undertakings)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. Damages of EUR 4,289 were awarded to Claimant
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not mentioned
Key Legal issues: • Mistake as a ground for avoidance of a contract on the basis of a competition law infringement that the consumer was unaware of at time of conclusion of the contract	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Not mentioned (although it is mentioned that the calculation was simply made by the judge).
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerrit Oosterhuis, Partner, Houthoff, g.oosterhuis@houthoff.com

Follow-on (EC or NCA?) or stand-alone? Standalone. Interestingly, after this decision, a complaint was filed to the Belgian Competition Authority and after investigation, the association of undertakings was held responsible for the infringement at hand (although it could not be fined due to restrictions in the law at the time for associations of undertakings).	

Brief summary of facts

An association of undertakings (De Schepper) agreed on a certain amount of 'honorary wages' based on a fixed percentage of costs for an architectural project: the deontological norm. Claimant agreed on the 12% fee, as established in the norm, unaware that it infringed competition law. When Defendant claimed payment of the fee, Claimant refused and submitted that the norm was illegal and that therefore the contract could be avoided on the ground of mistake.

Brief summary of judgment

Claimant is entitled to damages, because it was found that this agreement on the deontological norm is an infringement of Article 2(1) Act on the Protection of Economic Competition. The fact that Defendant sent an annex with the deontological standard together with the agreement, even though Claimant expressly rejected the same deontological norm in the contract, pressurised Claimant to believe that this norm entailed an obligation. Claimant was unaware of the illegality of the norm at time of conclusion of the contract, and therefore, the contract can be avoided on the ground of mistake.

Country: Belgium	
Case Name and Number: Europese Commissie/Otis e.a. (A.R. A/08/06816) (24-11-2014)	
Date of judgment: 24 November 2014	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Commercial Court, Brussels	**Was pass on raised (yes/no)?** No
Claimants: European Union (specifically the European Commission)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. The Court refers to the Proposal for the EU Damages Directive, but expressly rejects application thereof, since the Directive was not signed into law at the time of initiation of the proceedings before the Court.
Defendants: Otis, Kone, Schindler, Thyssen Krupp	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Court decided Claimant insufficiently proved its damages and the causal link.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 6,134,451
Key Legal issues: • Substantiation of damages and a causal link	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Not relevant in this case since no damages were awarded.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerrit Oosterhuis, Partner, Houthoff, g.oosterhuis@houthoff.com
Follow-on (EC or NCA?) or stand-alone? Follow—on (EC, Case COMP/E-138.823)	

Brief summary of facts

Four manufacturers of elevators concluded price-fixing agreements in Belgium for new elevator systems and maintenance contracts between 1996 and 2004. The cartelists divided the market by allocating tenders and maintenance contracts. This infringement formed the basis for the claim for damages by the European Commission, that had entered into maintenance contracts for its elevators with the infringing parties.

Brief summary of judgment

The claim for damages was dismissed. Under Belgian law, Claimant must provide proof in order for the Court to establish the wrongful act, the damage incurred, and the causal link between the two. A Commission decision that establishes an infringement of then article 81 TEC is sufficient proof of the wrongful act. The legal test for the existence and extent of damages is that there must be a high degree of probability, to the extent that one does not have to seriously consider the opposite. It is in principle sufficient that there is a condition sine qua non link between the ground for liability and the damages. The Commission's decision relied upon does not confirm a price-increasing effect of the infringement. It merely establishes that the agreements between defendants were aimed at price inflation, but it does not prove that they also succeeded in this goal. Moreover, the 'normal circumstances' also do not prove this, as was confirmed in a study ordered by the Commission, that in cases of bid-rigging, an effect on the price cannot be assumed. The Court thus concluded that insufficient evidence is provided to conclude that damages have been incurred as a result of the mistake.

Country: Belgium	
Case Name and Number: Belgische Staat/liftenproducenten (24-04-2015)	
Date of judgment: 24 April 2015	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Commercial Court, Brussels	**Was pass on raised (yes/no)?** No
Claimants: Belgische Staat/Regie der Gebouwen	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. The Court refers to the Proposal for the EU Damages Directive, but expressly rejects application thereof, since the Directive was not transposed into Belgian law at the time of initiation of the proceedings before the Court.
Defendants: Otis, Kone, Schindler, Thyssen Krupp	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Court decided the claimant insufficiently proved its damages and the causal link.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unclear	**Amount of damages initially requested:** The specific amount of damages was not mentioned but the claimants appointed an independent (and specialised) party (Oxera) to support the claim.
Key Legal issues: • Substantiation of damages and a causal link	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Irrelevant as no damages were awarded.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerrit Oosterhuis, Partner, Houthoff, g.oosterhuis@houthoff.com

Follow-on (EC or NCA?) or stand-alone?	
Follow-on (EC, Case COMP/E-1/38.823)	

Brief summary of facts

Four manufacturers of elevators concluded price-fixing agreements in Belgium for new elevator systems and maintenance contracts between 1996 and 2004. The cartelists divided the market by allocating tenders and maintenance contracts. This infringement formed the basis for the claim for damages by the Belgian State and Flemish Community that had bought elevators and had entered into maintenance contracts for its elevators with the infringing parties.

Brief summary of judgment

It is for the claimant to provide evidence for the fact that they paid an increased price for the products/services. The Commission decision at hand did not establish a price-increasing agreement, but merely a market-sharing agreement. Therefore, it does not prove the wrongful act. The claimant does not provide concrete evidence for the sine qua non link required and the damage. It should have pointed to specific contracts in which it incurred the damages. The Court thus concluded that the claimant had not proven that the agreements with the manufacturers led to damages.

Country: Belgium	
Case Name and Number: Herman Verboven e.a. / Honda Motor Europe Logistics (23-3-2017)	
Date of judgment: 23 March 2017	
Economic activity (NACE Code): G.45—Wholesale and retail trade and repair of motor vehicles and motorcycles	
Court: Commercial Court, Gent	**Was pass on raised (yes/no)?** Yes
Claimants: Herman Verboven, BVBA Occasiemarkt, NV Erx, BVBA Fraussen, NV Delta Motorcycle, NV Motorshop Desmet R	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes
Defendants: Honda Motor Europe Logistics	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. Damages of EUR 20,000 were awarded to each of the six claimants.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The claimants only requested the compensation of their damage. They also requested expert advice in order to calculate the damage they suffered.
Key Legal issues: • Limitation period • Subjective element of a mistake • Passing-on	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Calculation *ex aequo et bono* (this is a method used when the amount of the damages cannot be calculated with precision. In this scenario, the judge may use his discretion to provide a damages amount that is considered "fair".
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerrit Oosterhuis, Partner, Houthoff, g.oosterhuis@houthoff.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA, Decision of the BCA of 31 January 1999, B.S. 13 March 1999. p. 8279-8281)	

Brief summary of facts

The claimants are independent importers of motorcycles of different brands. Honda required importers to obtain a certificate of conformity from Honda for each motorcycle they wanted to import, to ensure that each motorcycle was in conformity with the approved standard type. It only allowed authorised Honda distributors to request a certificate. This system of certification was in place from 1991 until 1996.

Brief summary of judgment

The Belgian Competition Authority found that the Honda entity that issued certificates in Belgium, abused its dominant position by operating its certification system. The claimants filed for follow-on damages. The limitation period does not start to run until there is a final and conclusive decision that establishes a competition infringement. Since an objective wrongfulness was established, the defendant must prove that there is no subjective element but failed to do so. The damages are for example caused by the fact that Honda employed a limitation of two motorcycles per application for a certificate, and by the obligation to subject the motorcycle to a sound test. According to the court, the claimants sufficiently proved that the infringement was the cause of the damages incurred. The damages could not be calculated or estimated and were thus established on grounds of fairness.

BRAZIL

INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

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In Brazil, private antitrust litigation is set forth in Law No. 12,529/2011 (the "**Brazilian Antitrust Law**") but is mainly based on general rules of tort liability provided in Law No. 10,406/2002 (the "**Brazilian Civil Code**"). Private enforcement of antitrust law has historically been limited, but there is a trend of expansion resulting from stronger public prosecution of cartels and broad diffusion of competition policy; new rules and guidance from government agencies and authorities; and bills aiming to introduce specific procedural rules and to promote private antitrust litigation, especially Brazilian Senate's Bill No. 283/2016 ("Bill No. 283/2016", currently Bill No. 11,275/2018).

1. Jurisdiction

The primary authority in charge of enforcing antitrust law in Brazil is the Administrative Council for Economic Defence ("**CADE**"). However, CADE is only in charge of public enforcement and not of private damages actions.

Therefore, victims of anti-competitive practices can seek compensation before civil state courts in the venue of their domicile, according to Article 53, V, of Law No. 13,105/2015 (the "**Brazilian Code of Civil Procedure**").

If the Brazilian Government, state-owned companies, government agencies—such as CADE, foundations, professional activity supervisory boards or even the Federal Public Prosecutor's Office—are parties, the jurisdiction will be of federal courts. In case such entities intervene in the process as interested third-parties, the case records shall also be sent from the state courts to the federal courts.

2. Relevant legislation and legal grounds

Article 47 of the Brazilian Antitrust Law expressly states that parties directly or indirectly harmed by anti-competitive practices, as well as entities with standing to propose collective actions in Brazil, may sue the infringers to obtain damages and the cessation of the practices, regardless of any inquiry or any on-going administrative process. This means that infringers can be sued even if no violation had been previously established by CADE.

Since the Brazilian Antitrust Law offers no other guidance[1] regarding private antitrust litigation, claimants must resort to general rules of tort liability.

The general rule of tort liability in the Brazilian legal system is set forth by Article 927 of the Brazilian Civil Code, which establishes that any party that causes harm to others, by committing a wrongful act, is bound to repair it.

In addition, Article 186 of the Brazilian Civil Code sets forth that any party that violates rights and causes harm to another, by action, voluntary omission, negligence or imprudence, commits a wrongful act. Abuse of rights is also a wrongful act, according to Article 187 of the Brazilian Civil Code. Therefore, the configuration of a wrongful act requires the violation of the legal system and consequent harm to another party.

This means that tort liability—and, therefore, antitrust damages actions in Brazil—is subject to the existence of four essential conditions: (i) wrongful act; (ii) fault or intent[2]; (iii) harm; and (iv) causal link between the wrongdoing and the harm, in accordance with Article 927, which requires wrongful act and harm, and Article 403, which requires causal link, both from the Brazilian Civil Code.

Any victim, whether they are direct or indirect customers, competitors, suppliers, etc., can seek compensation before the Brazilian courts, as long as they can prove they were harmed by the anti-competitive conduct. Parties have the right to employ all legal, as well as morally legitimate, means to prove the facts on which the claim is based, even if they are not specified in the Brazilian Code of Civil Procedure. Usual methods include documental and expert evidence.

As indicated above, it is not necessary that CADE, the Public Prosecutor or criminal courts have started an investigation or issued a decision finding an infringement for the action to be admitted, and therefore "stand-alone actions" are possible. However, to date, most antitrust damages actions in Brazil were based on decisions from CADE convicting companies for participating in cartels, and can be characterised as "follow-on actions".

Private antitrust damages actions will usually not be stayed as a result of ongoing investigations by CADE regarding the same conduct. However, defendants may seek the stay of a claim based on related pending decisions, such as the judicial review of CADE's decision in which the claim is based, in accordance with Article 313, V, "a", of the Brazilian Code of Civil Procedure. Some claims were stayed based on this provision[3].

1 In some cases, CADE may issue non-binding guidance regarding the calculation of damages, to help potential claimants. Recently, CADE issued Resolution No. 21/2018, which regulates the procedure to access documents and information contained in its administrative proceedings. In addition, it establishes that CADE may consider, in the calculation of fines or settlements' values, eventual judicial or extrajudicial reparation of the damages caused.

2 The necessity to prove fault or intent in antitrust damages actions against companies is debatable, since the Brazilian Antitrust Law establishes strict liability for companies that take part in anti-competitive conducts. However, it can also be argued that mentioned strict liability only applies in the public enforcement and that demonstration of guilt or intent is fundamental to civil liability.

3 As an example, see Process No. 0004954-43.2013.8.21.0012 of the Dom Pedrito, Rio Grande do Sul, judicial district, involving the "cartel of medicinal gases".

3. What types of anti-competitive conduct are damages actions available for?

Antitrust damages actions can be brought against any kind of anti-competitive conduct, meaning any act that has the purpose or may produce any of the following effects, whether or not they succeed and regardless of fault: (i) limiting, adulterating, or in any way hindering free competition or free enterprise; (ii) controlling relevant markets of goods or services; (iii) arbitrarily increasing profits; and/or (iv) abusively dominating a market, in accordance with Article 36 of the Brazilian Antitrust Law.

As examples, the following conducts, mentioned in Article 36 of the Brazilian Antitrust Law, may be subject to antitrust damages actions: (i) agreements with competitors regarding prices, quantity of goods, allocation of shares or segments of markets, etc.; (ii) promotion or influence of uniformed or concerted business practices amongst competitors, aiming to standardize the agents' conducts (e.g. imposition of price lists for a given category, or by a class association); (iii) limiting or preventing the access of new entrants to the market; (iv) creating difficulties for the establishment, operation or development of competitors; and others, but mainly those listed in the Brazilian Antitrust Law.

4. What forms of relief may a private claimant seek?

In accordance with Article 47 of the Brazilian Antitrust Law, private claimants may seek: (i) the cessation of the anti-competitive conducts and (ii) compensation for losses and damages suffered.

This means a private claimant may seek pecuniary damages—including overcharges paid and any loss of profits—as well as pain and suffering damages (non-pecuniary losses). In the case of cartels, for instance, non-pecuniary losses could be claimed based on the reduction of welfare for consumers deprived of access to the affected products, either because of overcharges or reduction in supply. This may be the case, for example, in relation to a cartel that affects public health or essential goods.

According to Article 944 of the Brazilian Civil Code, compensation is measured by the magnitude of the damages. Punitive damages are not available for antitrust damages actions. In addition, damages must be assessed on a case-by-case basis.

Claimants may also seek an injunction to immediately cease the anti-competitive conduct—such as discriminatory practices or denying access to essential facilities, among others, in accordance with Article 47 of the Brazilian Antitrust Law and Articles 294 to 311 of the Brazilian Code of Civil Procedure[4].

Infringers may be considered jointly and severally liable for the damage caused by collective anti-competitive conducts, based on Article 942 of the Brazilian Civil Code. This would mean that a victim could claim full compensation from any of them until being fully compensated. Infringers which compensated damages above their individual share of responsibility could pursue reimbursement against other joint infringers, in accordance with Articles 283 and 934 of the Brazilian Civil Code. With that said, joint and several civil liability

4 As an example, see Process No. 332.865 (2013/0120915-8)—MG at the Brazilian Superior Court of Justice, involving the so called "cartel of medicinal gases".

for collective anti-competitive conducts is not a settled matter under the Brazilian courts' case law and some authors question this position[5].

With the objective of settling that and other matters related to antitrust damages actions, Bill No. 283/2016 aims to establish double damages for parties injured by cartels and promotion or influence to adopt uniform or concerted business practices between competitors. Signatories of leniency agreements or cease-and-desist commitments (settlements) with CADE may be dismissed from paying double damages if they deliver to CADE documents that allow for the calculation of the harm caused by the infringement. In addition, if Bill No. 283/2016 is approved, signatories of leniency agreements or settlements will not be considered jointly and severally liable with other infringers. Such Bill was already approved in the Brazilian Senate and now awaits approval in the Brazilian House of Representatives[6]. The provisions of the Bill will enter into force after its official publication as Law and will only apply to new infringements, in accordance to Decree-Law No. 4,657/1942 (so-called "Introductory Law to the Rules of Brazilian Law"), which disciplines the application of Brazilian laws in general and establishes that new laws, as a general rule, do not affect juridical acts fully performed while the previous applicable law was in force.

The calculation of damages usually demands the production of expert evidence, which may be requested by the parties or *ex officio* by the judge, in accordance with Article 370 of the Brazilian Code of Civil Procedure.

As the calculation of civil damages in cases of anti-competitive practices may be an arduous task for the judiciary, decisions from CADE may sometimes include considerations and guidance for judges to set the amount to be paid to the victim in case the claim is received.[7] The Public Prosecutor's Office or the judge may also request CADE to provide information, including any estimation of damages it could have made in the course of the administrative investigation. In accordance to Article 118 of the Brazilian Antitrust Law and Article 138 of the Brazilian Code of Civil Procedure, CADE may also be notified to intervene as assistant or *amicus curiae* in claims involving Brazilian Antitrust Law.

Finally, the calculation of non-pecuniary losses caused by anti-competitive conducts is a complex and hardly predictable matter in Brazil, especially due to the lack of clear and settled parameters for such task. Usually, for cases involving non-pecuniary losses in general, courts take into account the intensity of suffering and case law. In the case of antitrust damages claims, however, there is still not sufficient case law or guidance in Brazil, and non-pecuniary losses awarded so far are somewhat arbitrary.

5. Passing-on defence

Courts in Brazil have admitted the passing-on defence, at least in the first and second instances[8], even though it is not expressly set forth in any legislation in force. It is currently

5 See PASTORE, Ricardo Ferreira; MOTTA, Lucas Griebeler; IGNÁCIO, Renata Rossi. *Responsabilização solidária de cartelistas em ações indenizatórias: reflexões, limites e desafios*. In: A Livre Concorrência e os Tribunais Brasileiros: Análise crítica dos julgados no Poder Judiciário envolvendo matéria concorrencial. São Paulo: Singular, 2018.

6 One of the two commissions involved in the review of this bill has already issued a favourable opinion. It is a positive sign in the sense of a future adoption. However, it is difficult to estimate how long it will need to be finally approved, as the Brazilian legislative process can be extremely variable, depending on political interests.

7 For instance, CADE, administrative process No. 08700.002821/2014-09, Paulo Burnier da Silveira, 07 June 2017.

8 To date, there is no public decision from the superior/supreme courts yet.

based on Article 944 of the Brazilian Civil Code, which establishes that compensation is measured by the extension of the damages, and Article 884 of the Brazilian Civil Code, which prohibits unjust enrichment.

There is controversy regarding the burden of proof on the matter of passing-on. Some authors argue the burden of proof falls on the claimant, who must prove the facts that constitute its rights, in accordance with Article 373, I, of the Brazilian Code of Civil Procedure. Other authors argue that it is up to the defendant to prove the existence of facts that can block, modify or dismiss the claimant's rights, in accordance with Article 373, II of the Brazilian Code of Civil Procedure. There is no settled case law in any of those directions, as this is a new matter in Brazil, and there is no strong trend between academics for either side.

The current version of Bill No. 283/2016 aims to settle the question by establishing that the passing-on of overcharges will not be presumed and that defendants must prove that it happened.

Either way, considering that claimants can more easily demonstrate that overcharges were not passed on to their own consumers, the judge may shift the burden of proof to the claimants, provided this is done in a reasoned decision. In that case, claimants must be given the opportunity to challenge the shifting of the burden of proof (Article 373, §1º of the Brazilian Code of Civil Procedure), *i.e.* they may ask the judge to reconsider his/her decision to shift the burden of proof.

In the cases in which the burden of proof falls on the defendants, they may claim the disclosure of documents in possession of the claimants in order to prove the passing-on (Articles 396 to 404 of the Brazilian Code of Civil Procedure).

If the court supports the passing-on defence, indirect customers would still need to file a new lawsuit, subject to the same legal requirements and rules previously indicated.

6. Pre-trial discovery and disclosure, treatment of confidential information

Pre-trial discovery

There is no pre-trial discovery phase in Brazil. Unless provided otherwise by any specific legislation, the burden of proof falls on the claimant regarding the facts that constitute his rights and on the defendant as to the existence of any fact that blocks, modifies or extinguishes the claimant's rights.

The judge may also assign the burden of proof differently, provided this is done in a reasoned decision, giving the assigned party the opportunity to argue against the shift of the burden of proof.

In addition, in accordance with Articles 381 to 383 of the Brazilian Code of Civil Procedure, a claimant may present a motion for the early production of evidence. The motion shall be admitted in cases in which: (i) there is reasonable fear that it may become impossible or very difficult to attest certain facts during the course of the suit; (ii) the evidence to be produced may render viable an amicable solution between the parties or facilitate a swift

outcome through another adequate mean of dispute resolution; and (iii) prior knowledge of the facts may either justify or avoid the filing of the suit.

The claimant must precisely state the facts on which the evidence rests. The judge shall then determine the service of process upon parties who have interest in the production of evidence or in the fact to be proven. The interested parties may request the production of any piece of evidence in the same proceeding, provided it is related to the same fact, unless its joint production causes excessive delay—this should be assessed in each case, based on a proportionality analysis.

In those proceedings, the judge shall not render judgment on the occurrence or not of the fact, nor on the respective legal consequences.

Furthermore, during the course of a lawsuit, a claimant may request the disclosure of documents or evidence in possession of defendants or third parties. This means that the judge may order the production of documents from the files of CADE or from criminal investigations.

CADE's Resolution No. 21 of 12 September 2018, regulates the procedure to access documents and information contained in administrative proceedings to impose sanctions for violations against the economic order. By standard, all documents and information are considered public, and even confidential records will be publicised after CADE's Tribunal final decision. However, there are exceptions that will be maintained confidential even after CADE's final decision, such as: (i) the anti-competitive conduct records elaborated based on self-accusatory documents and information voluntarily submitted during the negotiations of leniency agreements and settlements; (ii) documents that contain industrial secrets; (iii) documents related to business activity whose disclosure may represent competitive advantages to other economic agents; (iv) documents and information whose confidentiality is protected in specific legislation, such as tax and banking information, professional secrets, among others; (v) documents whose confidentiality was defined in judicial decisions; (vi) documents provided by a proponent during the negotiations of Leniency Agreement or Settlements subsequently frustrated; and others. However, access to those documents and information may be granted by specific judicial decisions, keeping in mind the necessity to protect the national policies of leniency and settlements.

7. Limitation Periods

The limitation period for individual antitrust damages actions is three years, according to Article 206, § 3º, V of the Brazilian Civil Code. For collective actions, the limitation period is five years, by analogy with Law No. 4717/1965, which sets forth the limitation period for collective claims ("*Ação Popular*").

There is no settled case law regarding whether the limitation period should be counted from the date the damage happened (e.g. the date of each acquisition subject to overcharge) or from the date the victim became or could reasonably have become aware of the damage (e.g. the public disclosure of the investigations or of CADE's final decision).

In addition, case law is not yet settled about the period of time for which damages can be sought. In other words, when dealing with continuous conducts (e.g. a long lasting cartel) courts could consider the limitation for each case of damage (e.g. each purchase subject to

overcharge), for the entire period or only injuries suffered in the three years prior to the last violation or reasonable awareness of the damage.

Brazilian Senate's Bill No. 283/2016 aims to raise the limitation period for individual antitrust damages actions to five years counted from the unequivocal knowledge of the infraction, which will happen on the date of publication of CADE's final decision or the outcome of the criminal action.

Parties potentially harmed by anti-competitive conducts may also seek motions to interrupt the limitation. Those consist of simple and non-adversarial proceedings, set forth in Article 202 of the Brazilian Civil Code and Article 726 of the Brazilian Code of Civil Procedure. They can be used to interrupt the limitation period once and retain the rights for future lawsuits.

8. Appeal

Rulings of civil courts must be appealed before the respective state or federal Court of Appeals, which has jurisdiction over matters of fact and law.

Rulings of the Court of Appeals may be appealed before the Brazilian Superior Court of Justice, which rules only on points of law related to the application of federal laws or treaties, and the Brazilian Supreme Court, which rules on points of law related to the Brazilian Constitution.

9. Class actions and collective representation

Under Brazilian Antitrust Law, antitrust damages actions may be proposed by entities listed in Article 82 of Law No. 8.078/1999 (the "Brazilian Consumer Protection Code") for the defence of homogeneous individual rights.

Furthermore, Law No. 7.347/1985 regulates collective actions in Brazil for the recovery of damages caused by infractions against the economic order.

In accordance with mentioned legislation, collective actions for the recovery of antitrust damages may be filed by: (i) the Public Prosecutor's Office; (ii) the Public Defender's Office; (iii) the Union, states, the federal district and municipalities; (iii) government agencies, state-owned companies, foundations and private companies controlled by the government; and (iv) associations that already existed for at least one year and that include in their institutional objectives the defence of consumers, competition or the economic order.

The majority of collective actions related to antitrust damages, in Brazil, were filed by the Public Prosecutor's Office. In the few existing cases, CADE usually sends an official letter to the Public Prosecutor informing such Prosecutor of a recently issued infringement decision and suggesting that collective actions be initiated.

According to Article 103, III, of the Brazilian Consumer Protection Code, decisions in collective actions relating to antitrust damages give rise to *res judicata* and are binding upon everyone—benefiting all the victims and their successors—only if the claim is granted.

This means that each individual party or their successors may proceed with the liquidation and execution of the decision for their part of the damages. However, if the claim is not granted, interested parties that did not act as co-claimants may file individual lawsuits.

Collective actions do not operate as *lis pendens* to individual lawsuits, but the positive *res judicata* will not benefit the individual claimants if they do not request the suspension of their individual claims within 30 days, counted from the knowledge that the collective action exists.

10. Key issues

Uncertainties regarding the limitation period

As stated above, one of the main difficulties involving antitrust damages actions in Brazil is the lack of settled case law regarding whether the limitation period should be counted from the date on which the damage happened or from the date on which the victim became or could have reasonably become aware of the damage—there is controversy if the awareness should be presumed only after CADE's final decision as well. Case law is also not settled about the period of time for which damages can be sought when courts are dealing with continuous conducts, such as long-lasting cartels.

Such uncertainties may discourage claimants from filing antitrust damages actions in Brazil. For this reason, Bill No. 283/2016 aims to settle the question by setting that the limitation period will be counted only from the unequivocal knowledge of the infraction, which will happen after the publication of CADE's final decision or outcome of the criminal action.

Burden of Proof for the Passing-On Defence

In the matter of passing-on defence, there is controversy regarding if the burden of proof should fall on the claimant or the defendant. There is no settled case law in any of those directions, as this is a new matter in Brazil, and there is no strong trend between academics for either side. This, in turn, generates legal uncertainties that may be prejudicial for both claimants and defendants.

The current version of Bill No. 283/2016 aims to settle the question by establishing that the pass-on of overcharges will not be presumed and that defendants must prove that it happened. If such provision enters into force, however, there will still be discussions regarding how defendants will be able to prove the passing-on, since they probably do not have access to the claimants' pricing strategies.

Calculation of damages

The calculation of antitrust damages is an arduous task for the claimants and the judiciary. This step usually demands the production of expert evidence and, even so, may stumble in the lack of familiarity of Brazilian courts with antitrust matters, lack of documents to base the calculation and difficulties to reach legal standards. The consulted case law shows that the liquidation phase in antitrust damages actions is surrounded with uncertainties, as very

often, in the past, the damages awarded were estimated or arbitrated by courts in a merely discretionary manner (*i.e* with no actual link between the harm and the award).

Decisions from CADE may sometimes include considerations and guidance for judges, and CADE may be requested to provide information or to intervene in claims. However, additional changes in the Brazilian legislation, joined by the specialisation of Brazilian courts in antitrust matters, would be helpful.

Methodology for the selection of cases

The attached database includes cases found through research of case law from the various state, federal and higher courts in Brazil, based on the terms "cartel" and "Law 12.529/2011" (the Brazilian Antitrust Law), and on Article 47 thereof (which provides for private antitrust damage claims). We selected cases in which decisions on the merits are publicly available. In addition, we listed cases that represent different types of actions (e.g. individual claims, class actions, public-interest civil actions), as well as cases that bring different requests and results.

Country: Brazil	
Case Name and Number: Process No. 3002976-90.2005.8.26.0506 (Civil Appeal)	
Date of judgment: 26 August 2005	
Economic activity (NACE Code): M.74.90—Other professional, scientific and technical activities n.e.c.	
Court: São Paulo Appellate court (Tribunal de Justiça do Estado de São Paulo)	**Was pass on raised (yes/no)?** No
Claimants: Laboratório São Paulo de Análise Clínicas Ltda. ("Laboratory"), a medical analysis laboratory. The Laboratory was also a respondent in second instance as Unimed also appealed on other grounds.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Unimed de Ribeirão Preto—Cooperativa de Trabalho Médico de Ribeirão Preto ("Unimed"), a private health plan. Unimed was also Claimant in second instance as it appealed on other grounds.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—BRL 80,000 (US$ 15,087)in moral damages awarded to the first claimant (laboratory), plus interest calculated from the summons and monetary adjustment from the publication of the final decision. No material damages awarded.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Material damage equivalent to the amount spent by the Laboratory to fulfil Unimed's requirements under the agreement (BRL 300,000 or US$ 56,578), loss of profits equivalent to BRL 28,000 (US$ 5,280) per month over a period of 86 months, plus moral damages.
Key Legal issues: • Abrupt disruption of business relationships	**Is the dispute likely to be settled privately?** No

Direct or indirect claims? Direct	**Method of calculation of damages:** Assessment from the Court considering the nature of the offense suffered by the Laboratory, Unimed's way of acting contrary to good faith, and the negative consequences on the Laboratory's existing business.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** José Gabriel Assis de Almeida, Partner, JG Assis de Almeida & Associados, jgaa@aaalaw.com.br; Mickael Viglino, Partner, JG Assis de Almeida & Associados, mv@aaalaw.com.br
Follow-on (EC or NCA?) or stand-alone? Follow-on (CADE's Administrative Procedure No. 08012.006459/1998-31, judged in September 2001)	

Brief summary of facts

After a more than 20-year-long business relationship, during which the Laboratory provided medical services to Unimed on an exclusive basis, Unimed unilaterally ended the business relationship after the Laboratory refused to amend their existing agreement so that (i) the *de facto* exclusivity be formalised, with the prohibition from the Laboratory to provide services to any other entity, health plans and the likes; and (ii) Unimed gets to approve the nomination of the Doctor in charge of the management of the Laboratory. This situation was qualified as an illegal abuse of dominant position by the Brazilian NCA—CADE and Unimed fined BRL 63,846 (US$ 11,040). The Laboratory then filed a lawsuit against Unimed with the judiciary for moral and material damages.

Brief summary of judgment

The de-accreditation of the Laboratory by Unimed, constituting an abrupt disruption of a long-term business relationship, after Unimed unsuccessfully tried to impose abusive business conditions that hurt the pre-existing relationship, justify the award of moral damages to the Laboratory. The recognising judiciary may not ignore the decision from the Brazilian NCA—CADE recognizing the existence of an abuse of dominant position, even if the merits of such decision may be subject to judicial review.

Country: Brazil	
Case Name and Number: Process No. 0036211-12.2013.8.07.0001 (Civil Appeal)	
Date of judgment: 7 August 2013	
Economic activity (NACE Code): D.35—Electricity, gas, steam and air conditioning supply	
Court: Federal District Appellate court (Tribunal de Justiça do Distrito Federal e dos Territórios)	**Was pass on raised (yes/no)?** No
Claimants: Public Prosecutor's Office of the Federal District (Ministério Público do Distrito Federal e dos Territórios)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Liquigas Distribuidora S/A, Nacional Gas Butano Distribuidora Ltda. and Supergasbras Energia Ltda	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—Moral damages in amounts of 20% of net revenues realised by each Respondent in the Federal District, up to the maximum amount BRL 250,000 (US$ 47) per Respondent.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending—Extraordinary appeal by Defendants under review	**Amount of damages initially requested:** The Public Prosecutor's Office claimed pecuniary damages in the amount of 20% of the net revenues earned by each company in 2009, or, in the impossibility of its calculation, in an amount set by the judge.
Key Legal issues: • Cartel • Collective moral damages	**Is the dispute likely to be settled privately?** No.
Direct or indirect claims? Direct	**Method of calculation of damages:** Percentage (20%) of net billing realised by each Respondent in the Federal District, up to the maximum amount BRL 250,000 (US$ 47,148) per Respondent.

Individual or collective claims? Collective (claim filed by the Public Prosecutor's Office for the collective damage suffered by the consumers of the Federal District).	**Name and contact details of lawyer who has drafted summary:** José Gabriel Assis de Almeida, Partner, JG Assis de Almeida & Associados, jgaa@aaalaw.com.br; Mickael Viglino, Partner, ,JG Assis de Almeida & Associados, mv@aaalaw.com.br
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The Public Prosecutor's Office alleges that between August 2009 and May 2010, the Defendants, all competitors on the market for the distribution and resale of kitchen gas in the Federal District, formed a cartel to artificially set the price of Liquefied Petroleum Gas—LPG, and divide the market through agreements and alliances, directly affecting the collective interests of consumers. The first judge dismissed the claim, considering that there was no proof of the alleged facts. The Public Prosecutor's Office appealed, arguing that the facts alleged were sufficiently proved.

Brief summary of judgment

Agreements like cartels are hardly formalised by a written document, so that one shall not disregard the evidence brought to court (studies from two technical advisory bodies and telephone tapping of the defendants), which proves the existence of an agreement in order to avoid competition among dominant companies in the LPG market within the Federal District. Anti-competitive offenses may result in collective moral damages, as specific situations may affect a community's honour. The amount of damages shall aim to discourage the reiteration of the offense but without compromising the business itself, so that there shall be a cap.

Country: Brazil

Case Name and Number: Process No. 1050035-45.2017.8.26.0100 (Civil Appeal); Process No. 1076834-28.2017.8.26.0100 (Civil Appeal); Process No. 1076386-55.2017.8.26.0100 (Civil Appeal); Process No. 1076640-28.2017.8.26.0100 (Civil Appeal); Process No. 1076741-65.2017.8.26.0100 (Civil Lawsuit); and others.

https://esaj.tjsp.jus.br/cposg/open.do

Date of judgment: 26 August 2017

Economic activity (NACE Code): C.23.6.1—Manufacture of concrete products for construction purposes

Court: São Paulo Appellate court (Tribunal de Justiça do Estado de São Paulo)	**Was pass on raised (yes/no)?** Yes
Claimants: Brazilian companies of the civil construction sector	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Companies of the cement and concrete sectors	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Claims were dismissed based on the following arguments: (i) three-year limitation; (ii) lack of documents; (iii) lack of civil liability; (iv) pass-on of overcharges; and (v) defective complaints. There are ongoing claims.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Some of the claims were already dismissed and closed (final decision). Other claims were dismissed but are still subject to appeal (decision pending). Some claims were withdrawn, and some claims were suspended. Some claims are ongoing (with no decision). There were no claims granted to this moment.	**Amount of damages initially requested:** Pecuniary damages to be calculated as at least 20% of total sales made to each individual claimant.

Key Legal issues: • Cartel • Tort Liability • Statute of limitations • Pass on	**Is the dispute likely to be settled privately?** Since no claims were granted at this point, it is unlikely. This could change based on the result of the appeals.
Direct or indirect claims? Direct	**Method of calculation of damages:** Pending. No claims were granted to this moment.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu thales.lemos@cesconbarrieu.com.br
Follow-on (EC or NCA?) or stand-alone? Follow-on (CADE's Administrative Procedure No. 08012.011142/2006-79, judged in May 2014).	

Brief summary of facts

Antitrust Damage Claims filed by companies active within the civil construction sector in Brazil based on CADE's condemnation of the so-called "Cement Cartel", on 28 May 2014 (resulting in total cartel fines of around BRL 3.1 billion (US$ 584,640 million). They argue they were harmed by overcharges in the prices of cement and concrete.

Brief summary of judgment

Some claims were dismissed on the basis of the following arguments: (i) three-year limitation, counted from the alleged anti-competitive conducts or presumed knowledge of the conducts, such as the publication of the investigations by CADE; (ii) lack of documents, such as invoices to prove the commercial relations between the claimants and defendants; (iii) lack of civil liability—e.g. causal link between the alleged cartel and any harm supported by the claimants; (iv) pass-on of overcharges to final consumers, which was presumed, based on the expected rationale of economic agents; and (v) defective complaints (for instance, the description of the facts did not logically lead to the claimants' requests). Not all of such arguments were adopted in every lower court decision, but at least one of them leaded the judge to dismiss the claim.

Some other claims were withdrawn after the judge ordered the amendment of the pleadings (e.g requested clarifications).) Finally, a third group of claims were suspended until final judgment upon the actions aiming to annul CADE's decision, filed by some of the convicted companies. Some first instance sentences were reverted in the second degree

of jurisdiction (such decisions involved only preliminary matters and merits are yet to be discussed on the first instance). There are Special Appeals pending, regarding such higher courts' decisions.

There are still claims ongoing (with no decision).

To this moment, no claims were granted.

Country: Brazil

Case Name and Number: Process No. 0051034-04.1995.4.03.6100 (Civil Appeal)

http://web.trf3.jus.br/acordaos/Acordao/BuscarDocumentoGedpro/1649899

Date of judgment: 3 April 1995

Economic activity (NACE Code): C20.1.5—Manufacture of fertilisers and nitrogen compounds

Court: Regional Federal Appellate court of the Third Region (Tribunal Regional Federal da 3ª Região)	**Was pass on raised (yes/no)?** No
Claimants: Federal Public Prosecutor's Office (Ministério Público Federal)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Ultrafértil S/A, Fosfértil S/A and IAP, Manah, Solorrico S/A, Takenaka S/A, Fertiliza and Fertibrás (companies that form "Holding Fertifós", which holds 70% of Ultrafértil and Fosfértil's shares)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—Pecuniary damages to be calculated based on the advantages obtained by companies of Holding Fertifós and other companies that obtained advantages from the restrictive policy adopted by Ultrafértil and Fosfértil in detriment of small and medium Brazilian companies.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—ongoing in the Brazilian Superior Court of Justice.	**Amount of damages initially requested:** Pecuniary damages to be calculated based on advantages obtained by companies favoured by the anticompetitive conduct (methodology to be set at the liquidation of awards).
Key Legal issues: • Cartel • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** Pecuniary damages to be calculated based on the advantages obtained by companies of Holding Fertifós and other companies that obtained advantages from the

	restrictive policy adopted by Ultrafértil and Fosfértil in detriment of small and medium Brazilian companies (methodology to be set at the liquidation of awards—appeal pending).
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Class action filed by the Federal Public Prosecutor arguing that Defendants engaged in a cartel in the market for inputs for the production and commercialization of fertilizers and abused their dominant position in such market, including refusal to contract and creation of difficulties for rivals, for inputs for the production and commercialisation of fertilisers.

The class action is the result of an investigation initiated by the Federal Public Prosecutor, which concluded that cartelization started after the privatization of companies Fosfértil and Ultrafértil, which had a national monopoly on the production of inputs for fertilizers. The class action initially counted with CADE's assistance, but after the companies settled with CADE in the parallel administrative investigation (through a cease-and-desist agreement), CADE decided to withdraw from the judicial action because it had no additional interest in it.

Brief summary of judgment

The lower court had dismissed the claim, understanding that claimants had no right of action, considering the settlement of the companies with CADE and that there were not harmful effects on the market. The Regional Federal Appellate Court reverted and decided: (i) that Defendants engaged in a distribution cartel, as evidenced by the expert opinion in the case records, and abused their dominant position by refusing to contract and by granting discounts based on the total value of purchases, therefore harming small and medium size rivals in the downstream market; (ii) that the settlement with CADE does not eliminate the illicitude of the conduct. Therefore, Defendants shall compensate for the losses caused.

There is an ongoing appeal at the Superior Court of Justice.

Country: Brazil	
Case Name and Number: Process No. 964.306 (Extraordinary Appeal)	
http://portal.stf.jus.br/processos/downloadPeca.asp?id=314569863&ext=.pdf	
Date of judgment: 2 October 1997	
Economic activity (NACE Code): D.35—Electricity, gas, steam and air conditioning supply	
Court: Federal Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Federal Public Prosecutor's Office (Ministério Público Federal)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Agipliquigás, Supergasbrás, Gás Butano Ltda., Minasgás S/A, Ultragás Ltda. and Pampagás Ltda.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Claim was dismissed based on the state action doctrine.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No.	**Amount of damages initially requested:** BRL 1,000,000 (US$ 188,593)
Key Legal issues: • Cartel • State action doctrine	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Class action filed by the Federal Public Prosecutor arguing that Defendants engaged in a cartel in the market for the distribution of liquefied petroleum gas (LPG) in the state of Rio Grande do Sul.

Brief summary of judgment

The lower court granted the claim and sentenced the Defendants to pay compensation for diffuse damages to consumers, equivalent to BRL 1 million (US$ 188,593). Each Defendant was held liable for a percentage of the compensation equivalent to their market share at the time of the practices. The Regional Federal Appellate Court upheld the judgment .

The Superior Court of Justice granted the appeal to reverse the judgment , based on the state action doctrine, considering that the LPG market had its prices fixed and charted by the regulatory bodies of the sector during the period of the alleged cartel. The Federal Supreme Court, which is the highest judicial body in Brazil, and which main competence is to safeguard the Brazilian Constitution, declined to hear the extraordinary appeal. According to the FSC, the review would demand analysis of infra-constitutional legislation (a competence of the SCJ) and a new appreciation of the facts and evidence in the case records, which is not the function of the extraordinary appeal (which, in brief, is to judge decisions that contradict the Brazilian constitution, involve constitutionality matters or deem a local law valid when contested in face of federal law).

Country: Brazil	
Case Name and Number: Process No. 70068906171 (Civil Appeal)	
https://www.tjrs.jus.br/site_php/consulta/download/exibe_documento.php?numero_processo=70068906171&ano=2016&codigo=2250996	
Date of judgment: 3 October 2006	
Economic activity (NACE Code): G47.3.0—Retail sale of automotive fuel in specialised stores	
Court: Rio Grande do Sul Appellate court (Tribunal de Justiça do Estado do Rio Grande do Sul)	**Was pass on raised (yes/no)?** No
Claimants: Public Prosecutor's Office of Rio Grande do Sul (Ministério Público do Rio Grande do Sul)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Auto Posto Marau Ltda., Auto Transporte Maruense Ltda., and others.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Claim was dismissed based on lack of evidence.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No.	**Amount of damages initially requested:** Unspecified material damages for each individual potentially harmed; BRL 30,000 (US$ 5,657) for collective moral damages; a fine of 30% over gross revenues of the companies in the year before the filing of the class action; a fine for board members corresponding to 10% of the fines applied to their respective companies.
Key Legal issues: • Cartel • Lack of evidence	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A

Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Class Action filed by the Public Prosecutor arguing that gas stations of the municipality of Maura engaged in a cartel.

Brief summary of judgment

The lower court understood that there was a lack of evidence of cartel but ultimately granted the claim because the gas stations supposedly tried to protect their dominant position by coercing a new player (entrant) to raise its prices. Therefore, sentenced the Defendants to pay compensation for collective non-pecuniary losses and a fine whose value should be directed to the State Fund of Diffuse Rights.

The appellate court reversed the decision, understanding that the lower court decision was beyond the Public Prosecutor's request (ultra petita), since the claim was based on the existence of an alleged cartel. In addition, the appellate court highlighted the lack of evidence of such cartel. According to the appellate court, the economic analysis carried out by the Public Prosecutor only showed evidence of parallelism, which would be licit and justified by the small number of players (gas stations) in the city. In addition, direct evidence of an illicit agreement was not found.

Country: Brazil	
Case Name and Number: Process No. 0012334-56.1999.4.05.8300 (Civil Appeal)	
https://www4.trf5.jus.br/data/2013/02/00123345619994058300_20130228_3525962.pdf	
Date of judgment: 5 April 1999	
Economic activity (NACE Code): G.47.3.0—Retail sale of automotive fuel in specialised stores	
Court: Regional Federal Appellate court of the Fifth Region (Tribunal Regional Federal da 5ª Região)	**Was pass on raised (yes/no)?** No
Claimants: Federal Public Prosecutor's Office (Ministério Público Federal)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Mega Posto Ltda. and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—BRL 500,000.00 (US$ 94,296)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes.—Ongoing before the Brazilian Superior Court of Justice.	**Amount of damages initially requested:** Unspecified in public documents
Key Legal issues: • Cartel • Overcharges	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** The Tribunal considered principles of reasonability and proportionality to arbitrate damages.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br

Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Class Action filed by the Public Prosecutor arguing that the gas stations of the municipality of Pernambuco had been engaged in a cartel.

Brief summary of judgment

The lower court granted the claim and condemned the gas stations to pay pecuniary losses of BRL 1 million (US$ 188,593). The appellate court partially upheld but lowered the compensation to half, that is, BRL 500,000.00 (US$ 94,296).

Country: Brazil	
Case Name and Number: Process No. 0004954-43.2013.8.21.0012 (civil lawsuit)	
Date of judgment: 16 December 2013	
Economic activity (NACE Code): C.32.5.0—Manufacture of medical and dental instruments and supplies	
Court: Dom Petrito/RS judicial district.	**Was pass on raised (yes/no)?** No
Claimants: Santa Casa de Caridade de Dom Pedrito	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Linde Gases Ltda., Air Liquide Brasil Ltda. and others.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Unspecified material damages due to overprice; pain and suffering damages; cancellation of any existing debts.
Key Legal issues: • Cartel • Follow-on suit based on a condemnatory decision subsequently overturned by the Judiciary—the damage claim was dismissed • Lack of evidence	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br

Follow-on (EC or NCA?) or stand-alone? Follow-on (Brazilian NCA—CADE's Administrative Procedure No. 08012.009888/2003-70, judged in September 2010)	

Brief summary of facts

Damage claim filed by a hospital based on CADE's condemnatory decision of the so-called "medicinal gases cartel"(resulting in total cartel fines being imposed by CADE of US$ approximately BRL 2.9 billion or US$ 547 million). CADE's administrative procedure was subsequently declared null and void by the Judiciary due to the illegality of the evidence.

Brief summary of judgment

The lower court dismissed the claim since it was based on CADE's condemnatory decision, which was subsequently declared null and void by the Judiciary due to illegality of the evidence used for conviction. Therefore, the claim lacked evidence.

Country: Brazil	
Case Name and Number: Interlocutory Appeal in Special Appeal nº 332865-MG	
Date of judgment: 25 September 2009	
Economic activity (NACE Code): C.32.5.0—Manufacture of medical and dental instruments and supplies	
Court: Superior Court of Justice	**Was pass on raised (yes/no)?** Pending
Claimants: Associação dos Hospitais de Minas Gerais—AHMG	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: White Martins Gases Industriais Ltda.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Pending
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—no final decision in the first instance yet.	**Amount of damages initially requested:** Unspecified in public, electronically available, documents.
Key Legal issues: • Cartel • Follow-on suit based on a condemnatory decision subsequently overturned by the Judiciary—the damage claim persisted • Injunction granted to claimants	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** Pending. An expert was appointed by the judge to calculate damages.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Joyce Honda, Partner, Cescon Barrieu, joyce.honda@cesconbarrieu.com.br; Thales Lemos, Associate, Cescon Barrieu, thales.lemos@cesconbarrieu.com.br

Follow-on (EC or NCA?) or stand-alone? Follow-on (–Brazilian NCA—CADE's Administrative Procedure No. 08012.009888/2003-70, judged in September 2010)	

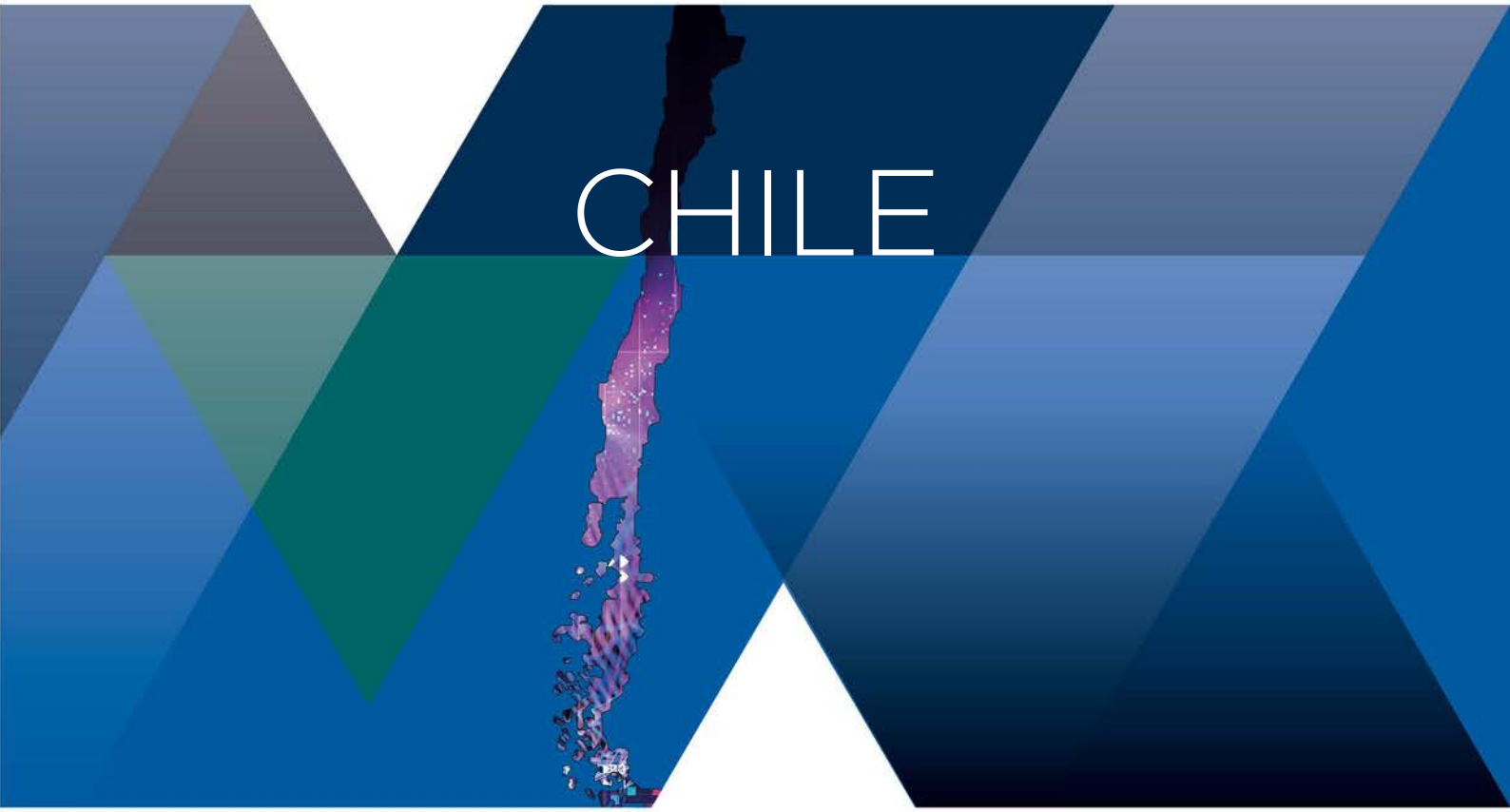
Brief summary of facts

Damage claim filed by a hospital based on CADE's condemnatory decision of the so-called "medicinal gases cartel". CADE's administrative procedure was subsequently declared null and void by the Judiciary due to the illegality of the evidence.

Brief summary of judgment

The lower court granted an injunction to AHMG considering that evidence provided (including CADE's decision and information regarding investigations by the federal police and Public Prosecution Office) was robust and consistent. The injunction was granted to stop the defendants from practicing overcharges. The process is currently in the phase of production of expert opinion regarding the alleged damages.

CHILE



INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

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Historically, Chile has used a system that has privileged the actions of the National Economic Prosecutor's Office ("**FNE**") to prosecute the conducts contemplated in the Competition Law (Decree-law no. 211 of 1973) without leaving much room for private enforcement. Before the modification of the law, the Chilean system provided an action for damages that had to be initiated after a condemnatory judgment issued by the Competition Court and that could only be brought before the competent Civil Court according to the general procedural rules. Before such Civil Court, only the loss and the causality had to be proved, since the facts and the legal qualification had been clearly established by the Competition Court Decision. However, the law also provided for another option to victims of anti-competitive practice, who could also go directly to Civil Courts, without a final judgment of the Competition Court, in which case, damages, causality, and the existence of the anti-competitive conduct had to be proven.

With Law No. 20,945 published in August 2016, a series of modifications were introduced, including a new system of compensation for damages for attacks against competition. In this regard, the reform contemplates two actions:

- an individual action incorporated in the new Article 30 of Competition Law; and
- a collective action in the new Article 51 of Law No. 19,496 on the Protection of Consumer Rights (both Articles modified as a result of the reform of the year 2016).

This increased the incentives for private parties to participate in proceedings before the Competition Court, and also the deterrent and corrective power of its resolutions, since in addition to the fines imposed by this authority, compensation for damages will also apply.

1. Jurisdiction

The Competition Court ("*Tribunal de Defensa de la Libre Competencia*") has exclusive jurisdiction to resolve antitrust matters in Chile and to decide on public and private disputes.

Article 30 of Competition Law establishes that the damages actions arising from a final judgment of the Competition Court shall be filed before this Court. Thus, it is understood that currently there are no damages actions if there is no judgment issued by the Competition Court. Moreover, the only competent court to hear damages actions will be the Competition Court itself. Accordingly, the legislator sought both to contribute to the procedural economy and to allow the damage caused to be determined by the

same specialised tribunal that established the facts serving as antecedents. While stand-alone actions are possible according to general rules of non-contractual liability, in such cases all the elements of the liability must be proven. Therefore, the burden of proof and procedures have higher complexities than the process before the Competition Court.

Finally, it should be noted that the final paragraph of Article 30 provides that the Competition Court shall also be competent to rule civil actions arising from the criminal procedure contemplated in Title V of the law (these are collusion, or agreements or concerted practices involving competitors).

2. Relevant legislation and legal grounds

In the first place, the damages actions must comply with the general requirements established by the Chilean legislation, jurisprudence and doctrine, constructed principally from Article 2,314 of the Chilean Civil Code, and which would be the following:

- existence of fraudulent or culpable conduct;
- existence of damage;
- causal relationship between the conduct and the damage; and
- absence of liability exonerators.

Considering specific terms, the only norm regarding damages actions for anti-competitive conducts is found in Article 30 of Competition Law (without prejudice to Article 51 of Law No. 19.496, which enshrines the special procedure for the protection of the collective or diffuse interest of consumers).

The Competition Court shall base its decision on the facts established in its previous judgment about the anti-competitive conduct that caused the damage. Furthermore, the Court will evaluate the evidence according to Sound Criticism Rules.[1]

The compensation for the anti-competitive damages shall include all damages caused during the period in which the infringement has been extended.

Article 30 establishes the procedure to be followed in the individual compensation actions filed before Competition Court, which is known in the legislation as the "summary procedure", consists of a shorter and more efficient mechanism for obtaining compensation. According to Article 680 of the Chilean Code of Civil Procedure, the summary procedure will apply in all cases where "the action filed requires, by its nature, expeditious processing to be effective". As it is a shorter procedure than the ordinary one, it allows to the victim to reduce costs. In general, in the Chilean system, the summary procedure is applied in cases that requires speed of processing for effective results. On the other hand, Article 51 of the Law No. 19.936, which provides actions for protection of the collective of diffuse interes of

1 According to Sound Criticism Rules, the judge is free to appreciate the evidence, but always respecting the principles of logic, the maxims of experience, and scientifically sound knowledge. This system is different from the Legal or Assessed Evidence one, where it is the law that gives each evidence submitted a predetermined value or weighting, mandatory for the judge. In Chilean legislation, it is the legislator who establishes whether Sound Criticism Rules or Legal Evidence will apply in the procedure.

consumer, states the procedure to be followed in such actions shall be the special procedure provided for in the same law, even if they are brought before the Competition Court.

3. What types of anti-competitive conduct are damages actions available for?

The damages action is not limited to any anti-competitive agreements or abuses of dominant position. An enforceable judgment issued by the Competition Court is sufficient. In other words, a final ruling issued by the Competition Court condemning any antitrust conduct is enough. This judgment is the only but necessary antecedent to file an action for compensation for damages without being limited to any particular anticompetitive conduct.

4. What forms of relief may a private claimant seek?

The law is clear in stating that damages actions "shall include all damages caused during the period in which the infringement has been extended," without making distinctions as to consequential damages, lost profits or moral damages. However, as a general rule in the Chilean legal system, the only damages that can be compensated are the direct and not the indirect ones.

The damages included in the compensation will be analysed below in paragraph 9.

5. Standard of proof

Article 30 also establishes that the proof appreciation within this procedure will be evaluated in accordance with the Sound Criticism Rules. This proof appreciation, which is more flexible than the one regulated by law, is consistent with the legislator's idea of granting competence in damages actions to a specialised court, which has greater flexibility in the analysis and weighting of evidence with respect to such technical and complex matters.

There has been no precedent to date as regards passing-on defence.

6. Confidentiality, discovery, exhibition, leniency

In the trial before Competition Court, all documents and other records are public, with some exceptions established in the same Competition Law, such as commercially sensitive data of the companies. Nevertheless, other parties, and third parties such as consumers could review all non-confidential data to fund a damage action.

Furthermore, claimants for damages could ask the Court to order companies to exhibit some documents, including those provided in the trial for anti-competitive infringement.

Regarding leniency, the Chilean system does not include any benefit related to damages actions for anti-competitive infringements. The benefits of leniency are limited to the penalty of a fine and imprisonment. The publicity of the information and records—with the

above-mentioned exceptions—are one of the deterrents for potential leniency applicants, given the fact that mostly all information will be publicly available for civil claimants.

7. Limitation Periods

Regarding the individual action contemplated in Article 30 of Competition Law, the final paragraph of Article 20 of Competition Law states that civil actions arising from an antitrust conduct shall be exercised up to four years from the date on which the final judgment serving as antecedent to the civil action is found to be final and enforceable.

In the absence of an express provision, regarding the collective action contemplated in Article 51 of Law No. 19,496, the general rules established in Article 2514 of the Chilean Civil Code shall apply, which establishes that ordinary actions may be exercised within a five years term[2], starting from the date when the obligation became enforceable (which, in the case of damage claims, occurs once the final judgment serving as antecedent to the civil action is found to be final and enforceable).

Likewise, according to the general rules, the period for exercising the actions are naturally interrupted when the debtor recognises the obligation, either expressly or tacitly, and are civilly interrupted by the interposition of the lawsuit (Article 2518 of the Civil Code).

8. Appeal

Article 30 sets that the final judgment issued by the Competition Court, can only be subject to an appeal before the Supreme Court, that can review and reverse with broad powers on the merits of the case.

9. Class actions and collective representation

Class actions, under Chilean law, are contemplated in law No. 19,496, as a mean to protect the interest of the consumers. The class action is only for consumers matters and have no application in other areas. To file a claim for collective damages, the law requires the coordination of at least 50 people affected by the same illicit behavior, or the representation of the National Consumer's Service ("**SERNAC**") or consumers associations.

This action, in antitrust matters is found in Article 51 of Law No. 19,496. The first paragraph of said Article states the procedure "shall apply when the collective or diffuse interest of consumers is affected. This special procedure shall be subject to the following procedural rules. All the submitted evidence must be appraised in accordance with the sound criticism rules".

The foregoing without prejudice to what is stated in No. 2 of Article 51 of Law No. 19,496: "The compensations determined in this procedure may not be extended to moral damages suffered by the claimants". As a general rule in the Chilean system, the only damages that can be compensated are the direct and not the indirect ones.

2 Ordinary actions have a different term than the executive ones, which shall be exercised within a three years' term.

According to this Article, in the event of harm to the collective or diffuse interest of consumers through an anti-competitive conduct, the lawsuit may be processed in accordance with the previous special procedure before the Competition Court. This may be the case where, for example, collusion has led to an increase in the price passed on to consumers. Thus, it is possible to conclude that the Competition Court may hear individual claims through the summary procedure, and class actions through the special procedure contemplated in Article 51 of Law No. 19.496.

For example, the Competition Court established that even if the lawsuit is filed jointly, the damages are individual, so that each of the claimants must prove the respective damage suffered and there is not a kind joint and several liability among the defendants.

On the other hand, and since the law does not distinguish between individual and collective actions, it has been understood that the jurisdiction of the Competition Court to hear damages actions may be extended to the collective actions contemplated in Article 51 of Law No. 19.496 on the Protection of Consumer Rights (which contemplates a special procedure for the protection of the collective or diffuse interest of consumers). Such Article states that, "notwithstanding the provisions of Article 30 of Competition Law, and without prejudice to the appropriate individual actions, the damages actions filed before the Competition Court (on the occasion of violations of Competition Law), declared by a final enforceable judgment , may be processed through the procedure established in this paragraph when the collective or diffuse interest of consumers is affected."

This change in legislation is very recent, so there is no precedent for its application, where compensation for damage for collective interest has been awarded. Notwithstanding this, it has been said by the chilean Supreme Court (in just one case at the moment) that Article 51 is an alternative procedure to Article 30 of the competition law, which will be applicable in cases of collective actions, with jurisdiction of the Competition Court.

Methodology for the selection of cases

To date, only two lawsuits have been filed under this new modality before the Competition Court, and both have ended without a final decision of the Court. While there are no more cases of compensation for damages in Chilean case law, it is possible to extract some trends laid down by the Competition Court from the aforementioned cases.

Country: Chile	
Case Name and Number: "Demanda de Sandra Fuentes Salazar y otros contra Empresa de Transportes Rurales Limitada y otros" Number: CIP—1—2017	
http://consultas.tdlc.cl/lexsoft/do_search?proc=8&idCausa=42093	
Date of judgment: 14 December 2017 (Date of admission)	
Economic activity (NACE Code): H.49.3.1—Urban and suburban passenger land transport	
Court: Competition Court (Tribunal de Defensa de la Libre Competencia, "TDLC")	**Was pass on raised (yes/no)?** N/A
Claimants: Owners of the interurban passenger transport company "Línea Azul", as natural persons: Sandra Viviana Fuentes Salazar, Julia Guillermina Salazar Crane and Marcelo Antonio Hernández Sandoval.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Empresa de Transportes Rurales Limitada ("Turbus"), Servicios Pullman Bus Costa Central S.A ("Pullman Costa"), and Transportes Cometa S.A ("Transportes Cometa").	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** On 27 March 2018, the Competition Court approved a conciliation agreement reached by the plaintiff and Tur Bus, by which the latter was obligated to pay, to the claimants as a whole, the sum of CLP 675,000,000—(US$ 1,022,422). Regarding the other defendants, in December 2018 the plaintiff withdrew the lawsuit, which was accepted by both Servicios Pullman Bus Costa and Transportes Cometa. As a result of the above, the Competition Court closed the case in January 2019.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The case ended without appeal.	**Amount of damages initially requested:** The claimants initially requested the following amount of damages: CLP 3,110,000,000 (US$ 4,712,121) for emergent damages due to the loss of their investment, CLP 815,000,000 (US$ 1,234,848) for profit lost due to the impossibility of continuing their businesses, and CLP 17,875,000,000

	(US$ 27,083,333) for property damages due to the decay of their financial situation. They also requested CLP 300,000,000 (US$ 454,545) for each one of them for moral damages. All the amounts were sued with adjustments and interests.
Key Legal issues: • Compensation for damages due to antitrust conduct, collusion, exclusion, conciliation, agreement, waived of the lawsuit.	**Is the dispute likely to be settled privately?** In effect, with one of the defendants (Tur Bus) the case ended by conciliation, which means an agreement was reached between the parties within the process and approved by the Court. As for the other defendants (Pullman Costa y Transportes Cometa), although there was a withdrawal of the lawsuit, this occurred because of a private agreement reached between the parties, which was carried out outside the trial, but, nevertheless, had consequences within it (finishing the process by waiver of the lawsuits).
Direct or indirect claims? Direct	**Method of calculation of damages:** As the trial ended by conciliation agreement and waiver of the lawsuits, the calculation of damages by the Court did not operate.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Benjamín Grebe, Partner, Prieto Abogados, bgrebe@prieto.cl; Manuela Barros, Prieto Abogados, mbarros@prieto.cl
Follow-on (EC or NCA?) or stand-alone? Follow-on. Previous case: Requisition of the National Economic Prosecutor's Office against Servicios Pullman Bus Costa Central S.A and others. Available in: https://consultas.tdlc.cl/do_search?proc=3&idCausa=41381	

Brief summary of facts

In June 2011, the National Economic Prosecutor initiated a requisition against the defendants for antitrust conducts. In January 2014, the Competition Court established in its final judgment that the referenced companies had intentionally executed coordinated actions to block the entry of new competitors, affecting "Línea Azul" in particular. The Court also ordered that the defendants should comply with the agreements entered into with the Prosecutor in order to protect competition, by agreeing not to take any action aimed to prevent, block or delay access to terminals—and to offices within them—by current or potential competitors in the intercity passenger transport market and aimed to terminate the lease of the ticket offices corresponding to the bus terminals of intercity public transportation in different cities.

As a result of the previous process, the claimants started a lawsuit in 2017 before the same Court for compensation of damages. They own a Chilean family company called "Línea Azul" that initiated in 2006 an expansion strategy with the purpose of providing services in the north of the country and involving an important investment. The claimants argued they had been exposed to many difficulties as a result of the anti-competitive behaviors of the defendants that had been characterised as collusion by the Competition Court. However, the defendants counter-argued that the losses suffered by "Línea Azul" had been caused by the negligent administration of the owners and the lack of planning of their projects.

Brief summary of judgment

Regarding Tur Bus, the case ended by a conciliation agreement between the owners of Linea Azul and Turbus Bus, approved by the Competition Court on 27 March 2018. Regarding the two other defendants, Pullman Costa and Transportes Cometa, the claimants withdrew the lawsuit on 18 December 2018, which was agreed by the defendants. Accordingly, the case was closed by the Court in January 2019.

Country: Chile	
Case Name and Number: CIP—3—2019	
Date of judgment: 25 June 2019 (Date of admission)	
Economic activity (NACE Code): Food.	
Court: Competition Court (Tribunal de Defensa de la Libre Competencia, "TDLC")	**Was pass on raised (yes/no)?** N/A
Claimants: Conadecus (National Consumersan Users of Chile Corporation) and Fojjuc (trainers of youth consumer organisations)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Agrosuper S.A., Empresas Aríztía S.A., Agrícola Don Pollo Limitada.,	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** The lawsuit was inadmissible.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A. The lawsuit was declared inadmissible.	**Amount of damages initially requested:** CLP 799,431,494 (US$ 1,030,593)
Key Legal issues: • Collective actions, Compensation for damages due to antitrust conduct, collusion	**Is the dispute likely to be settled privately?** No. The lawsuit was inadmissible.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A. The lawsuit was inadmissible.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Benjamín Grebe, Partner, Prieto Abogados, bgrebe@prieto.cl; Daniella Ibaceta, Associate, Prieto Abogados, dibaceta@prieto.cl

Follow-on (EC or NCA?) or stand-alone? Follow-on. Previous case: Requisition of the National Economic Prosecutor's Office against Agrícola Agrosuper and others. Available in: https://consultas.tdlc.cl/do_search?proc=3&idCausa=41383	

Brief summary of facts

On 25 September 2014, the Competition Court ruled in favour of the claim filed by the National Economic Prosecutor's Office (FNE) against the defendant companies. This judgment was confirmed by the Supreme Court on 29 October 2015, for having colluded by agreeing to limit the production of poultry meat to the national market and assigning market shares.

Therefore, in June 2018, the claimants filed a claim for damages, as they have the right to act on behalf of the collective interest of the affected consumers. The claim is based on the damage suffered by consumers as a result of the limitation of production and market allocation for the production of poultry meat. First, they alleged damage to the interest of consumers who stopped consuming the colluded products, as a result of not being able to pay the overcharged price, damage for the purchase of products at collusive prices, as well as collective non-material damage.

Brief summary of judgment

On 29 December 2019, the lawsuit was declared inadmissible, because the National Consumer Service filed a claim for compensation for the same facts, which is currently being processed, so that according to Law 19,946 the claimants would not have standing to sue at this venue.

Country: Chile	
Case Name and Number: "Demanda de Papelera Cerrillos S.A. contra CMPC Tissue S.A. y otra". Number: CIP—3—2020	
https://consultas.tdlc.cl/do_search?proc=8&idCausa=42178	
Date of judgment: 21 April 2020 (Date of admission)	
Economic activity (NACE Code): Tissue paper	
Court: Competition Court (Tribunal de Defensa de la Libre Competencia, "TDLC")	**Was pass on raised (yes/no)?** N/A
Claimants: Papelera Cerrillos S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: CMPC Tissue S.A., SCA Chile S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A The trial is still in process before TDLC	**Amount of damages initially requested:** CLP 4,009,515,898 (US$4,900,000)
Key Legal issues: • Compensation for damages due to antitrust conduct, collusion	**Is the dispute likely to be settled privately?** The procedure is in the probationary stage, conciliation between the parties (opportunity to settle privately) failed.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A. The trial is still in process, now in probationary stage.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Benjamín Grebe, Partner, Prieto Abogados, bgrebe@prieto.cl; Daniella Ibaceta, Associate, Prieto Abogados dibaceta@prieto.cl

Follow-on (EC or NCA?) or stand-alone? Follow-on. Previous case: Requisition of the National Economic Prosecutor Office against CMPC and other. Available in: https://consultas.tdlc.cl/do_search?proc=3&idCausa=41603	

Brief summary of facts

On 28 December 2017, the Competition Court decided to condemn the defendants for colluding in the tissue paper market, which was confirmed by the Supreme Court.

The claimant is a small paper company, which was affected by the collusion of both companies, falling into a situation of bankruptcy, leaving the market, so they demand compensation for the emerging damage, lost profits and moral damage caused by the anti-competitive actions of the defendants.

Brief summary of judgment

The procedure is in the probationary stage.

CHINA

INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

Contributors

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Throughout the enforcement of the Anti-monopoly Law of the People's Republic of China (the "Anti-monopoly Law"), the number of private enforcement cases stood far behind the ones related to public enforcement. In addition, due to the institutional design of the legal regime, in particular, the lack of class action for civil disputes caused by anti-competitive behaviours, the burden of proof on the claimant and so forth, claimants seeking damages from a monopoly or from cartel members seldom obtain rewards under the PRC anti-monopoly legal regime. The amount of the compensation that a victim can obtain, as a result of "antitrust damages", seems relatively low in comparison to the overall cost for private enforcement, even when the court has identified a monopoly or a cartel.

The Anti-monopoly Law was implemented on 1 August 2008. Article 50 of the Anti-monopoly Law formulates that "undertakings that implement anti-competitive activities and cause others to suffer losses therefrom shall bear civil liability pursuant to the law." This provision provides the basic legal foundation of the antitrust civil damage compensation litigations.

In order to handle cases of civil disputes caused by anti-competitive behaviours, prevent anti-competitive behaviours, protect and promote fair competition in the market, and safeguard rights and interests of consumers and the common interests of society, the Supreme People's Court of the People's Republic of China (the "PRC") issued the "*Provisions of Supreme People's Court on Several Issues Relating to Laws Applicable for Trial of Civil Dispute Cases Arising from Monopolies*" (the "**Anti-monopoly Judicial Interpretation**") in 2012, which provides further guidance for antitrust civil litigation.

1. Jurisdiction

The Anti-monopoly Law of the PRC does not set the administrative enforcement proceedings as a precondition for civil lawsuits. Article 2 of the Anti-monopoly Judicial Interpretation stipulates that a claimant may file a civil lawsuit directly with a court or after a penalty decision of the Anti-monopoly Enforcement Authority (AMEA) takes effect. Therefore, the People's Court will accept a lawsuit regardless of whether it is a stand-alone or a follow-on lawsuit.

Articles 3, 4, 5 and 6 of the *Antitrust Judicial Interpretation* specified the jurisdiction of antitrust civil litigations as follows:

1.1 Level Jurisdiction

Based on the professionalism and complexity of antitrust civil litigation cases, the first-instance of antitrust civil litigation cases shall be heard by the competent intermediate People's Courts (IPCs). According to Article 3 of the Anti-monopoly Judicial Interpretation, the competent IPCs includes the IPCs of the cities where people's governments of the provinces, the autonomous regions, the municipalities directly under the central government and the municipalities with independent planning status locate, and the intermediate people's courts designated by the Supreme People's Court. In addition, upon the approval of the Supreme People's Court, the basic-level people's courts may hear the first-trial monopoly civil dispute cases.

The *Notice of the Supreme People's Court on Issues Concerning the Jurisdiction of Intellectual Property Courts over Cases* formulates that the intellectual property court shall have jurisdiction over cases of first instance regarding civil disputes over monopoly within the jurisdiction of the city where the intellectual property court is located. To date, there are 23 Intellectual Property courts throughout China, including the IP court in Beijing, Shanghai, Guangzhou, Shenzhen to name a few, are entitled to hear antitrust disputes.

1.2 Geographical Jurisdiction

The territorial jurisdiction of antitrust civil litigation cases shall be determined in accordance with the specific circumstances of the case and in accordance with the jurisdictional provisions of the Civil Procedure Law and relevant judicial interpretations concerning infringement disputes and contract disputes. The lawsuit relating to any antitrust civil litigation case shall be within the jurisdiction of the People's Court of either the place where the infringement was committed or the place where the defendant resides. The lawsuit relating to any contract resulting in an antitrust civil litigation case shall be under the jurisdiction of the People's Court of either where the defendant resides or the place where the contract was performed.

1.3 Transfer Jurisdiction

If (i) the case was filed by a non-monopoly dispute and (ii) the defendant files a defence or counterclaim on the grounds that the claimant was engaged in any monopolistic behaviour, the case shall be transferred to the People's Court with jurisdiction on monopoly matters, provided that the defendant brings appropriate evidence and demonstrates that the judgment should be based on the Anti-Monopoly Law.

Therefore, even when a case is not initially a monopoly dispute, it should be transferred to a court with jurisdiction over monopoly disputes if (i) the defendant's argument or counterclaim is on the grounds of the claimant's monopoly behaviours and supported by evidence, or (ii) the case needs to be judged under the Anti-monopoly Law, but the first court has no jurisdiction over monopoly disputes.

1.4 Consolidate Trial

Articles 6(2) of the Antitrust Judicial Interpretation formulates that "where two or more claimants filed a lawsuit separately with different People's Courts with jurisdiction for

the same monopoly act, the People's Court which accepts the lawsuit later shall, upon becoming aware of the earlier case filing by the relevant People's Court, rule within seven days that the case shall be transferred to the People's Court which has accepted the lawsuit earlier. The People's Court which accepts the transferred case may process the lawsuits together. The defendant shall take initiative to provide the people's courts with relevant information about their involvement in other lawsuits for the same act during the defence stage."

2. Relevant legislation and legal grounds

The *Antitrust Judicial Interpretation*, issued by the Supreme People's Court, is formulated in accordance with the relevant provisions of the Anti-monopoly Law, the Tort Liability Law, the Contract Law and the Civil Procedure Law. Provided that the defendant violates the relevant provisions of the Anti-monopoly Law and implements a monopoly agreement or abuse of market dominance, the claimant may file a lawsuit and require the defendant to compensate for the loss based on the Anti-monopoly Law, Article 52 of the Contract Law and Article 3 of the Tort Liability Law.

According to Article 1 of the *Antitrust Judicial Interpretation*, a natural person, a legal person or other organization that has suffered a loss due to monopolistic behaviour and a violation of the antitrust law due to the contents of the contract or the association's articles of association may file a civil lawsuit before the People's Court. This is the specific application of Article 119 of the Civil Procedure Law in monopoly dispute cases. Accordingly, a purchaser (including the direct and indirect purchaser) may file an antitrust civil lawsuit if he/she has suffered a loss due to monopolistic behaviour.

3. What types of anti-competitive conduct are damages actions available for?

Article 1 of the Antitrust Judicial Interpretation clearly formulates that "the scope of civil disputes caused by monopolistic behaviours, including natural persons or legal persons who have suffered losses due to monopolistic behaviours and disputes over the antitrust law, such as the contents of contracts and the associations of trade associations, or other organizations, civil lawsuits brought to the People's Courts. The causes of actions in the antitrust civil lawsuits in the Notice of the Supreme People's Court on the Promulgation of the Revised Regulations on Cases of Action for Civil Cases issued by the Supreme People's Court in 2011 includes:

- disputes over anti-competitive agreements: (i) disputes over horizontal agreements; (ii) disputes over vertical agreements;
- disputes over abuse of dominant market position: (i) disputes over monopoly pricing, ii) disputes over predatory pricing, (iii) disputes over refusal to deal, (iv) disputes over restriction of trading, (v) disputes over bundle trading, and (vi) disputes over differential treatments;
- disputes over concentration of undertakings;

Generally speaking, from 2008 to 2018, the proportion of disputes over abuse of a dominant market position among antitrust lawsuits was the highest, and the proportion of disputes over monopoly agreements was lower.

4. What forms of relief may a private claimant seek?

The main purpose of antitrust civil compensation is to compensate the claimant rather than to impose punitive damages on the defendant. The liabilities formulated in Article 14 of the *Antitrust Judicial Interpretation* include cessation of an infringement and compensation for the losses, among others. At the same time, the people's court may include the reasonable expenses paid by the claimant for investigating and preventing the monopolistic or collusive behaviour into the scope of compensation for losses upon the request of the claimant.

The *Antitrust Judicial Interpretation* does not clearly specify the forms of liability, e.g. separate liability or joint and several liabilities. The claimant shall submit their claims in accordance with the *General Rules of the Civil Law, the Tort Law and the Contract Law*.

5. Passing-on defence

There is no explicit provision in Chinese law for the pass-on defence. However, as (i) compensation for infringement in China is generally limited to the actual losses suffered by the claimants and (ii) indirect purchasers are allowed to sue as claimants in monopoly disputes, defendants can file pass-on defence in the monopoly disputes. However, in general, it can be said that, according to the general rules of the China's Civil Procedure Law, the parties are liable to provide evidence for their own claims. The rules of evidence shall also be applicable to issues related to the pass-on defence issues where there are no special provisions.

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no discovery procedure in China at the moment. Article 64 of the Civil Procedure Law of the PRC provides that the basic rule of proof in the field of civil litigation is "Litigants shall be responsible for providing evidence for their assertions". The general rules of proof for civil litigation cases are applicable to the antitrust damages actions. In order to alleviate the burden of proof for the claimant, Article 7, 8, and 9 of the Antitrust Judicial Interpretation have provided specific guidance, as follows:

- When the anti-competitive behaviour for which a lawsuit is filed is a horizontal agreement between or among undertakings, the defendant shall bear the burden of proof to show that the said agreement does not exclude or restrict competition.
- When the anti-competitive behaviour for which a lawsuit is filed is an abuse of market dominance, the claimant shall bear the burden of proof that the defendant has dominance in the relevant market and has committed abuse of market dominance. Where the plea of the defendant is based on the legitimacy of its action, the defendant shall bear the burden of proof.

- When the anti-competitive behaviour for which a lawsuit is filed is an abuse of market dominance by a public utility enterprise or any other undertakings which has monopolistic status pursuant to the law, the People's Court may rule that the defendant has dominance in the relevant market in accordance with the specific details of market structure and competition, except where there are contrary evidences to reverse the judgment.

Article 64 of the *Civil Procedure Law* delegates to the People's Court the power to investigate and gather evidence, which stipulates that "where a litigant and his/her/its agent ad litem are unable to gather evidence on their own due to objective reasons, or in the case of evidences deemed by the People's Court to be necessary for trial of case, the People's Court shall investigate and gather the evidences".

Therefore, the Court may, when deemed necessary, investigate and gather evidence. In respect of protection of commercial secrets and sensitive information, Article 11 of the Antitrust Judicial Interpretation stipulates that "for evidence which involves State secrets, commercial secrets, personal privacy or any other contents which should be kept confidential pursuant to the law, the People's Court may, according to their official powers or the application of a party concerned, adopt protective measures such as private hearing, restriction or prohibition of replication, showing to attorneys only, being ordered to execute letter of confidentiality undertaking, etc."

However, there are no specific provisions that mandate antitrust enforcement agencies to disclose information about anti-monopoly conducts before the People's Court (especially when the investigation programme is still in progress). Neither is there any rule regarding whether antitrust enforcement authority may disclose the evidence that the parties submitted in the application for leniency or in the commitment.

China's anti-monopoly civil litigation is independent of the anti-monopoly administrative law enforcement in terms of procedure. Therefore, the evidential capacity, probative value of the penalty and the obligation to disclose the facts stipulated in the penalty decision have become the key issues for the connection and coordination between the two mechanisms. There is no specific provision that helps resolve these issues at this moment. Despite the fact that Article 114 of the Interpretations of the Supreme People's Court on Application of the Civil Procedural Law formulates that "matters stated in documents prepared by State agencies or any other organizations with social management functions pursuant to the law within the scope of official powers shall be presumed to be true", there is no existing rules regarding whether anti-monopoly administrative penalty decisions can be used as evidence in civil proceedings. In judicial practice, however, courts do refer to administrative penalty decisions when adjudicating cases.

7. Limitation Periods

The General Principles of Civil Law stipulates that "the limitation of action of an application to a People's Court for protection of civil rights are three years".

- The limitation of action for a lawsuit to seek compensation of damages arising from an anti-competitive behaviour shall commence from the date on which the claimant becomes aware or should become aware that its interests are harmed.

- Where the claimant reports an anti-competitive behaviour for which a lawsuit is filed to the antitrust enforcement agency, the limitation of action shall be suspended until the investigation has been revoked terminated.

- Where the alleged anti-competitive behaviour has taken place for more than two years consecutively at the time of filing the lawsuit by the claimant, and the defendant raises a limitation of action plea, compensation of damages shall be computed up to two years before the date of filing of the lawsuit by the claimant to the People's Court.

8. Appeal

China's civil procedure is subject to a two-tier judicial system. In the antitrust civil litigation, provided that a party (or parties) refuses to accept the judgment of the first instance, it may appeal to the higher court, and the second instance court will examine the relevant facts and the application of the law in the appeal request. After a court decision that has already taken effect, the parties may also apply for retrial in a higher court. Article 200 of the Civil Procedure Law lists the circumstances in which the people's court should retry the cases.

On 1 January 2019, the *Provisions of the Supreme People's Court on Several Issues Concerning Intellectual Property Tribunal* came into force. Appellate cases on monopoly disputes shall be heard by the Intellectual Property Tribunal of the Supreme Court.

The Intellectual Property Tribunal, based in Beijing, is a standing judicial body established by the Supreme Court to take charge of hearing of appellate cases of patent and other intellectual property requiring specialty. The judgments and decisions rendered by the Intellectual Property Tribunal are rulings of the Supreme Court.

9. Class actions and collective representation

Articles 53 and 54 of the Civil Procedure Law stipulate the representative action. Under the representative action where a person who is elected by a large number of parties to facilitate litigation and conduct litigation on behalf of their interests. The representative action is divided into two types according to the number of people represented:

- Definite population representative lawsuit: In the case of a joint action where there are multiple litigants who are parties to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative shall be binding upon the litigants he/she represents;

- Indefinite population representative lawsuit: Where the subject matter of the litigation is common, there are multiple persons who are parties to the lawsuit, but the number of persons is not definite at the time of filing of the lawsuit, the People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period. The said judgment or ruling shall apply to unregistered rights holders who have filed a lawsuit within the limitation of action.

Consumers whose interests are damaged by anti-competitive behaviour can file a lawsuit directly with the court or jointly select representatives with other consumers.

Methodology for the selection of cases

The judgments that are selected thereafter are the most relevant damages cases under the Anti-monopoly Law of China since 2008, including both follow-on and stand-alone proceedings, and are final.

Country: China

Case Name and Number: Dongguan Hengli Guochang Electrical Store v. Dongguan Shengshi Xinxing Gree Trading Co., Ltd. & Dongguan Heshi Electric Appliance Co., Ltd. Vertical Monopoly Agreement Dispute Case. Case No.: (2016) Guangdong Civil Final No. 1771

http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=c511ba00956c4d2cae2fa97a00be5dbe

Date of judgment: 19 July 2018

Economic activity (NACE Code): G.46.4.3—Wholesale of electrical household appliances

Court: The High People's Court of Guangdong Province	**Was pass on raised (yes/no)?** N/A
Claimants: Dongguan Hengli Guochang Electrical Store ("Guochang" Store")	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Dongguan Shengshi Xinxing Gree Trading Co., Ltd. ("Shengshi Company") & Dongguan Heshi Electric Appliance Co., Ltd. ("Heshi Company")	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Because the claimant failed to prove the minimum resale price agreement in this case has the effect of excluding or restricting competition.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The High People's Court of Guangdong Province heard the appeal of the case and issued the final judgment on 19 July 2018. The Court upheld the judgment of the first-instance and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 4.861million (US$ 0.7346 million)
Key Legal issues: • The constitution of vertical anti-competitive agreement. • Civil liability of participants of vertical anti-competitive agreement.	**Is the dispute likely to be settled privately?** No.

Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yang (Sabrina) WANG, Senior Counsel, Commerce & Finance Law Offices, wangyang@tongshang.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone.	

Brief summary of facts

Hengli Guochang Electrical Appliances Store ("Guochang Store"), Shengshi Xinxing Gree Trading Co., Ltd. ("Shengshi company"), Heshi Electric Co., Ltd. ("Heshi company") signed the 2012 and 2013 "Tripartite Agreement on Sales of Household Air Conditioners for Gree Electric Appliances in Dongguan", expressly stipulating that Guochang Store must abide by the relevant systems and requirements of Shengshi Company's market management specifications, and in the process of terminal sales, the minimum retail price shall not be lower than Shengshi Company's minimum retail price per period, and shall not cause any form of low price behaviour. At the beginning of 2015, Guochang Store planned to terminate the cooperative relationship with Shengshi Company and Heshi Company. Heshi Company did not fully refund the "maintenance deposit" paid by Guochang Store on the grounds that Guochang had violated the agreement to sell products below the minimum retail price during February 2013 and was fined RMB 13,000 (US$ 1,964) by Shengshi Company on the basis of the agreement. Therefore, Guochang Store filed a lawsuit with the Guangzhou Intellectual Property Court in the first instance court on 15 May 2015.

Brief summary of judgment

On 30 August 2016, the Guangzhou Intellectual Property Court made a judgment of first instance, dismissed the claimant Guochang Store's claim, and determined that the agreement of Shengshi Company to limit the minimum resale price was not an anti-competitive agreement as defined in the Anti-Monopoly Law.

Guochang Store refused to accept the judgment of the first instance court and appealed to the Guangdong High People's Court.

On 19 July 2018, High People's Court of Guangdong Province confirmed the findings of the lower court. It held that Shengshi Company did not breach the Anti-monopoly law. In particular, the Court held that competition in the home air-conditioning product market was sufficient (although Gree's products enjoyed a comparative advantage) and that Shengshi Company had not maintained minimum resale price. In any case, the behaviour at hand did not lead to the evidence provided by Guochang Store and the court's ex-officio evidence, although Gree's home air-conditioning products have a comparative advantage

in the relevant market. Considering the sufficient competition in the home air-conditioning product related market, it cannot be concluded that Shengshi Company had maintained the minimum resale price with the purpose of achieving high monopoly profits, nor had the behaviour led to the serious consequences such as foreclosure or restriction of excluding and restricting competition.

Evidence provided by the defendant can prove that the air-conditioning product market in Dongguan was fully competitive, and the Gree brand did not benefit from an absolute advantage in the air-conditioning market in the region amounting to, and it is not enough to form a dominant market position. Even if the Gree air-conditioning brand limited the minimum sales price, consumers could completely choose other similar brands. In the industrial chain, there was no evidence that the competitive relationship of air-conditioning product-related industries would be affected by the sales price limit of Gree air-conditioning. On the other hand, the claimant and other dealers could still participate in competition in many aspects such as pre-sales promotion, sales promotion and after-sales service. In other words, even with in the same air-conditioning brand, consumers still had a number of options so that intra-brand competition was not harmed.

Therefore, the claimant's appeal was rejected and the original judgment was upheld.

Country: China	
Case Name and Number: Pan Yao v. Shanghai International Commodity Auction Co., Ltd. Case No.:(2017) Shanghai Civil Final No.75	
http://www.hshfy.sh.cn/shfy/gweb2017/flws_view.jsp?pa=adGFoPaOoMjAxN6Opu6bD8dbVNzW6xSZ3c3hoPTIPdcssz	
Date of judgment: 11 May 2017	
Economic activity (NACE Code): C.29.3.2—Manufacture of other parts and accessories for motor vehicles	
Court: Shanghai High Court	**Was pass on raised (yes/no)?** N/A
Claimants: PAN Yao	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Shanghai International Commodity Auction Co., Ltd	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The court held that the auction for non-business vehicle licence plates operated by the defendant was a performance of an administrative function. It should not be considered as a proper relevant market for the purpose of the Anti-monopoly law. The case was therefore dismissed as lack of standing.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Shanghai High Court heard the appeal of the case and issued the final judgment on 11 May 2017. The appeal court upheld the judgment of the first-instance and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 300 (US$ 44)
Key Legal issues: • Determination of market dominance • Definition of relevant market	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yi Jin, Partner, King & Capital Law Firm, jinyi@king-capital.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone.	

Brief summary of facts

The claimant was a resident of Shanghai and began to participate in the vehicle licence plates auction for his motor vehicle since 2016. The defendant was the only auction house for the city's non-business vehicle licence plates designated by the Shanghai municipal government. The claimant alleged the defendant abused the dominant position by charging an unfairly high commission, and claimed the damage of RMB 300 (US$ 44) for his failure in obtaining the vehicle licence plate through the auction.

Brief summary of judgment

The first instance court ruled that, in this case the defendant served as the executor for allocating public resources under the Shanghai Municipal Transportation Commission's authorization. Therefore, the defendant was not an independent operator in this regard. On this basis, Shanghai's non-business vehicle licence plates auction service did not constitute a competitive commodity market which might subject to the Anti-monopoly Law. The court made the judgment in favour of the defendant on 3 January 2017. The Claimant appealed to Shanghai Higher Court.

The appeal court affirmed the ruling of the lower court, and rejected the appellant's claim on 11 May 2017. The appeal court repeated the ruling of the lower court and ruled the auction for non-business vehicle licence plates is essentially performing an administrative function delegated by the Shanghai government. Therefore, it shall not be considered as a proper relevant market for the purpose of the Anti-monopoly Law. The case is therefore dismissed as lack of standing.

Country: China

Case Name and Number: Junwei Tian v. Beijing Carrefour Business Co., Ltd. Shuangjing Branch, Abbott Trade (Shanghai) Co., Ltd. Case No.:(2016) Beijing Civil Final No.214

http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=7ad234f9cfdc453aae0aa8f22dc22004

Date of judgment: 22 August 2016

Economic activity (NACE Code): G.46.7.3—Retail sale of pharmaceutical goods

Court: The Higher People's Court of Beijing	**Was pass on raised (yes/no)?** N/A
Claimants: Junwei Tian	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Beijing Carrefour Business Co., Ltd. Abbott Trade (Shanghai) Co., Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claimant failed to prove the existence of the RPM agreement, and therefore the causal link.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Higher People's Court of Beijing heard the appeal of the case and issued the final judgment on 22 August 2016. The Court upheld the judgment of the first-instance and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 1,030 (US$ 453)
Key Legal issues: • Proper defendant • Burden of proof • Compensation to indirect purchaser	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yi Jin, Partner, King & Capital Law Firm, jinyi@king-capital.com
Follow-on (EC or NCA?) or stand-alone? Follow-on. NDRC penalty No. [2013]4	

Brief summary of facts

In 2014, Junwei Tian filed an action against Carrefour and Abbott seeking damages for the difference between the amounts he paid to Carrefour for the infant formula manufactured by Abbott,(the overpaid due to Abbot's RPM practice) and the market price for Abbott's infant formula (the price at the competition level). The claimant argued on the ground that National Development and Reform Commission had imposed an administrative penalty on Abbott's resale price maintenance ("RPM"), which caused his overpayment for the infant formula. Abbott therefore shall be held plausible for his overpayment.

Brief summary of judgment

Beijing IP Court rejected Junwei's arguments.

- Elements of the claim: The Court believed that the vertical agreement is required to satisfy the element of "eliminating or restricting competition" to be regarded as an anti-competitive agreement. The claimant shall bear the burden to prove the existence of the RPM agreement, the damages caused by it, and the causation between the RPM agreement and the damages.
- Existence of anti-competitive agreement: Although the administrative penalty was imposed, only the manufacturer was punished but not the distributors. Therefore, the penalty decision alone is not sufficient to establish that Carrefour had entered into an RPM agreement with Abbott. Regarding the Supply agreement between Carrefour and Abbott, the suggested retail price is not binding and does not have the effect of eliminating or restricting competition.
- Compensation to the indirect purchaser: The Court confirmed that the claimant, as an indirect purchaser, shall have the right of action. But his claim was dismissed by inability of proving the causation.

The Higher People's Court of Beijing dismissed the appeal of the claimant for failing to prove the existence of an RPM agreement.

Country: China	
Case Name and Number: Wu Xiaoqin v. Shanxi Broadcast & TV Network Intermediary (Group) Co., Ltd., Dispute over Tie-in Sale. Case No.: (2016) Zuigaofa Minzai No.98	
Date of judgment: 31 May 2016	
Economic activity (NACE Code): J.60.2.0 — Television programming and broadcasting activities	
Court: Supreme People's Court of The People's Republic of China	**Was pass on raised (yes/no)?** N/A
Claimants: Wu Xiaoqin ("Wu", the Claimant)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Shanxi Broadcast & TV Network Intermediary (Group) Co., Ltd. ("Broadcast Company", the Defendant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Broadcast Company was ordered to return the digital TV programme fee of RMB 15 (US$ 2) back to Wu.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No.	**Amount of damages initially requested:** N/A
Key Legal issues: • Whether Wu is the proper claimant • Whether the Broadcast Company conducted tying or attached other unreasonable trading conditions to its downstream customers • Whether this case shall apply the Anti-Monopoly Law ("AML")	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Zhan Hao Managing Partner, Anjie Law Firm, zhanhao@anjielaw.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone.

Brief summary of facts

On 10 May 2012, Wu went to the Broadcast Company to pay the basic maintenance fee for digital TV services. The Broadcast Company informed him that the fee was raised from RMB 25 to RMB 30 per month. Therefore, Wu paid RMB 90 for three months, including RMB 75 as the digital TV basic maintenance fee and RMB 15 (US$ 2) as the digital TV programme fee (value-added service). However, Wu learned afterwards that the subscription of digital TV programs is only optional and voluntary. Therefore, Wu believed Broadcast Company had harmed his right of free choice as consumer had been harmed by the Broadcast Company, and further held that Broadcast Company as a public utility possesses a dominant position in the digital TV market, and its behaviour of charging digital TV programme fees together with the basic maintenance fee without any notice constitutes illegal tying.

On 4 June 2012, Wu filed an antitrust lawsuit and requested the court to declare that Broadcast Company's charge of digital TV programme fees was invalid, and the defendant should refund him RMB 15 (US$ 2).

Brief summary of judgment

This case was heard by the local and high courts. Said courts ruled that the Broadcast Company's act of charging WU Xiaoqin a digital television programme fee of RMB 15 was invalid, and ordered the former to return RMB 15 to WU. Later, on 31 May 2016, the Supreme Court, after a retrial, set aside the second-instance judgment but affirmed the first-instance judgment.

During the retrial, the Supreme Court found that the Broadcast Company holds a dominant market position in Shanxi Province's cable TV transmission service market. It held that the involved bundling charges should be construed as tying, since the evidence produced could not prove consumer choice over whether or not to pay for the basic maintenance fee or the digital TV programme fee separately. Furthermore, there was no explanation to justify said tying. Based on the above findings, the Supreme Court drew the conclusion that the bundling of the basic digital TV service and the digital TV paid programme service violated Article 17(5) of the AML. The Broadcast Company was ordered to return the digital TV programme fee of RMB 15 back to Wu.

Country: China

Case Name and Number: Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd. Case No.: (2013) Civil Division III Final No. 4

http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=4fe3cab686984f8f91313ec8b921b96c

Date of judgment: 8 October 2014

Economic activity (NACE Code): J.62.09—Other information technology and computer service activities; J.61.9—Other telecommunications activities

Court: The Supreme People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Beijing Qihoo Technology Co., Ltd.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Tencent Technology (Shenzhen) Co., Ltd. Shenzhen Tencent Computer System Co., Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claimant failed to prove the defendant's dominant position.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Supreme People's Court issued the final judgment which upheld the judgment of the first-instance and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 150 million (US$ 0.2422 million)
Key Legal issues: • Definition of the relevant market • Hypothetical Monopolist Test in a zero-price market • Dominant position in the internet industry	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yi Jin, Partner, King & Capital Law Firm, jinyi@king-capital.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

In September 2010, the instant messenger software, Tencent QQ, and QQ Software Manager were installed in a package and in the process of installation, users were not prompted that QQ Software Manager would be installed simultaneously.

On 21 September 2010, Tencent Technology (Shenzhen) Co., Ltd. (hereinafter referred to as "Tencent Company") issued an announcement that QQ Software Manager and QQ Doctor in use would automatically be upgraded to QQ Computer Housekeeper.

On 29 October 2010, Beijing Qihoo Technology Co., Ltd. (hereinafter referred to as "Qihoo Company") and Qizhi Software (Beijing) Co., Ltd. issued the software "Koukou Bodyguard".

On 3 November 2010, Tencent Company released a "Letter to QQ Users" and stopped its services of QQ software on computers installed with 360 software (Qihoo Company's product).

On 4 November 2010, Qihoo Company announced the recall of its software Koukou Bodyguard. On the same day, Qihoo, through its 360 Security Centre, announced that upon the strong intervention of the relevant state departments, full compatibility between QQ software and 360 software has been realized.

On 15 November 2011, Qihoo Company filed a lawsuit with the Higher People's Court of Guangdong Province accusing Tencent Company of abusing its dominant positions in instant messenger software and service-related markets. Qihoo Company alleged that Tencent Company and Shenzhen Tencent Computer System Co., Ltd. (hereinafter referred to as "Tencent Computer Company") had dominant positions in the relevant markets of instant messenger software and services. And the two companies explicitly prohibited their users from using Qihoo's 360 software, threatening them to stop QQ software services. They refused to provide relevant software services to users who had installed 360 software, in order to force users to delete 360 software; and took technical measures to prevent users who have installed 360 browsers from accessing the QQ space (Qzone). The aforesaid acts constituted a restriction on transactions.

Qihoo Company also claimed that Tencent Company and Tencent Computer Company bundled QQ Software Manager with its instant messenger software and installed QQ Doctor in the name of upgrading QQ Software Manager, which constituted tie-in sale.

Qihoo Company requested the Higher People's Court of Guangdong Province to order that Tencent Company and Tencent Computer Company should immediately cease the

anti-competitive behaviour of abusing their dominant market positions and jointly and severally pay Qihoo Company RMB 150 million (US$ 0.2422 million) for its economic loss.

Brief summary of judgment

On 20 March, 2013, the Higher People's Court of Guangdong Province made a judgment holding that the claims of Qihoo Company should be dismissed. Qihoo Company appealed to the Supreme Court.

The Supreme Court modified the definition of the relevant market in the first-instance judgment, finding that the relevant market should be defined as the instant messaging service market in mainland China, including both PC-based instant messaging services and mobile-based instant messaging services; both integrated instant messaging services and non-integrated instant messaging services e.g. text, audio and video.

However, the Supreme Court, holding that Qihoo Company failed to prove the dominant position and anti-competitive behaviours of Tencent, issued its final judgment on 8 October 2014 and dismissed Qihoo Company's appeal.

Country: China

Case Name and Number: Lou Binglin v. Beijing Aquatic Product Wholesale Industry Association Monopoly Dispute Case. Case No.:(2013) Beijing Civil Final No.4325

http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=9890951a671d49f38546dab854cb9b20

Date of judgment: 9 April 2014

Economic activity (NACE Code): G.46.38—Wholesale of other food, including fish, crustaceans and molluscs

Court: The High People's Court of Beijing	**Was pass on raised (yes/no)?** N/A
Claimants: Lou Binglin	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Beijing Aquatic Product Wholesale Industry Association.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claimant failed to prove the existence of the causal link between the defendant's anti-competitive behaviours and his losses. No.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Beijing High People's Court heard the appeal of the case and issued the final judgment on 9 April 2014. The Court upheld the judgment of the first-instance and dismissed the Defendant's appeal.	**Amount of damages initially requested:** RMB 772,512 (US$ 0.1258 million)
Key Legal issues: • Eligibility of both parties • Whether the Behaviour of the Association should be deemed as organization of monopoly agreement to fix or change the price of scallop among competitive operators	**Is the dispute likely to be settled privately?** No

• Whether the provisions on the "Rewards and Penalties" had constituted a monopoly agreement	
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yang (Sabrina) WANG, Senior Counsel, Commerce & Finance Law Offices, wangyang@tongshang.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone.	

Brief summary of facts

Beijing Aquatic Wholesale Industry Association (hereinafter referred to as the "Association") put certain "Rewards and Penalties Provisions" in its "Association Manual", which read, "Members are prohibited to sell whole scallops to non-members in the market where members of the association are located ", "Members are prohibited from unfair competition or selling scallops without discount and not in accordance with sales price discount sales of the association ". At the same time, the above regulations were implemented within the association, and several studies on the adjustment of scallop price on Zhangzidao Company (the supplier of scallop products) were made and determined. Lou Binglin was unable to obtain the supply of Zhangzidao scallops after withdrawing from the association.

Brief summary of judgment

On 18 September 2013, Beijing Intermediate People's Court ruled against the defendant.

On 9 April 2014, High People's Court of Beijing dismissed the appeal from of the defendant and upheld the original judgment of the first instance, which can be summarized as follows:

- Confirming that Articles 1 and 2 of the "Promotions and Penalties Provisions" in the "Beijing Aquatic Wholesale Industry Association Manual" involved in the case are invalid;
- As of the effective date of the judgment, the Aquatic Products Wholesale Association has ceased to organize members to reach a monopoly agreement involving changes in the case and fixing the price of Zhangzidao scallops;
- Dismissing other claims of the claimant Lou Binglin.

The reasonings of the High People's Court of Beijing are as follows:

The Association is a social organization legal person, which independently conduct business, and falls within the definition of undertakings of the Antimonopoly Law.

After the Aquatic Products Wholesale Association was registered and established on 29 September 2011, the Aquatic Products Wholesale Association it organized several meetings to discuss and make corresponding decisions on (i) the sale prices of different types of scallop products, (ii) the prohibition of sales at discounted prices and (iii) the corresponding penalties. The intention was to reduce or even eliminate competition among members by fixing prices, and to increase sales profits as well as the sales rebates offered by Zhangzidao Company the supplier of the scallop products, which itself will weaken or eliminate market competition to a certain extent, resulting in exclusion or restriction of competition. The effect will would ultimately harm the interests of consumers.

Regarding the Article 2 of "Promotions and Penalties Provisions", members are were prohibited from selling entire scallops to non-members in the markets where members of the Association are located. If scallops' sales had been allowed to be made externally, this would have inevitably caused price competition between non-members or between members and non-members, resulting in undermining the purpose of the price agreement between members being useless. Thus, the aforementioned provisions clearly had the effect of excluding and restricting competition.

Regarding Lou Binglin's claim for compensation for losses, regarding scallops in addition to purchase scallops from the supplier Zhangzidao company through the Aquatic Wholesale Association, Luo can also purchase scallops through other channels such as Zhangzidao company's direct store in Beijing. In terms of other sea products available to Luo, even if Lou Binglin cannot sell Zhangzidao scallops, he may sell other shellfish products. In terms of the purchase channels of the shellfish products, Luo can also purchase products from other provinces such as Shandong, Liaoning and etc. Therefore, Lou Binglin's loss of expected profits based on the sale of scallops in Zhangzidao was not directly related to the monopoly behaviour of the Association.

Country: China

Case Name and Number: Huawei Technologies Co., Ltd. vs. InterDigital Technology Corporation; InterDigital Communications, Inc.; and InterDigital, Inc. Dispute over Abuse of Market Dominance. Case No.: (2013) Yuegaofa Minsan Zhongzi No.306

Date of judgment: 21 October 2013

Economic activity (NACE Code): J.62.0—Computer programming, consultancy and related activities

Court: Guangdong High People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Huawei Technologies Co., Ltd. ("Huawei")	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: InterDigital Technology Corporation; InterDigital Communications, Inc.; and InterDigital, Inc. ("IDC")	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. Huawei was awarded damages of RMB 20,000,000 (US$ 3 million)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No.	**Amount of damages initially requested:** RMB 20,000,000 (US$ 3 million)
Key Legal issues: • Whether the court of first instance had violated legal procedures during the trial • How to identify the relevant market for this case • Whether IDC abused its market dominance • Whether the damages awarded by the court of first instance are reasonable	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The court considered the reasonable expenses paid by Huawei, including attorney's fees in China and America, notarial fees, competing interest losses, together with other factors, such as the nature of IDC's

	infringement, the severity of its subjective fault, and the damage it caused Huawei.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Zhan Hao Managing Partner, Anjie Law Firm, zhanhao@anjielaw.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Huawei is a major global supplier of telecommunication equipment. Both InterDigital Communications, Inc. and InterDigital, Inc. are the wholly-owned subsidiaries of InterDigital Technology Corporation (IDC).

IDC holds a large number of standard essential patents ("2G, 3G and 4G SEPs") in the US and China. Huawei had negotiated with IDC for several years. Suddenly, IDC initiated litigation against Huawei by bringing private actions against it in the United States.

In response to the IDC's actions, Huawei filed a lawsuit with the Shenzhen Intermediate People's Court on 6 December 2011 against IDC, in which Huawei claimed that IDC had abused its dominant position in the relevant market by: (i) setting unfairly high royalties for its patent licenses disregarding its commitment to the principle of fair, reasonable and non-discriminatory fees (FRAND); (ii) setting discriminatory trading conditions for counterparts with similar conditions; (iii) attaching unreasonable conditions to its patent-licensing arrangements; and (iv) arranging tie-in sales. Huawei requested the court to order IDC to immediately cease abuse of its dominant market position in relation to the SEPs for 3G technology, and award damages of RMB 20 million (US$ 3 million) to Huawei.

The Shenzhen Intermediate People's Court ordered the defendant to immediately stop its monopolistic conduct, namely overpricing and tying sales, and awarded damages of RMB 20 million (US$ 3 million) to the Claimant. However it rejected Huawei's other claims. Both parties appealed to the Guangdong High People's Court. The court of second instance made a final judgment to reject both parties' appeals and uphold the original judgment.

Brief summary of judgment

The court ruled (i) that each SEP constitutes an independent relevant market and thus (ii) that IDC holds a dominant position due to the following reasons:

- IDC owns standard essential patents within the global 3G wireless communication field (including China and the US) and owns 100% of the market share for licensing each essential patent under the 3G standard;

- IDC does not conduct any substantive production activity, and merely relies on patent licensing as its business operations model; and
- due to IDC's business operations model, IDC would not depend on, or agree to SEP cross-licensing with other SEP holders like Huawei. Therefore, in this case, IDC has the power to force Huawei to adopt terms on pricing, quantities, and other transaction conditions before licensing Huawai its 3G essential patents. IDC was held liable for abusing its market position by imposing monopolistic high prices for its SEPs and tying arrangements.

The final judgment determined that IDC holds dominant market positions in the relevant markets, and IDC's behaviours, of applying excessive licensing conditions, as well as the tying of non-essential patents with SEPs, breached its FRAND commitments and constituted abuse of market dominance. As for the amount of damage, the court held that both the Claimant and the defendant failed to provide adequate evidence for "the damages suffered by the Claimant or the amount of profits gained by the defendant, as a result of the infringement." Nevertheless having considered the reasonable expenses, competing interest losses, and other factors, such as the nature of the defendant's infringement, the level of subjective mistakes, and the severity of damage caused to the Claimant, the court awarded damages of RMB 20 million(US$ 3 million) to Huawei.

Country: China

Case Name and Number: Beijing Ruibang Yonghe Technology and Trade Co., Ltd. vs. Johnson & Johnson (Shanghai) Medical Devices Co, Ltd. & Johnson & Johnson (China) Medical Devices Co, Ltd., Dispute over Vertical Monopoly Agreement. Case No.: (2012) Hugao Minsan (Zhi) Zhongzi No.63

Date of judgment: 1 August 2013

Economic activity (NACE Code): C.32.5—Manufacture of medical and dental instruments and supplies

Court: Shanghai High People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Beijing Ruibang Yonghe Technology and Trade Co., Ltd. ("Ruibang")	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Johnson & Johnson (Shanghai) Medical Devices Co, Ltd., and Johnson & Johnson (China) Medical Devices Co, Ltd. (collectively "J&J")	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. Ruibang was awarded damages of RMB 530,000 (US$ 83,967)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Shanghai High People's Court heard the appeal of the case and issued the final judgment on 1 August 2013. The Court revoked the judgment of first instance and ruled that J&J shall compensate Ruibang for its economic losses of RMB 530,000 (US$ 83,967).	**Amount of damages initially requested:** RMB 14,399,300 (US$ 2 million)
Key Legal issues: • Eligibility of Ruibang as a claimant • Whether eliminating or restricting competition is an essential element in the finding of vertical monopoly agreement under Article 14 of the Anti-Monopoly Law ("AML")	**Is the dispute likely to be settled privately?** No

• Who bears the burden to prove the agreement in question had the effect of eliminating or restricting competition • Whether the agreement in question constitutes an anti-competitive agreement • Whether Ruibang's claim for damages should be supported	
Direct or indirect claims? Direct	**Method of calculation of damages:** • The scope of damages supported by the court is the loss of profit in the relevant market for surgical sutures in 2008 • The court considered it reasonable to use Ruibang's sales target as the expected sales performance of Ruibang in 2008 in view of the fact that Ruibang's performance exceeded sales targets by 10% in the past three years • The profit margin claimed by Ruibang was adjusted with reference to the sales prices and margins of other brands , so that it reflects the normal profit margin in the relevant market rather than the profit margin achieved through the implementation of the anti-competitive agreement
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Zhaoqi (Charles) CEN, Partner, Zhong Lun Law Firm, Beijing Office, cenzhaoqi@zhonglun.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

As a distributor of J&J's surgical sutures, staplers and other medical devices, Ruibang had been a business partner of J&J for 15 years. In January 2008, J&J and Ruibang signed a Distribution Agreement which stipulated that Ruibang shall not sell products at a price lower than that specified by J&J. In March 2008, Ruibang won a bid to supply J&J surgical sutures to Peking University People's Hospital by offering the lowest price among bidders. In July 2008, J&J cancelled Ruibang's rights to sell at two other hospitals on the

ground that Ruibang had lowered its prices without permission. J&J no longer accepted Ruibang's orders for surgical sutures after 15 August 2008, and completely stopped the supply of sutures and staplers in September 2008. In 2009, J&J did not agree to renew the Distribution Agreement with Ruibang. Ruibang filed a lawsuit with Shanghai No.1 Intermediate People's Court, alleging that the minimum resale price clause stipulated by J&J in the Distribution Agreement constituted a vertical anti-competitive agreement which was prohibited by the AML and requesting the court to order J&J to compensate its losses of RMB 14,399,300 (US$ 2million).

Brief summary of judgment

Shanghai No.1 Intermediate People's Court dismissed all the claims of Ruibang on the grounds that Ruibang failed to produce evidence to support its allegations. Ruibang refused to accept the judgment of first instance and appealed the case to Shanghai High People's Court.

During the trial of second instance, the Shanghai High People's Court held that the relevant market in this case was the surgical suture market in mainland China; competition in the market was insufficient and J&J had a strong market power in the market; the agreement restricting minimum resale price had the effect of eliminating and restricting competition in the relevant market and there was no obvious and sufficient pro-competitive effects, thus the agreement in dispute shall be deemed to constitute an anti-competitive agreement. J&J's actions of disqualifying Ruibang from selling to some hospitals and ceasing the supplying of sutures to Ruibang were anti-competitive behaviours prohibited by the AML and J&J shall compensate Ruibang for the loss of profit of suture products in 2008 as a result of the aforesaid anti-competitive behaviours. Accordingly, the court decided that J&J should pay RMB 530,000 (US$ 83,967) to Ruibang in compensation for its economic losses.

Country: China	
Case Name and Number: Wuxi Baocheng Natural Gas Cylinder Company v. Wuxi China Resources Vehicle Gas Company. Case No.: (2012) Jiangsu High Court IP Division Final No.0004, (2011) Wuxi Intermediate Court IP Division First No.0031	
Date of judgment: 23 October 2012	
Economic activity (NACE Code): G.47.3.0—Retail sale of automotive fuel in specialised stores	
Court: Jiangsu High People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Wuxi Baocheng Natural Gas Cylinder Company	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Wuxi China Resources Vehicle Gas Company	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claimant failed to prove the defendant's delay in supply would amount to a refusal to deal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes, Jiangsu high court upheld the judgment of lower court and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 18,000 (US$ 2,852)
Key Legal issues: • the qualification of the claimant • the distinctions between a delay-to-deal and a refusal-to-deal	**Is the dispute likely to be settled privately?** N/A
• the effect of restriction or elimination of competition resulting from a refusal to deal	
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yi Jin, Partner, King & Capital Law Firm, jinyi@king-capital.com

Follow-on (EC or NCA?) or stand-alone?	
Stand-alone	

Brief summary of facts

The claimant, Wuxi Baocheng Gas Cylinder Inspection ("Baocheng"), engaging in compressed natural gas (CNG)inspecting and installing, claimed that the defendants, Wuxi China Resources Vehicle Gas Company ("China Resources Gas") had abused its market dominance by refusing to supply natural gas to vehicles registered by the claimant, *i.e.* the claimant alleged that the defendant refused to issue gas refilling cards to two cars of Baocheng, and claimed therefore a damage of RMB 18,000 (US$ 2,852).

Brief summary of judgment

The first-instance court believed that China Resources Gas enjoyed market dominance in Wuxi's auto gas refilling service market, as it was the city's only auto gas refilling service provider.

However, the court dismissed Baocheng's abuse claim, considering that a temporary delay in providing service should not be treated as a refusal to supply.

Baocheng appealed the ruling before Jiangsu High Court.

The Jiangsu High Court confirmed that judgment and concluded that China Resources Gas had not abused its dominant position. The reasonings were pursuant to the following reasoning:

- China Resources Gas' behavior amounted to a delayed transaction but not a refusal to supply, because it had eventually issued gas-refilling cards to the two vehicles of the claimant on 4 January 2011.
- The defendant's behaviour had not resulted in an elimination nor restriction on competition.
- The claimant failed to prove that the defendant intentionally refused to deal.

The Jiangsu High Court confirmed that concluded that, if the delayed transaction in this case was considered to be a refusal to deal, this would mean that any dominant enterprise that fails to deliver goods or provide services in a timely manner will bear civil liability under the Anti-Monopoly Law. The court further considered that such an approach would result in imposing excessive burden and legal liabilities upon dominant companies.

The judgment was affirmed.

Country: China	
Case Name and Number: LIU Dahua v. Dongfeng-Nissan Motor Co., Ltd., and Hunan Huayuan Industry Co., Ltd. Case No.: (2012) Xiang High Court Civil Division III Final No.	
Date of judgment: 22 June 2012	
Economic activity: G.45—Wholesale and retail trade and repair of motor vehicles and motorcycles	
Court: Hunan High People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Liu Dahua	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Dongfeng-Nissan Motor Co., Ltd. and Hunan Huayuan Industry Co., Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claimant failed to prove the defendant's dominant position in the relevant market, the argument is dismissed due to lack of standing, as well as the failure in establishing the causal link.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. The Hunan High People's Court issued the final judgment which upheld the judgment of the first-instance and dismissed the Claimant's appeal.	**Amount of damages initially requested:** RMB 260 (US$ 41)
Key Legal issues: • Definition of relevant market • Dominant positions in relevant markets • Abuse of dominant position	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Yi Jin, Partner, King & Capital Law Firm, jinyi@king-capital.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

The Claimant is the owner of a Dongfeng-Nissan Teana. Liu had his car's left front door lock cylinder replaced by Dongfeng-Nissan 's 4S shop, Hunan Huayuan Industry Co., Ltd. ("Nissan 4S shop"), The Nissan 4S shop charged Liu RMB 307 (US$ 48) for the part replacement, and RMB 300 for car maintenance. Soon after that, the Claimant found out that two independent repairers charged much lower prices for similar quality of spare parts as well as vehicle maintenance compared with the Nissan 4S shop. In addition, LIU also found that Dongfeng-Nissan's policy prohibited its distributors from merely selling the parts to customers (without provision of the relevant services). So, he brought the suit alleging that Dongfeng-Nissan along with its 4s shop abused its dominant position by charging excessive prices on original parts and the maintenance, as well as adopting an anti-competitive policy, abused its dominant position.

The court of first instance dismissed the Claimant's claim. The Claimant subsequently appealed before the Hunan High People's Court of appeal, which upheld the judgment of the lower court.

Brief summary of judgment

The Hunan High People's Court concluded that due to the defendant's failure in defining proper relevant markets, and by conducting the analysis on the demand-side substitution, in particular, the court has considered the function, features, as well as the usage of the replacements, therefore the court held that, both the original spare parts (parts that produced by Dongfeng-Nissan or other licensed producers) and the aftermarket auto parts (parts that produced and sold by other companies) should be considered in a broader market definition. Also, due to the defendant's failure in proving the market dominance held by the defendant, the Hunan High People's Court of appeal upheld the lower court's verdict. As far as the franchise policy is concerned, the court of appeal concluded it was not necessarily anti-competitive.

Country: China	
Case Name and Number: Tangshan Renren Information Service Co., Ltd. vs. Beijing Baidu Netcom Science and Technology Co., Ltd., Dispute over Abuse of Market Dominance. Case No.: (2010) Gaomin Zhongzi No.489	
Date of judgment: 9 July 2010	
Economic activity (NACE Code): J.63.12—Web portals	
Court: Beijing High People's Court	**Was pass on raised (yes/no)?** N/A
Claimants: Tangshan Renren Information Service Co., Ltd. ("Tangshan Renren")	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Beijing Baidu Netcom Science and Technology Co., Ltd. ("Baidu")	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Tangshan Renren failed to prove that Baidu held a dominant market position. No.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Beijing High People's Court upheld the judgment of Beijing No.1 Intermediate People's Court.	**Amount of damages initially requested:** RMB 1,106,000 (US$ 0.1634 million)
Key Legal issues: • Whether the court of first instance has violated legal procedures during the trial • Whether Baidu's behaviour is an abuse of market dominance and whether it should bear corresponding legal liabilities	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Zhaoqi (Charles) CEN, Partner, Zhong Lun Law Firm, Beijing Office, cenzhaoqi@zhonglun.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

Baidu is a leading online search engine provider in China. In addition to providing free search services to users, Baidu also provides paid listing services to website owners, wherbey the more a website owner pays, the higher the website's ranking would be in relevant search results.

Tangshan Renren was the owner of a medical information website, www.qmyyw.com. Tangshan Renren believed that Baidu had blocked its website because it reduced its investment in Baidu's paid listing service, and the blocking had led to a significant reduction in the number of visits to its website.

Tangshan Renren filed a case with the Beijing No.1 Intermediate People's Court, alleging that Baidu had abused its dominant position by blocking Tangshan Renren's website and thus forcing Tangshan Renren to subscribe to Baidu's paid listing services. Tangshan Renren sought damages of RMB 1,106,000 (US$ 0.1634 million) and an order that Baidu unblock its website.

Brief summary of judgment

The court defined the relevant service market as a search engine service market and rejected Baidu's claim that the search engine service could not be a relevant market under the Anti-Monopoly Law because it was delivered "free of any charge" to users. However, the court noticed that, search engine services were also provided to website owners who would pay to achieve a better ranking in search results. The court defined the relevant geographic market as China-wide, considering that the majority of users who used Chinese search engines were located in China, and search engine services which Chinese users could select and access were also generally provided within China.

The court held that the evidence provided by Tangshan Renren was insufficient to sustain the claim that Baidu held a dominant market position. Tangshan Renren also failed to prove its allegation that Baidu blocked its website because it reduced its investment in paid listing; on the contrary, there was a legitimate justification for Baidu to block Tangshan Renren's website because Tangshan Renren had created "junk links". "Junk links" are artificially created links which have nothing to do with the keywords typed into a search engine but which fool the search engine's algorithm into improving a website's ranking for said keywords. To protect the interests of search engine users, Baidu adopted a rule in its policies to block websites which rely on "junk links". According to Baidu's policy, when "junk links" are identified by the anti-cheating mechanism of Baidu, the infringing website will automatically be punished by Baidu.

Thus, the court of first instance dismissed all the claims of Tangshan Renren. This judgment was upheld on appeal.

FRANCE

INTERNATIONAL CHAMBER OF COMMERCE

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In France, private antitrust litigation has been based on general rules of civil contractual and tort liability. First milestone decisions date back from the early 2010s. Private enforcement of antitrust law has historically been limited but two changes in legislation may encourage civil actions: (i) the introduction of an opt-out class action into French law by Law No. 2014-344 of 17 March 2014 ("**Hamon Law**") and (ii) Ordinance No. 2017-303 ("**Ordinance**") and Decree No. 2017-305 ("Decree") of 9 March 2017 implementing the EU Directive 2014/104 of 26 November 2014 on Antitrust Damages Actions (the "**Directive**"), which have introduced specific procedural rules for private antitrust actions (Articles L.481-1 et seq. of the French Commercial Code).

1. Jurisdiction

The primary authority in charge of enforcing competition law in France is the French Competition Authority ("**FCA**"). However, the FCA is only competent for public enforcement and not for private damages actions.

Victims of anti-competitive practices can seek compensation before one of the eight civil or eight commercial courts specialised in competition law. Class actions, however, can be brought before any civil court in France.

Administrative courts have jurisdiction when the alleged damage relates to an administrative contract. Criminal courts have jurisdiction when the claim is based on criminal liability (which, under French law, may arise in respect of certain anti-competitive conducts). The rules applicable to administrative and criminal actions are not covered in this overview.

The jurisdictional clause included in an agreement may also be applicable provided that the alleged anti-competitive practices materialise in the contractual relations between parties and/or by means of contractual terms, without necessary express reference to disputes relating to liability incurred as a result of an infringement of competition law.

In civil actions for damages, claimants can bring actions based on a decision from a competition authority finding an infringement of competition law against the defendant(s) (follow-on actions) or, irrespective of a public enforcement procedure, on the basis of a stand-alone action. However, stand-alone actions for damages may also be stayed until the competition authority has issued a decision.

2. Relevant legislation and legal grounds

In order to be valid, a claim for damages must be based both:

i. on civil liability legislation:

- either general civil liability:
  - Tortious liability: Articles 1240 et seq. of the French Civil Code; or
  - Contractual liability (when the alleged harm results from contractual relationships between the parties, e.g. for an abuse of dominance): Articles 1103 et seq. of the French Civil Code;
- And/or the new framework introduced by the Ordinance and the Decree which provide specific procedural rules relating to the liability of infringers of competition law: new Article L.481-1 et seq. of the French Commercial Code ("FCCom");

ii. and the relevant French and/or EU antitrust legislation: private antitrust actions can be based on any violation of French (Articles L.420-1, L.420-2, L.420-2-1, L.420-2-2 and L.420-5 FCCom) or EU (Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")) competition law.

Any victim, whether they are direct or indirect customers, competitors, suppliers, and so forth, can seek compensation before French courts provided that they satisfy the general conditions set out by civil liability rules, such as e.g. standing and interest in the case. As mentioned above, it is not necessary that the FCA or the European Commission has issued a prior decision finding an infringement for the action to be admitted, except for class actions, which must be follow-on actions.

To date, most cases have been based on tortious liability (still applicable to any actions for damages based on an infringement of competition law arising before 11 March 2017—see below) which requires the claimant to bring evidence of (i) a fault—*i.e.* an anti-competitive behaviour, (ii) damage, and (iii) causation between the two. This means that an infringement of competition law may constitute a wrongdoing that entitles any victim to claim damages for the harm suffered. Under the general regime, the burden of proof of the three above-mentioned elements falls on the claimant.

The Ordinance and the Decree have made it easier for claimants to establish those three elements:

- New Article L.481-2 FCCom provides that a decision of the FCA finding an infringement of competition law and which can no longer be appealed on such findings constitutes irrefutable evidence of fault. This does not apply to decisions of inadmissibility, dismissal, or commitment decisions of the FCA, since there is no finding of an infringement, but still applies to settlement decisions. French courts may still use commitment decisions, in which the FCA raises only competition concerns on the basis of a preliminary assessment of the competitive situation, as *prima facie* evidence of the fault. In the PMU case, the Paris Court of Appeal considered that the commitment decision may still provide sufficient elements to establish the undertaking's liability.[1]

1 Paris Court of Appeal, 12 September 2018, n° 18/04914, *PMU / Betclic.*

As regards decisions by the European Commission, French courts are bound by final decisions of the European Commission enforcing Articles 101 and 102 TFEU. However, decisions of national competition authorities in the EU only have evidential value (*i.e.* they are taken into account as a piece of evidence but the court is not bound by the decision to find that competition law has been infringed).

Parties, which have been granted immunity from fine under the leniency programme, are not exempt from civil liability. However, they benefit from some protection as regards access to the file and cannot be found jointly and severally liable for damages with other parties to the infringement (except in specific circumstances as detailed below).

- New Article L.481-7 FCCom provides for a presumption that anti-competitive agreements have caused damage—this reduces the claimant's burden of proof to establishing causation between the anti-competitive practice and the damage.

- New Article L.481-3 FCCom provides that damage caused by anti-competitive practices includes (i) the overcharge paid, (ii) loss of profits, (iii) loss of opportunity and (iv) moral prejudice. In addition, new Article L.481-4 FCCom has introduced a presumption that the purchaser has not passed on the additional costs incurred as a result of the anti-competitive practice to its own customers. Such presumption may be rebutted.

Rationae temporis application of the Ordinance

Pursuant to the principle of non-retroactivity of the law, the new substantial provisions of the Ordinance, and in particular the above-mentioned presumptions, are only applicable to actions for damages as a result of infringements of competition rules (*i.e.* the facts causing liability) arising after its entry into force, *i.e.* from 11 March 2017 onwards.

However,

- procedural rules regarding the production of evidence (Articles L. 483-1 to L. 483-4, L. 483-6, L. 483-7, L. 483-9 and the first four paragraphs of articles L.483-7 and L.483-10, and Article L.462-3 FCCom), apply to all claims lodged since 26 December 2014 (as provided in Article 22 of the Directive);

- provisions extending the limitation period apply when the limitation period had not expired at the date of entry into force of the Ordinance. In such case, account must be taken of the period that has already elapsed.

For the time being, most actions remain subject to the previous substantive provisions. That being said, the Paris Court of Appeal recently applied the presumption regarding causation link to an infringement that occurred prior to the entry into force of the Ordinance in the Doux case.[2] In this case, the European Commission fined animal feed phosphates producers for price-fixing and market-sharing in 2010; its decision was confirmed by the General Court of the European Union in 2015. In the follow-on action for damages, the Paris Court of Appeal confirmed that the claimant suffered damages resulting from the cartel on the basis of evidence of price increases during the practices but also included a general statement

2 Paris Court of Appeal, 6 February 2019, n° 17/04101, *Doux*.

that such evidence was "reinforced by the fact that cartels generally lead to higher prices or prevent a price decrease that would have occurred in the absence of the cartel".

3. What types of anti-competitive conduct are damages actions available for?

Damages actions are not limited to anti-competitive agreements and abuses of dominant position. They are also available for damage resulting from abuses of economic dependency (Article L.420-2, 2° FCCom), allocation of exclusive import rights in French overseas territories (Article L.420-2-1 FCCom), agreements or practices relating to transportation (Article L.420-2-2 FCCom) and abusively low retail prices (Article L.420-5 FCCom).

4. What forms of relief may a private claimant seek?

Punitive damages are not available under French law.

The sole purpose of damages actions is to compensate for the damage suffered by the claimant, *i.e.* a pecuniary loss. Causation between the fault and the damage must be direct, which means that the claimant must prove that the damage it suffers results entirely from the anti-competitive behaviour.

As mentioned above, new Article L.481-3 FCCom provides that damage caused by anti-competitive practices includes (i) the surcharge paid, (ii) loss of profits, (iii) loss of opportunity and (iv) moral prejudice, and new Article L.481-7 FCCom has introduced a presumption that anti-competitive agreements and concerted practices cause damage (to the exclusion of abuses of a dominant position).

The French Ministry of Justice issued a circular providing useful guidance on the new provisions resulting from the implementation of the Directive, in particular on the calculation of reparable damage.[3]

Claimants may also ask the court to (i) declare their agreement with the defendant null and void, or (ii) issue an injunction requiring the defendant to grant access to an essential facility or to resume business relationships for example.

Undertakings that have infringed competition law are jointly and severally liable for the damage caused by the infringement to the claimant. This means that a victim can claim full compensation from any of them until fully compensated. Infringing undertakings contribute to the payment of damages in proportion of their relative responsibility in the harm caused (so that they are able to recover a contribution from any other undertaking if they have to pay the victim in full).

However, infringing undertakings that have been granted immunity from fine by the FCA are not jointly and severally liable towards other victims than those who they have direct or indirect contractual relationships with, unless the said victims are unable to obtain compensation from the other infringers (new Article L.481-11 FCCom).

3 Available at http://www.textes.justice.gouv.fr/art_pix/JUSC1708788C.pdf.

5. Passing-on defence

The burden of proof of causation between fault and damage falls on the claimant. Before the Ordinance and Decree entered into force, in respect of vertical relationships between suppliers (members of a cartel) and business customers (claimants), case-law provided that the purchaser had to demonstrate that it had not passed on the surcharge resulting from a cartel to its own customers.[4]

New Article L.481-4 FCCom has reversed the presumption underlying the "passing-on defence" and provides that a direct or indirect purchaser is deemed not to have passed on the overcharge to its own customers. It is now for the defendant to prove that the purchaser has done so. In a 2017 decision, the Paris Court of Appeal applied this new presumption in a case that was subject to the previous regime and confirmed the loss by finding that the defendants failed to show that the overcharge had been passed on to the claimant's own customers.[5] However, in other decisions, judges applied the previous regime when the facts at stake pre-dated the entry into force of the Ordinance and Decree on 11 March 2017.[6]

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no discovery procedure in France: the burden of proof falls on the claimant and the defendant has no disclosure obligation.

However, the claimant is entitled to request the disclosure of documents that are considered as necessary to prove the alleged facts.

The judge may also order the production of documents from the file of the FCA, the European Commission or a national competition authority within the EU, but only after the public enforcement proceedings are over. However, under new Article L.483-5 FCCom, the judge is prevented from ordering disclosure of documents pertaining to the parties' (i) leniency applications and (ii) settlement submissions.[7]

Law No. 2018-670 of 30 July 2018 provides for a specific regime protecting business secrets in proceedings before the French civil and commercial jurisdictions. The judge may for instance decide that only a non-confidential version of certain documents will be provided, that the pleadings will be held *in camera*, or that only a non-confidential version of the decision will be available online. In practice, the judge may design innovative solutions in order to find the right balance between protecting confidential information and disclosing relevant documents to the parties such as data rooms with a confidentiality obligation for the requesting party.[8] This law has replaced previous similar provisions, which were specifically relating to private antitrust actions for damages.

4 See for instance French Supreme Court, 15 May 2012, n° n° 11-18.495, *Le Gouessant*.

5 Paris Court of Appeal, 20 September 2017, n° 12/04441, *JCB Services*.

6 See e.g. Paris commercial court, 20 February 2020, No. 420491, *Provera et. al.*.

7 Previous legislation already provided that documents prepared by an infringing undertaking with a view to apply for leniency or collected by the FCA in the context of a leniency application could not be disclosed to civil courts.

8 T. com. Paris, 25 September 2017, *Carrefour*.

7. Limitation Periods

The limitation period is five years from the date when the victim becomes or should have become aware of, cumulatively, (i) the litigious behaviour and the fact that it was anti-competitive, (ii) the harm that it caused to the victim and (iii) the identity of the infringer(s). This is the common law limitation period in civil matters (Article 2224 of the French Civil Code).

Regardless of the above, the limitation period does not start to run until the infringement has ceased (Article L.482-1 FCCom).

Under the current provisions, the start of a procedure by the FCA, the European Commission or a national competition authority in the EU, as well as any act of investigation relating to an infringement of competition law, interrupts the limitation period as long as the competition authority decision can be appealed (this captures any ordinary form of appeal and therefore excludes an appeal before the French Supreme Court) (Article L.462-7 FCCom).

In addition, the starting point of the limitation period for damages actions introduced against an infringing undertaking that has been granted immunity, or a reduction of fine, is postponed until the claimant is able to act against the other infringing undertakings (in case they appeal the competition authority decision) (Article L.482-1 FCCom).

However, as mentioned above, such provisions only apply to cases where the infringement decision was issued after the entry into force of the Ordinance, *i.e.* 11 March 2017.

In addition, the judge will have some room to assess the date when the claimant "*becomes or should have become aware of*" the litigious behaviour. For instance in a 2019 decision,[9]—where the facts date back before the provisions regarding the interruption of the limitation period during the FCA procedure—the Paris commercial court considered that the claimant's action for damages was time-barred despite the fact that it was introduced less than five years after the FCA's decision fining SANOFI for abuse of dominance. The court pointed out that the claimant had been involved in the proceedings before the FCA from the start, and that he had replied to several requests for information. The court considered that the starting point of the limitation period was the date when the claimant, in response to a request from the FCA, provided an estimate of the damage it had suffered from SANOFI's practice, such response dating more than five years before the introduction of the claim. It will be interesting to see if the Court of Appeal also considers whether undertakings involved in the FCA proceedings, claimant or interested third-party, should be deemed aware, in particular, of the fact that the litigious behaviour was anti-competitive despite the FCA not having ruled on the question yet.

8. Appeal

Rulings of commercial and civil courts can be appealed before the Paris Court of Appeal, which has exclusive jurisdiction in competition matters (Articles L.420-7 and R.420-5 FCCom).

9 Paris Commercial Court, 1 October 2019, *CNAMTS / Sanofi*.

Rulings of the Paris Court of Appeal may be appealed before the French Supreme Court, which rules only on points of law.

9. Class actions and collective representation

The Hamon Law introduced an "opt-in" class action into French law, whereby consumers that are victim of an infringement of competition law by the same undertaking(s) may file a single claim. An authorised consumer association must introduce the claim on behalf of consumers affected by the infringement. This can only be a follow-on action.

As a first step, the judge hearing the class action shall rule on the defendant's liability in the case presented by the association, determine the category of consumers who can join the action and identify the amount of damages or the method to determine this amount. The judge orders public notice of this judgment in order to make consumers aware that they have the ability to join the class action and thereby seek compensation.

Once informed of the decision, consumers may choose to join the action and therefore receive compensation in the terms of the judgment, or not.

To date, very few class actions have been introduced before the French jurisdictions and, to the best of our knowledge, none in antitrust matters.

10. Key issues

The entry into force of the presumptions facilitating private actions

As mentioned above, up until this date, most private actions are subject to the previous regime and do not benefit from the provisions of the Ordinance. That being said, civil judges tended to make an early application of the provisions of the Directive before the Ordinance, to the benefit of claimants. In practice, decisions of the FCA finding an infringement already constitute almost irrefutable evidence of a civil fault. That being said, not all judges have made such early application, which may result in a certain lack of consistency in the case-law.

Starting point of limitation period—Question concerning claimants / third parties to the FCA proceedings.

As mentioned above, the limitation period is a focus in the recent decisions and will undoubtably give rise to abundant case-law. In particular, the starting point of the limitation period and the consideration of the victims for their participation to the FCA procedure may become a sensitive issue.

In cartel cases, the limitation period should start running strictly from the day an infringement decision is issued. Considering the secret nature of cartels, the victim may not have been aware of the infringement before. Consequently, only an infringement decision

would provide the victim with enough factual elements of such practices to substantiate a damage claim.[10]

But in other cases (e.g. in abuse of dominance cases), the limitation period could start running before the infringement decision, in particular when the victim has been involved in the proceedings before the FCA.[11]

Calculation of damages

The assessment of the harm suffered by the victims of competition law infringement remains a complex task in light of the French tort law principle of full compensation, despite the useful guidance provided by the Ministry of justice's circular and Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU (OJEU, 13.6.2013, C 167/19).

Methodology for the selection of cases

The following cases are the most relevant ones in the French case-law for both follow-on and stand-alone proceedings. This selection does not attempt to be exhaustive.

First instance judgments are included only to the extent that they are of particular relevance. In cases where the initial judgment has been appealed, only the last decision is being referred to. However, references to previous judgments are listed in the table.

10 See Paris Court of Appeal, 6 March 2019, Arkeos et al., concerning a decision ordering interim measures without ruling on the merits; see also Conseil d'Etat, 7e et 2e ch., 27 March 2020, n°420491, *Signalisation*.

11 See for instance, Paris Commercial Court, 1 October 2019, *CNAMTS / Sanofi*.

Country: France	
Case Name and Number: Cour d'Appel, Paris, 17 juin 2020 RG n°17/23041	
Date of judgment: 17 June 2020	
Economic activity (NACE Code): J.61— Telecommunications	
Court: Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: SA Digicel Antilles Françaises Guyane	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Orange and SA Orange Caraïbe (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 181.5 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 578 million
Key Legal issues: • Abuse of dominant position • Exclusivity clauses • Distribution agreement • Resale price maintenance	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA decision No. 09-D-36, upheld by the Paris Court of Appeal (23 September 2010, 2010/00163), then annulled by French Supreme Court (31 January 2012, 10-25.772), upheld again by the Paris Court of Appeal (4 July 2013) and the French Supreme Court (6 January 2015, 13-21.305))	

Brief summary of facts

Orange Caraïbe was fined by the FCA for: (i) imposing exclusivity clauses in distribution agreements with its independent distributors, (ii) having an exclusivity agreement with Cetelec, the only authorised repairer of terminals in the Caribbeans; (iii) setting up a customer loyalty programme; (iv) practising abusive differential pricing between "on net" and "off net" calls; and (v) resale price maintenance.

The Commercial Court awarded EUR 346 million to Digicel. The Commercial Court seemed to apply a presumption of causality. It noted that Orange did not prove that Digicel's prejudice could result from an erroneous commercial strategy or a lack of investment of Digicel. The Court considered that the interest rate applicable in the present case was the ARCEP rate (10.4%) unlike in the similar case Outremer Telecom where it applied the legal interest rate.

Brief summary of judgment

The Court of Appeal partially overturned the judgment rendered by the Commercial Court which considered that only certain practices amounted to a fault generating prejudice against Digicel. Besides damages for the customer loyalty programme and the price discriminatory practices, the Court of Appeal also awarded damages for the exclusivity agreement and the exclusivity clauses. The Court also confirmed the relevance of the two complementary methods used by the claimant for quantifying its prejudice and the use of the margin on variable costs but unlike the Commercial Court opted for the lower quantum instead of the higher one). The Court however quashed the judgment on the use of the ARCEP interest rate, putting more in line the Outremer and Digicel cases.

Country: France	
Case Name and Number: Conseil d'Etat, 7e et 2e ch., 27 March 2020, n°420491	
Date of judgment: 27 March 2020	
Economic activity (NACE Code): C32 Other Manufacturing / C 28 Manufacture of machinery and equipment	
Court: Conseil d'Etat (Supreme administrative court)	**Was pass on raised (yes/no)?** Yes
Claimants: Département de la Manche	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: Signalisation France	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 2.2 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Unknown
Key Legal issues: • Limitation period (starting point)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA, Decision 10-D-39)	

Brief summary of facts

In 2010, the FCA fined eight companies active in the road signalling sector for bid rigging and market sharing. Several local communities sought compensation for the overcharge paid as a result of the practices before administrative courts.

Brief summary of judgment

The Conseil d'Etat (French administrative supreme court) confirmed the judgments of the first instance and appeal courts ordering one of the cartel members, Signalisation France, to pay a local community (Manche department) EUR 2.2 million damages.

Before Law n° 2008-561 of 17 June 2008, limitation period for quasi-tort liability was ten years from the date when damage occurred. The above-mentioned law has reduced it to five years from the date the victim becomes or should have become aware of facts allowing it to seek compensation. The Manche department brought its claim on 16 February 2015. Signalisation France claimed that the claim was time-barred since the Manche department's became aware of the practices as early as 2006 (several press articles having been published at that time), or 2009 when prices decreased as a result of the end of the cartel, or in any event before the FCA 2010 decision as it was interviewed by the FCA during the investigation. Signalisation considered the limitation period started at the date of entry into force of the 17 June 2008 Law and ended five years later, on 20 June 2013.

The Conseil d'Etat considered that the Manche department did not have "sufficiently certain" knowledge of the scope of the practices before the FCA decision dating 22 December 2010, and confirmed the claim was not time-barred when introduced in February 2015.

Country: France	
Case Name and Number: Tribunal de commerce Paris, 3e ch., 20 February 2020, n°2017021571	
Date of judgment: 20 February 2020	
Economic activity (NACE Code): C.10.5—Manufacture of dairy products	
Court: Commercial Court (Paris)	**Was pass on raised (yes/no)?** Yes
Claimants: SAS Provera France, SAS Cora et SAS X Z	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Groupe Lactalis, SNC Lactalis Nestlé, SNC Novandie, SNC Andros, SAS X O P, SAS Senagral Holding, SASU General Mills Holding, SAS Yoplait France and SAS Yoplait	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 0
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** EUR 14.8 million
Key Legal issues: • Interest in action • Umbrella pricing • Burden of proof • Passing on	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA, Decision No 15-D-03, partially annulled by Paris Court of Appeal (23 May 2017), Appeal pending before the French Supreme Court)	

Brief summary of facts

Three companies of the Cora supermarket group sought compensation from dairy companies fined by the French Competition Authority in the context of the "yoghurt cartel" (FCA decision 15-D-03). Dairy companies were found to have participated in price fixing agreements and market allocation practices for private label dairy products between 2006 and 2012. Claimants requested disclosure of documents in order to be able to quantify the amount of damages.

Brief summary of judgment

The Court dismissed all of the claimants' requests. Three points to note:

First, the Court declared Provera inadmissible since, as a central referencing office for the supermarkets of the group, it did not purchase the products and thus had not shown that it had suffered any damage. The admissibility of the other claimants, supermarkets Cora and Match, was not challenged.

Second, regarding the 'Umbrella pricing', claimants argued that the prices charged by manufacturers which did not participate in the cartel and prices of private label products which were not targeted by the cartel had also risen because of the cartel. They also sought compensation for such price increase. However the Court considered that claimants had not evidenced any causal link between the practices and the alleged price increases.

Third, regarding the passing on, considering that the facts pre dated the entry into force of the Ordinance and Decree (11 March 2017), the Court applied the previous regime and ruled that claimants had not been able to provide relevant evidence on the level of passing on.

Country: France	
Case Name and Number: Tribunal de commerce de Paris, 1e ch., 1 October 2019, n°2017053369	
Date of judgment: 1 October 2019	
Economic activity (NACE Code): C21—Manufacture of basic pharmaceutical products and pharmaceutical preparations	
Court: First instance commercial court	**Was pass on raised (yes/no)?** No
Claimants: Caisse Nationale de l'Assurance Maladie des Travailleurs Salariés (CNAMTS)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Sanofi and SA Sanofi Aventis France	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages awarded
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 116 million
Key Legal issues: • Limitation period (starting point) • Interruption of limitation period	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA, Decision No 13-D-11, upheld by the Paris Court of Appeal (18 December 2014, No 2013/12370) and the French Supreme Court (18 October 2016, No 15-10.384))	

Brief summary of facts

On 14 May 2013, following a complaint by TEVA, a generics manufacturer, the FCA fined Sanofi EUR 40.6 million for abuse of dominance (disparaging the generic versions of Plavix®). Decision was confirmed by the Paris Court of Appeal in December 2014 and the French Supreme Court in October 2016.

The CNAMTS, a health insurance office, sought compensation for the overcharge paid to the insured persons and pharmacists and brought a claim to the Paris commercial court on 12 September 2017.

Brief summary of judgment

Sanofi argued that the CNAMTS' claim was time-barred since it became aware of the disparaging practices when the FCA issued a decision on interim measures (in this case on 17 May 2010), or at least when it had to respond to several requests for information of the FCA during the investigation in 2010 and 2011.

The Paris commercial court examined in concreto and in detail how CNAMTS had been able to monitor Sanofi's behaviour and how it had participated in the FCA investigation. In particular, pointing out that, on 16 September 2011, CNAMTS provided to the FCA an estimate of the damage suffered as a result of the practices, the court found that, at that date, CNAMTS was aware of Sanofi's practices, the fact that they were anti-competitive, their effect on generics and the possible harm they may have caused.

The claim having been brought more than five years after 16 September 2011, the Court considered it was time-barred.

CNAMTS also argued that, pursuant to Article L. 462-7, the limitation period had been interrupted by TEVA's complaint to the FCA on 2 November 2009. However, the Court pointed out that the new provisions of Article L. 462-7, introduced by the 2014 Hamon Law, were only applicable to facts arising after its entry into force. Therefore, it found that the limitation period had not been interrupted in the case at hand, and dismissed CNAMTS' claim.

Country: France	
Case Name and Number: Cour d'appel de Paris, Pôle 5 Ch. 4, 6 March 2019, n°17/21261	
Date of judgment: 6 March 2019	
Economic activity (NACE Code): C27.1.2—Manufacture of electricity distribution and control apparatus	
Court: Paris Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: SARL ARKEOS, SARL CAP ECO ENERGIE, SARL APEM ENERGIE, SARL SOL'AIR CONFORT, SAS GAVRIANE, SARL CAP SUD France (appellants)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: EDF (SA Electricité de France, SASU EDF Energies Nouvelles Réparties, SASU EDF ENR Solaire)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages or other remedies awarded.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** Unknown (blanked out in the judgment).
Key Legal issues: • Limitation period (starting point) • Interruption of limitation period	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA, Decision No 13-D-20, partially upheld by the Paris Court of Appeal (21 May 2015) and the French Supreme Court (27 September 2017)	

Brief summary of facts

On 8 April 2009, the FCA issued a decision imposing interim measures to EDF relating to potential abusive practices in the photovoltaic solar power sector (favouring its own subsidiary in an emerging market).

On 17 December 2013, it fined EDF for abuse of dominance. It was confirmed by the French Supreme Court in 2017.

Arkeos and other companies active in the sale and installation of solar panels sought compensation before the Paris Commercial Court on 11 September 2014. The Paris commercial court considered that their claim was time-barred and dismissed it. It found that the starting point of the limitation period was the FCA decision on interim measures of 8 April 2009.

Brief summary of judgment

The Court of Appeal quashed the commercial court's judgment.

It considered, first, that the FCA decision ordering interim measures could not be the starting point of the limitation period as it does not provide sufficient knowledge of the practices to the victims to enable them to seek compensation. Only the decision on the merits of 17 December 2013 provided such knowledge and was considered a relevant starting point for the limitation period, Arkeos' claim was thus regarded as not time-barred.

Even considering that the interim measure decision could be the relevant starting point, the Court found that Arkeos' claim was not time-barred, given that, when the new provisions of Article L.462-7 on the interruption of the limitation period resulting from the opening of a proceeding by the FCA entered into force on 19 March 2014, the five-year limitation period would not have had lapsed (would have expired on 8 April 2014). As a result, the Court ruled that the limitation period had been suspended until the date when the FCA decision on the merits became final (with the ruling of the Paris Court of Appeal on this decision of 21 May 2015).

However, the Court found that Arkeos and the other appellants had not evidenced any causal link between EDF's practices and the alleged harm. Therefore, it dismissed their claims.

Country: France	
Case Name and Number: CA Paris, pôle 5, ch.4, 12 September 2018, n°18/04914	
Date of judgment: 12 September 2018	
Economic activity (NACE Code): R.92.0.0—Gambling and betting activities	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Betclic	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Applicability of the Directive was discussed since the FCA did not impose any fine on PMU (commitment decision).
Defendants: GIE Pari Mutuel Urbain (PMU) (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** An expert opinion has been commissioned.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—Appeal before the Supreme Court was rejected. First instance judgment: TGI Paris, 5è ch., 2e section, 22 February 2018, RG15/09129.	**Amount of damages initially requested:** EUR 172.2 million
Key Legal issues: • Monopoly • Abuse of dominant position	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA decision No. 14-D-04)—PMU offered commitments to the FCA and did not receive any fine	

Brief summary of facts

PMU, active in the horse and sports betting services as well as poker game services, holds a monopolistic position in France in the organisation of horse betting services in its brick-and-mortar network. PMU also offers online horse and sports betting services, as well as online poker game services. Betclic offers online sports and horse betting services and online poker game services only (no offline services).

Until 2015, PMU used to pool the amount of bets placed online and offline.

Betclic considered that this provided the PMU website with a unique competitive advantage.

Brief summary of judgment

The Court of Appeal considered that PMU had abused of its dominant position by pooling the amount of online and offline bets and thus benefiting from unfair competitive advantage in an emerging market to the detriment of competing operators. Concerning the amount of damages, the court stayed the proceedings and referred to an expert's report.

Country: France	
Case Name and Number: CA Paris, 8 June 2018, n°16/19147	
Date of judgment: 8 June 2018	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SFR	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Orange (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 52.95 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—Supreme Court 16 September 2020, 18/21615 (partial annulment and referral to the Court of Appeal).	**Amount of damages initially requested:** EUR 181,52 million
Key Legal issues: • Unfair Competition • Predatory pricing • Substitutability • Discrimination in favour of one's own subsidiary	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com

Follow-on (EC or NCA?) or stand-alone? Stand-alone Previous rulings: Judgment of first instance (12 February 2014) found Orange guilty; the Paris Court of Appeal (8 October 2014) overturned the judgment; French Supreme court (12 April 2016) overturned the appeal judgment and referred the case back to the Court of Appeal	

Brief summary of facts

Orange had marketed an offer whereby owners of second homes could suspend their line at a low cost when their second home was unoccupied. SFR wanted to develop a competing offer but was not able to because of the monthly fees paid to the incumbent operator.

Brief summary of judgment

The Court held that Orange was required to submit offers that enabled its competitors to operate under satisfactory/reasonable pricing conditions. The Court considered that Orange's refusal to suspend the fees was abusive, as it was likely to prevent competitors from marketing a similar offer. It however refused to consider that tying of the second homes and the primary homes' offers were constitutive of an abuse. The Court therefore granted damages (EUR 52.95 million) only for the prejudice suffered from 2010 to 2016 relating to margin squeeze and sales below cost practices.

Country: France	
Case Name and Number: CA Paris, ch.5-4, 11 avril 2018, n°14/14758	
Date of judgment: 27 May 2015	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Lectiel	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Orange	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 2.5 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Case back before the Court of Appeal after second annulment by the French Supreme Court (Cass. Com., 3 juin 2014, n° 12-29482) Previous ruling: Paris Commercial Court, 5 January 1994 (no damages awarded) Paris Court of Appeal, 30 September 2008 Supreme Court, 23 March 2010, partial annulment only regarding the dismissal of damages to be paid by Orange Paris Court of Appeal, 27 June 2012—confirmed the initial judgment Supreme Court, 3 June 2014, annulment Paris Court of Appeal, 27 May 2015 (damages awarded for abuse of dominance and failure to comply with commitments)	**Amount of damages initially requested:** EUR 307 million

Key Legal issues: • Monopoly / Abuse of dominance • Market foreclosure • Essential facilities • Margin squeeze	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA Decisions No 98-D-60 and No 03-D-43 (failure to comply with commitments imposed in Decision No 98-D-60))	

Brief summary of facts

Orange, the French incumbent telecom operator, refused to provide Lectiel with a list of telephone subscribers. Orange offered to provide the list through a dedicated telematics service but Lectiel argued that the rate charged for such service was excessive.

The FCA concluded that Orange was in a dominant position on the market for prospecting databases and had abused such a dominant position as it prevented new entrants from entering the market and the development of technical innovation on such market.

Brief summary of judgment

The Court held that Orange was required to submit offers that enabled its The Court of Appeal considered that Orange has abused its dominance and appointed an expert in order to assess Lectiel's prejudice as the latter did not provide enough information for the Court to rule on the amount of damages.

The Court also upheld the first ruling of the Paris Court of Appeal as regards damages to be paid by Lectiel to Orange for illegal downloading of the list of phone subscribers.

Country: France	
Case Name and Number: CA Paris, pôle 5, ch.4, 20 December 2017, n°15/07266	
Date of judgment: 20 December 2017	
Economic activity (NACE Code): E.38.2—Waste treatment and disposal	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SARL DKT International	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA ECO-Emballages (Appellant) SA Valorplast (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No (lack of fault)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 350,000
Key Legal issues: • Abuse of dominant position • Disparagement • Discrimination • Collusive behaviour	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA)—ECO-Emballage and Valorplast offered commitments to the FCA and did not receive any fine (see FCA decision No. 10-D-29 of 27 September 2010).	

In first instance judgment, the Commercial Court (30 March 2015) found guilty the defendants and awarded EUR 400.000.	

Brief summary of facts

Eco-Emballage is a public company in charge of the collecting and recycling of household packaging waste. It has concluded an agreement with Valorplast for recycling plastic.
In 2004, DKT was created to recover household plastic waste. DKT reported allegedly abusive eviction practices (in particular, disparagement practices) from Eco-emballages and Valorplast to the FCA.

The FCA did not rule on the existence of an abuse of dominance as Eco-emballages and Valorplast committed to publish online a "vademecum" for household plastic waste recovery to provide local administrations with more information to enable them to make a more enlightened choice, to allow local administrations to change recovery methods during the six-year contractual period, and to offer available tonnages to recyclers that are not yet tied to it by long-term contracts.

Brief summary of judgment

The Court of Appeal therefore had to concretely assess whether there was a restriction of competition. It found that there was no restriction of competition for the following reasons:

i. the towns with which Eco-Emballages has contracted could put an end to the contract at any time,

ii. Eco-Emballage was bound by the requirements set up by the public authorities as part of the approval by the Ministry for Ecology,

iii. there was no proof of disparagement or discrimination against DKT and

iv. there was no sufficient evidence of collusive behaviour between Eco-Emballages et Valorplast.

The Court therefore did not grant any damages to DKT.

Country: France	
Case Name and Number: CA Paris, 20 September 2017, n°12/04441	
Date of judgment: 20 September 2017	
Economic activity (NACE Code): C28.92—Manufacture of machinery for mining, quarrying and construction	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SAS Central Parts	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: JCB SALES (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Damages: EUR 1.5 million EUR 40,000 (internal costs) EUR 41,000 (expert fees)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous rulings: Orleans Commercial Court—4 June 2008: Award of EUR 600,000 to Central Parts. Orleans Court of Appeal—1st April 2010: request for an expert's opinion on damages. French Supreme Court—15 November 2011 : annulment on the basis that "the JCB group" had no legal personality Paris Court of Appeal—26 June 2013: confirmed the existence of an infringement and the causal link with the prejudice suffered by Central Parts. Request for an expert's opinion on damages. French Supreme Court—6 October 2015: confirmation of the previous judgment.	**Amount of damages initially requested:** EUR 3.2 milllion (Appeal)

Key Legal issues: • Refusal to sell • Damage quantification	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC decision No COMP/35.918), partially upheld (fine reduced from EUR 39 to 30 million) by the Tribunal of the European Union (T-67/01 JCB Service v. Commission) and confirmed by the Court of Justice (C-167/04 P JCB Service v. Commission)	

Brief summary of facts

The JCB companies manufacture and market construction site machinery, earthmoving and construction equipment and agricultural machinery as well as the spare parts for those various products. They were found guilty by the European Commission of abusive refusal to sell. Indeed JCB refused that its selected distributors resold its products outside their allocated territories.

To circumvent such prohibition, Central Parts set up *ad hoc* companies which would purchase JCB Sales products from one of the authorised distributors in the UK in order to be able to resell them in France. JCB Sales became aware of this practice and the distributor stopped supplying Central Parts' *ad hoc* companies.

In 2005, Central Parts brought an action for damages against the JCB companies before the commercial Court. The Commercial Court ordered the JCB companies to pay EUR 600,000 to the claimant. An appeal was lodged and an expert was appointed to quantify the damage.

Brief summary of judgment

The Paris Court of Appeal confirmed the judgment of first instance except as regards the amount of damages which went up from EUR 600.000 to 1.5 million.

The Court upheld that damages should include any proven loss of earnings. In this case, the Court considered that the following damages should be taken into account:

- overcharges for setting up the *ad hoc* companies;

- staff costs dedicated to the logistics (but not the procurement staff costs as their role was not dedicated to circumventing the abusive practice);
- margin loss for new vehicles; and
- margin loss for spare parts.

Conversely, the Court considered that the following damage could not be accepted for lack of (sufficient) evidence:

- Financial costs related to the procurement activity;
- Margin loss for used vehicles.

Country: France	
Case Name and Number: CA Paris, 5 July 2017, n°15/12365	
Date of judgment: 5 July 2017	
Economic activity (NACE Code): G45.3—Sale of motor vehicle parts and accessories	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SAS SCPI (Société de commercialisation de produits industriels) SIFAM Trading	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SAS NGK SPARK PLUGS France (appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 193,246
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous rulings: Paris Commercial Court, 9 June 2015: injunction to deliver the orders with penalty, to apply commercial terms and conditions applicable to NGK's official distributors, EUR 230,000 damages Paris Court of Appeal, 16 December 2015: squashed the first judgment (refusal to sell were legitimate) Supreme Court, 21 June 2017 confirmed the judgment of the Court of Appeal (lack of potential and actual effect of foreclosure of the refusal to sell)	**Amount of damages initially requested:** EUR 193,246
Key Legal issues: • Abuse of dominant position • Refusal to sell	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

NGK is an international manufacturer of spark plugs and distributes its products through a network of national subsidiaries in the EU (such as NGK Spark Plugs France). SIFAM expressed its interest in becoming an authorised distributor of NGK's products. NGK refused on the ground that it was not considering extending its distribution network at that time. Four years later, NGK agreed to include SIFAM in its French distribution network. However, NGK refused to sell its products to SIFAM without any objective justification.

Brief summary of judgment

The Paris Court of Appeal considered that the manufacturer NKG (with a market share exceeding 50%) was a technological leader, whose products were essential and not substitutable with competing products. The Court found that NKG had abused of its dominant position because such refusal to sell was likely to exclude the distributor from the market and had no objective justification. The Court granted damages to SCPI and upheld the judgment of the court of first instance to the extent that it ordered NKG to deliver the products ordered and to apply for each SCPI order (past and present) the price and rebate conditions it applies to its own distributors.

It is worth noting that the Court took into account that the amount of damages requested was below the expert's estimate—as SIFAM did not ask for damages for loss of earning of products other than spark plugs—to award damages calculated on the basis of SIFAM's most favourable margin (damages amounted to the loss of margin over a two-year period which was calculated on the basis of the margin on the sale of US-imported spark plugs—which was the most favourable to the claimant).

Country: France	
Case Name and Number: TGI Lille, 6 June 2017, n°15/10938	
Date of judgment: 6 June 2017	
Economic activity (NACE Code): C.20.41 Manufacture of soap and detergents, cleaning and polishing preparations	
Court: First instance civil court	**Was pass on raised (yes/no)?** No
Claimants: Mme Vauchelin	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: Sociétés Colgate Palmolive, Henkel, Unilever, Procter et Gamble, Reckitt Benckiser	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 0 The claimant (a consumer) did not accurately quantify her damages and did not prove that she had indeed purchased the products affected by an overcharge.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 2,400
Key Legal issues: • Limitation period (starting point)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA decision No. 14-D-19). Partial reversal by Paris Court of Appeal (27 October 2016, 2015/01673).	

Brief summary of facts

Home care and personal care manufacturers such as Colgate-Palmolive, Henkel, Unilever, Procter & Gamble, Reckitt Benckiser were fined by the FCA for coordinating their commercial policies towards supermarkets, in particular price increases.

Brief summary of judgment

A consumer brought an action before commercial courts for the alleged overcharge she allegedly paid for the products subject to the cartel. The commercial court dismissed the claim for damages as the claimant did not bring sufficient evidence of the damage suffered. Interesting to note is the Court's view on the starting point of the limitation period for lodging a request for damages. Without expressly stating it, it can be inferred from the judgment that the Court considered that the limitation period should start from the date of publication of the sentencing decision as it could not be proven that the claimant was aware of the anti-competitive practices or had read relevant press articles on the case which were published prior to the FCA decision.

Country: France	
Case Name and Number: CA Paris, pôle 5, ch.4, 10 May 2017, n°15/05918	
Date of judgment: 10 May 2017	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SAS Outremer Telecom	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Orange Caraïbe (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 2.6 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Paris Commercial Court, 16 March 2015, No. 2010073867	**Amount of damages initially requested:** EUR 40.932 million
Key Legal issues: • Causal link between fault and damage • Exclusivity clauses • Customer loyalty programme • Discriminatory practices	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on (FCA decision No. 09-D-36, upheld by the Paris Court of Appeal (23 September 2010, 2010/00163), then annulled by French Supreme Court (31 January 2012, 10-25.772), upheld again by the Paris Court of Appeal (4 July 2013) and the French Supreme Court (6 January 2015, 13-21.305))

Brief summary of facts

Orange Caraïbe has: (i) imposed exclusivity clauses in distribution agreements with its independent distributors; (ii) applied an exclusivity clause inserted in a contract concluded with Cetelec, the sole authorised repairman of terminals in the Caribbeans; (iii) set up a customer loyalty programme; (iv) practised abusive price differentiation between "on net" and "off net" calls; (v) was positively discriminated by its parent company through a specific offer for professionals which could only be granted by Orange Caraibes; and (vi) implemented resale price maintenance.

Brief summary of judgment

The Court of Appeal partly overturned the judgment rendered by the Commercial Court (EUR 7.9 million) and considered that, for some of the abusive practices at stake, there was no evidence or sufficient evidence of a causal link between these practices and the damage claimed by Outremer Télécom.

Regarding the exclusivity clauses included by Orange in its distribution agreements, Outremer Telecom claimed that, as a result of such practices, it was unable to conclude contracts with independent distributors for the distribution of its own telephony offers and decided to set up its own points of sale. However, the Paris Court of Appeal pointed out that Outremer Telecom had made its own strategic and commercial development choices, without evidencing that they were related to the practices at stake.

Second point of interest, on the quantification of damages: the Court also pointed out that full compensation also includes compensation for the negative effects resulting from the lapse of time since the occurrence of the damaging event (the infringement), namely monetary erosion, but also the loss of opportunity suffered as a result of the unavailability of capital. However, regarding the quantification of such loss of opportunity, the Court ruled that, unless the claimant is able to show that it had to give up investment projects because of such capital unavailability, the loss must be assessed by applying the legal interest rate to the amount the claimant has been deprived of, and not the weighted average cost of capital (WACC).

As a consequence, the amount of damages to be paid was reduced from EUR 7.9 million to 2.6 million.

Country: France	
Case Name and Number: CA Paris,Pôle 5, ch.4, 14 December 2016, n°13/08975	
Date of judgment: 14 December 2016	
Economic activity (NACE Code): N.79—Travel agency, tour operator and other reservation service and related activities	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Switch	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SNCF Mobilités (Appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 6.9 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Confirmed by the French Supreme Court (Cour de cassation, Ch. Commerciale, 29 January 2020, No. 17-15.156).	**Amount of damages initially requested:** EUR 8.59 million
Key Legal issues: • Loss of opportunity vs certain loss	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA, Decision 09-D-06), upheld by Paris Court of Appeal, 23 February 2010 and Supreme Court , 16 April 2013	

Brief summary of facts

An SNCF subsidiary (now SNCF Mobilités) teamed up with Expedia (the worldwide leader in online travel sales) to create a joint venture to offer non-rail travel agency services on the website voyages-sncf.com. Other travel agencies were not able to offer similar promotional offers or functionalities than those available on voyages-sncf.com and some agencies, including Switch, brought a complaint to the FCA. Expedia and SNCF were fined by the FCA and offered commitments (other travel agencies being now on an equal footing with voyages-sncf.com). Switch sought compensation before the Paris commercial court.

Brief summary of judgment

The Court of Appeal awarded EUR 6.9 million damages to Switch, considering that Switch suffered a loss of revenue resulting from missed opportunity to offer its services to SNCF's international rail customers. It considered that Switch had not suffered from a mere loss of opportunity, but from identifiable harm resulting from the loss of customers who preferred buying tickets and other services on voyages-sncf.com. The Court of Appeal's reasoning seems questionable as it accepted that it was not possible to foresee how the market would have otherwise evolved (and to quantify the number of customers Switch actually lost as a result of the practices), it still considered that the loss suffered was certain.

The Court of Appeal's approach has been confirmed by the French Supreme Court (29 January 2020, 17-15.156).

Country: France	
Case Name and Number: A Paris, ch.5-4, 7 December 2016, RG 14/01036	
Date of judgment: 7 December 2016	
Economic activity (NACE Code): J.58.1.9—Other publishing activities	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Aviscom	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA La Montagne (appellant) SAS Centre France Publicité(appellant) SAS Dans nos cœurs (appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 10 000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 635 000
Key Legal issues: • Assessment of prejudice	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Aviscom operates a website for obituaries and condolences. It claimed that the newspaper La Montagne and the company "Dansnoscoeurs" it set up with other newspapers and which competes with Aviscom committed unfair commercial practices and abused their dominance. Disputed practices were related to the fact that (i) In the obituaries published

in its newspaper, La Montagne, only referred to the website of Dansnoscoeurs and (ii) the obituary was published both in a newspaper and online, with no information provided on the costs of each of these means of publication.

Brief summary of judgment

The Paris Court of Appeal upheld the judgment of first instance except for the amount of damages. The Court confirmed that the tying of the publication of an obituary in written and online press constituted (i) an abuse of dominance as it foreclosed the market as well as (ii) unfair commercial practices, but reduced the amount of damages from EUR 50,000 to EUR 10,000.

The Court considered that the loss of opportunity to increase its market shares was the only damage to be compensated for.

Country: France	
Case Name and Number: CA Paris, Pôle 5, ch.4, 13 April 2016, n°13/24840	
Date of judgment: 13 April 2016	
Economic activity (NACE Code): H.53—Postal and courier activities	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SARL Imperial Pub SARL GPS	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA La Poste SAS Mediapost	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Paris Commercial Court, 22 November 2013 (claims unfounded)	**Amount of damages initially requested:** EUR 1.8 million
Key Legal issues: • Predatory pricing • Causal link between fault and prejudice	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Imperial Pub and GPS, active on the market for distribution of unsolicited advertising leaflets, claimed that Mediapost, which is also present on this market and a subsidiary of La Poste (French universal postal service provider), benefited from unfair advantages due to the fact that it was a subsidiary of the dominant player, La Poste. Imperial Pub and GPS argued in particular that Mediapost was engaged in predatory pricing.

Brief summary of judgment

The Court dismissed the claimants' arguments for lack of sufficient evidence. In particular, claimants did not prove that the loss of clients from which they allegedly suffered resulted from an unfair pricing practice. The Court pointed out that, to be found abusive, a low pricing practice must be sufficiently permanent and widespread so that it appears as part of a strategy. The mere loss of one client does not characterise as such a practice.

Country: France	
Case Name and Number: CA Paris, Pôle 5, ch.4, 25 November 2015, n°12/02931	
Date of judgment: 25 November 2015	
Economic activity (NACE Code): J.63.12—Web portals	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Société Evermaps	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SARL Google France, Société Google Inc (appellant)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Paris Commercial Court, 31 December 2012 (EUR 500,000 awarded to the claimant)	**Amount of damages initially requested:** EUR 744,000
Key Legal issues: • Abuse of dominant position—predatory pricing • Forclosure • Evidence of fault (anti-competitive behaviour)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Google France launched the Google Map app, an application offering mapping services without charge, and as useful as the paid version. Evermaps, a competitor of Google Maps, claimed that, with the Google Map app, Google intended to attract customers and eliminate competitors.

Brief summary of judgment

The Court of Appel dismissed Evermaps' arguments for lack of evidence of an anti-competitive behaviour from Google, in particular Google's willingness to exclude competitors from the market.

The Court took into account the following elements:

i. the Opinion of the FCA which considered that there were no predatory pricing measures,

ii. the fact that it is not uncommon for competitors to offer products or services free of charge on multi-sided markets in order to increase the number of users on adjacent markets,

iii. the fact that Google's economical model was not obviously irrational,

iv. the fact that Google could not recover its losses even after excluding its competitors,

v. many competitors also provide such services free of charge or on a freemium basis like Google, and

vi. new entrants—like Amazon or Apple—could enter the market.

Country: France	
Case Name and Number: CA Paris, ch.5-4, 22 October 2015, RG 14/03665	
Date of judgment: 22 October 2015	
Economic activity (NACE Code): H.50—Water transport	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: Rocca Transports SARL (appellant)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: Société Nationale Maritime Corse Méditerranée (SNCM)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 50,000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Marseille Commercial Court, 6 March 2013, No. 2013F01275 (no damages awarded for lack of dominance and economical dependency).	**Amount of damages initially requested:** EUR 1.3 million
Key Legal issues: • Abuse of dominant position • Discriminatory discounts and rebates	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

SNCM implemented a discount system aiming to gain larger volumes of transport activities. This scheme only applied to the customers who shipped from Toulon. Rocca Transports (customer) could not benefit from such discounts as it shipped its products from Marseille. It considered that it was discriminatory as (i) the system would favour carriers who would commit to increase the volume of products shipped irrespective of the entire volume and that of other carriers already carried out by SNCM—it would be more difficult for big customers to obtain such rebates, (ii) it would favour exclusivity to the detriment of other sea carriers.

Brief summary of judgment

The Court of Appeal found that SNCM was in a dominant position and abused such a position when granting exclusivity rebates. Despite SNCM's declining market shares, the Court considered that SNCM's two competitors did not provide the same level of offer, Marseille's harbour provided more services than Toulon's and pointed out the lack of competitive pressure on SNCM, as found in a previous FCA decision (decision No 09-D-10 of 27 February 2009).

As these exclusivity rebates favoured carriers who committed to increase their shipping volume, while excluding those whose volume was higher and who had already contracted with SNCM, the Court quashed the judgment and considered that SNCM abused its dominance as well as acknowledged the state of economic dependence of Rocca Transports.

However, as the claimant did not bring any evidence as to the pricing policies offered by its competitors, the Court considered that it did not bring sufficient evidence to be compensated for a loss of clients.

The Court only granted damages (EUR 50,000) to Rocca Transports for loss of opportunity to win new clients and for the higher costs incurred as a result of the non-application of the rebate scheme.

Country: France	
Case Name and Number: CA Paris, pôle 5, ch.11, 2 October 2015, n°14/15779	
Date of judgment: 2 October 2015	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SAS Cowes	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: SA Orange (formerly France Telecom)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 7 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—Cass. Com. 26 April 2017, n°15-28.197: The French Supreme Court confirmed the Paris Court of Appeal's ruling Previous rulings: Paris Commercial Court, 31 January 2011 (no fault and thus no damages) Paris Court of Appeal, 21 December 2012, overturned (EUR 7 million damages) Supreme Court, 25 March 2014, invalidates the Court of Appeal's judgment for lack of evidence regarding fault	**Amount of damages initially requested:** EUR 117 million
Key Legal issues: • Abuse of dominance in emerging markets • Pricing practices	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA Decision No 04-D-18), upheld by Paris Court of Appeal, 11 January 2015 (increase of fines)	

Brief summary of facts

Subiteo (now Cowes) was created in the context of the opening of competition in the sector of broadband Internet. Subiteo withdrew from the market, as it was not able to subscribe to France Telecom's (Orange) offers on the upstream markets. Subiteo considered that France Telecom had deliberately delayed the deployment of its unbundling offers and offered them at prices, which did not allow other operators to compete efficiently. Subiteo claimed that France Telecom was responsible for its own market exit.

Brief summary of judgment

The Court considered that France Telecom, by delaying the opening up of the ADSL market to competition and its pricing practice, had forced Subiteo to abandon its project. This caused harm to Subiteo, for which France Telecom was ordered to compensate.

Country: France	
Case Name and Number: CA Paris, Pôle 5, ch.5, 2 July 2015, n°13/22609	
Date of judgment: 2 July 2015	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus; C.27.3—Manufacture of wiring and wiring devices	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** Yes
Claimants: EDF	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not applicable in this case (facts pre-dating entry into force of Decree and Ordinance).
Defendants: Nexans France Prysmian câbles	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes—Cass. Com., 13 September 2017, n°15/22837 and 15/23070: the French Supreme Court confirmed the Paris Court of Appeal's ruling.	**Amount of damages initially requested:** EUR 15 million
Key Legal issues: • Public tender • Anti-competitive agreement • Passing-on defence	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA decision No 07-D-26—no appeal)	

Brief summary of facts

EDF had launched a call for tenders for cables and complained to the FCA for anti-competitive practices of cable providers Nexans, Prysmian, Safran, etc. The FCA fined such companies for anti-competitive practices. EDF also requested the annulment of public contracts concluded with Nexans and Prysmian before French Civil Courts based on fraud, and compensation for damages suffered.

Brief summary of judgment

The Court dismissed EDF's claim as it considered that EDF did not provide sufficient evidence of the alleged fraud. EDF claimed that the amount of damages equalled the difference between the price offered by companies, which were not part of the anti-competitive practices, and the price paid by EDF. However, the Court disagreed with EDF's methodology (based on assumptions instead of actual prices submitted by a company which did not participate in the cartel), and considered that EDF had not established its prejudice.

Country: France	
Case Name and Number: CA Paris, Pôle 5, ch.5, 27 February 2014, n°10/18285	
Date of judgment: 27 February 2014	
Economic activity (NACE Code): C.10.91—Manufacture of prepared feeds for farm animals	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** Yes
Claimants: SNC Doux aliments Bretagne	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not adopted at that time.
Defendants: Société Ajinomoto Eurolysine and SA CEVA Santé Animale	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1.6 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous rulings: Paris Commercial Court, 29 May 2007 (Claimant ill-founded—no damages awarded) Paris Court of Appeal, 10 June 2009 (EUR 370,000 damages) Supreme Court, 25 June 2010 overturned the Court of appeal's judgment for not assessing whether the claimant has passed on the overcharge	**Amount of damages initially requested:** EUR 2.8 million
Key Legal issues: • Anti-competitive agreement on prices and sales volumes • Passing on defence	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (COMP/36.745 of 7 June 2000—no appeal)	

Brief summary of facts

Ajinomoto Eurolysine (AE) entered into an anti-competitive agreement on prices, sales volumes and exchange of individual information on the lysine market between July 1990 and June 1995.

Brief summary of judgment

The Court considered that the fault had been sufficiently proven by the Commission. Regarding the issue of evidence of damage, the Court of Appeal indicated that the required evidence of an absence of passing on was neither impossible nor excessively difficult since the claimant could prove either that the increase was not passed on resale prices or that passing on was not feasible.

As to the existence of the damage, the Court took into account that:

vii. passing on was not usual practice in the sector,

viii. the activity concerned (chicken farming) was highly competitive and under strong competitive pressure from emerging countries,

ix. Doux mostly sells to supermarkets that have very strong purchasing power to conclude that Doux could not pass on its overcosts.

Regarding the quantification of damages, the Court of Appeal referred to the Commission's decision, which had found that the cartel had had an effect on lysine price and set an overbilling of 30%.

Country: France	
Case Name and Number: CA Paris, Pôle 5, ch. 4, 27 June 2012, n°10/04245	
Date of judgment: 27 June 2012	
Economic activity (NACE Code): C.20.42—Manufacture of perfumes and toilet preparations	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SARL News Parfums	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not adopted at that time.
Defendants: SA Parfums Christian Dior, SA Guerlain, SA LVMH Fragance Brands	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 315,000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Paris Commercial Court, 11 February 2010 (no damages awarded)	**Amount of damages initially requested:** EUR 1,300,000
Key Legal issues: • Vertical restraints • Refusal to sell • Abusive termination • Lost profit	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The company News Parfums acted as a selective distributor for four perfume manufacturers belonging to the LVMH group (SA Christian Dior, SA Guerlain, and two companies of LVMH Fragrance Brands (SA CD and SA DZ). According to its distribution agreement, News Parfums was only entitled to sell these perfumes to end consumers and via its selected point of sale.

It decided to create a website to sell its products online and requested the four manufacturers' approval, as per the distribution agreements. The four manufacturers remained however silent and terminated their distribution agreements with News Parfums one year later.

Brief summary of judgment

The Court of Appeal considered that the silence of the manufacturers was equivalent to tacit refusal and that such refusal to sell their products on the internet was a by object anti-competitive practice.

The Court also considered that the four companies had wrongly terminated the agreements without sufficient notice, as evidence brought forward had not been obtained in a fair manner and could not therefore be taken into account.

The Court awarded to News Parfums compensation equivalent to one year of gross margin with each of the four manufacturers but refused to reinstate News Parfums as a selective distributor and to order publication of the judgment in the press.

Country: France	
Case Name and Number: Tribunal de Commerce, Paris, 6e ch., 30 March 2011, n°2009-073089	
Date of judgment: 30 March 2011	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Appeal (Paris)	**Was pass on raised (yes/no)?** No
Claimants: SAS Numéricable, SA NC Numéricable, SAS Est Vidéocommunication	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not adopted at that time.
Defendants: SA France Telecom—Orange	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 10 million
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 157 million
Key Legal issues: • Predatory Pricing • Damages to be compensated for (Loss of profits / Loss of business' value) • Disparagement	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/38.233 Wanadoo of 16 July 2003 upheld by T-340/03 and ECJ C-202/07P, and FCA Decision No 07-D-33 dated 15 October 2007—no appeal)	

Brief summary of facts

The European Commission imposed a EUR 10,35 million fine on Wanadoo Interactive, a subsidiary of France Telecom for abuse of a dominant position in the form of predatory pricing in ADSL-based Internet access services for the general public. It found that Wanadoo's retail prices which were below their average costs restricted market entry and development potential for competitors, to the detriment of consumers. Both the GC and the ECJ confirmed the European Commission's decision. In 2007, the FCA also fined France Telecom (EUR 45 million) for having hindered the development of internet access providers competing with its Wanadoo subsidiary through (i) putting at the disposal of alternative providers less updated and detailed information relative to the eligibility of ADSL lines, (ii) disparaging alternative providers and (iii) failing to set up an ADSL online order system as direct and as quick as the one at the disposal of France Telecom for marketing Wanadoo packs.

On these bases, Numericable claimed that France Telecom had implemented practices aimed at restricting the development of alternative operators by raising (i) a technological barrier without offering new entrants access to the telephone network under equivalent conditions to its own subsidiary Wanadoo and (ii) a trade barrier by offering Internet access at prices that were not economically practicable for any other operator and requested damages for the prejudice suffered.

Brief summary of judgment

The Court of Appeal found that as a direct competitor of France Telecom, but using its own networks, Numéricable was victim of the incumbent operator's anti-competitive practices of predatory pricing and disparagement. The Court assessed the damages in terms of loss of profits but refused to allow compensation for the loss of value of Numericable's business as it was not proven that Numericable overpaid for the acquisition of the other cable operators.

Country: France	
Case Name and Number: CA Versailles, 12e ch.2, 24 June 2004, n°2002-07434	
Date of judgment: 24 June 2004	
Economic activity (NACE Code): J.63.1.1—Data processing, hosting and related activities	
Court: Court of Appeal (Versailles)	**Was pass on raised (yes/no)?** No
Claimants: Verimedia	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Directive 2014/104 not adopted at that time.
Defendants: SA Médiamétrie, SA Secodip, GIE Audipub et al.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 100,000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No Previous ruling: Versailles Commercial Court, 9 October 2002 (lack of fault)	**Amount of damages initially requested:** EUR 2,891,931.94
Key Legal issues: • Damage quantification • Dominant position • Lack of transparency on pricing conditions • Restricting access to input	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Marie Louvet, Of Counsel, Herbert Smith Freehills Paris LLP, marie.louvet@hsf.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (FCA Decision No 98-D-53 of 8 July 1998). No appeal	

Brief summary of facts

The FCA found two companies, Mediametrie and Secodip, active in the quantitative media data collection (media auditing), guilty of abuse of dominant position for dilatory behaviour as the defendants refused to provide on time the information necessary for one of their customers, Verimedia, to carry on its activity and restricted its access to products and services necessary for its activity, through their GIE Audipub. On this basis, Verimedia requested damages.

Brief summary of judgment

The Court of Appeal confirmed that Verimedia has suffered prejudice due to SA Mediamétrie and Secodip's behaviours as members of the GIE Audipub.

For definying the quantum of damages, the Court took into account the period of time considered by the FCA as the infringement period (i.e years 2013 and 2014 instead of the five/six years alleged by the claimant).

GERMANY

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Germany has a dedicated set of rules that govern the recovery of (and defence against) antitrust damages claims. Equally, German courts have been dealing with respective cases for years and can rely on a breadth of experience and case law. In recent years, the number of antitrust damages actions has increased with the result that several cases have now also reached Germany's highest civil court—the *Bundesgerichtshof* (the Federal Court of Justice or "**FCJ**"). The resulting judgments continue to provide clarity for both claimants and defendants. Combined with Germany's relatively low court fees, efficient court proceedings and Germany's internationally well-respected *Bundeskartellamt* (the Federal Cartel Office or "**FCO**"), Germany is among the preferred jurisdictions for antitrust damages actions in Europe.

1. Jurisdiction

The FCO is competent to issue administrative decisions in relation to infringements of competition law. Private enforcement, however, is in the hands of the individual victims affected by the infringement.

Germany's competent civil courts of first instance for private antitrust damages actions are the *Landgerichte* (Regional Courts) as per Section 87 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*—"**GWB**"). In Germany, there is a total of 115 Regional Courts, but the legislator encouraged individual federal states to designate one or more centrally and exclusively competent courts per state to hear private antitrust cases (Section 89 GWB). Several states have made use of this opportunity. Claimants must consider such centrally competent courts when determining jurisdiction.

Specialised antitrust chambers within these individual courts often deal with these cases. The existence of such expert judicial bodies has contributed to the high quality of judgments in Germany regarding antitrust damages actions over the years.

2. Relevant legislation and legal grounds

The key legal provision granting individuals a claim for damages as the consequence of an intentional or negligent violation of European Union ("EU") and/or German competition law is Section 33a (1) GWB. In its current form, this provision was adopted through the 9th amendment to the GWB in June 2017, which implemented the EU Antitrust Damages Directive ("Damages Directive") of 2014 and transposed it into German law. Whereas previously there were only basic rules on antitrust damages to be found in the GWB, now there are extensive and detailed provisions (Section 33—Section 33h GWB).

In principle, antitrust damages claims are governed by the substantive law applicable at the time when the damage occurred, such as at the time of delivery of cartelised goods—unless otherwise determined by transitional provisions. For example, the Damages Directive and its German implementation in the GWB are generally applicable to claims that have arisen after 26 December 2016.

While Section 33a GWB is the basis for antitrust damages claims in Germany, Sectionk 33 (1) GWB also grants affected parties a claim for injunction and rectification—*i.e.* they can request that the infringer ceases the current infringement and desists from future infringements.

Right to bring an action

Any affected person—competitor or other market participant—who is impaired by the infringement can seek compensation under German law. This is in line with the Court of Justice of the European Union ("CJEU") according to which the principle of effectiveness (*effet utile*) requires that any individual must be able to claim compensation for any damages caused by competition law infringements.[1]

This includes not only direct, but also indirect victims who purchased cartelised goods from direct customers of the infringers (Section 33c GWB). In addition to this, even customers who did not purchase goods or services from cartel participants, may be considered affected by a cartel where it can be demonstrated that the general market price level has increased as a result of a cartel (also known as "umbrella pricing").

Even more, according to a CJEU ruling, even those who are not part of a supply chain trading the cartelised product in question can, nevertheless, claim damages.[2] This CJEU ruling brought about a change in German case law: previously courts required claimants to demonstrate that a cartel infringement had an impact on specific transactions. However, a recent judgment issued by the German Federal Court of Justice in January 2020 (*Schienenkartell II*) revisited this consideration. The Court clarified that this previous hurdle, named "cartel impact" (*Kartellbetroffenheit*), has been lowered to a rather abstract standard: in pre-Damages Directive cases it is now sufficient that the claimant demonstrates that the infringement is generally suitable to cause direct or indirect harm to the claimant.

Under the new rules implementing the Damages Directive (Section 33a (2) GWB) a reversal of the burden of proof is, in fact, already put in place on this point—*i.e.* the claimant will be able to rely on a rebuttable presumption that a cartel causes harm.

Proof of a competition law infringement and binding effect of authority decisions

Generally, the claimant bears the burden of proof regarding the existence of a competition law infringement.

In case the claimant bases its action on facts that have not previously been the subject of a competition authority's decision or facts outside the scope of such decision (a "Stand-alone action"), this burden of proof may be particularly burdensome.

1 CJEU, Case C-199/11, 6 November 2012, *Otis*, para. 41.

2 JEU, Case C-199/11, 6 November 2012, Otis, para. 41.

However German law also allows for so-called "Follow-on actions". Pursuant to Section 33b GWB, courts shall be bound by a finding of an infringement as established in a final decision by (i) the FCO, (ii) the European Commission, or (iii) another national competition authority in another EU Member State. "Decision" also covers fining decisions following a settlement procedure with the European Commission or the FCO. The binding effect covers not only the operative part of the decision, but also the factual and legal grounds on which the finding of the cartel infringement is based.

Commitment decisions by the FCO (Section 32b GWB), the European Commission (Article 9 VO 1/2003) or other relevant competition authorities do not have the same binding effect pursuant to Section 33b GWB. This does not mean, however, that a court faced with an antitrust damages action will ignore such commitment decisions. In the context of actions following a commitment decision, the findings of the respective competition authority regarding the infringement may be considered by courts as an indication, or even *prima facie* evidence (*Anscheinsbeweis*), of an infringement.[3]

Proof of causation

Generally, the claimant also bears the burden of proof regarding causation and quantum of the damages claimed.

Regarding causation, claimants can rely on certain easements of the burden of proof. Previously claimants could rely on the concept of *prima facie* evidence, which can be considered the "next best thing" after a full reversal of the burden of proof. While the German Federal Court of Justice abrogated this practice through its judgment dated 11 December 2018 (*Schienenkartell I*), it did emphasise that there is a strong factual presumption regarding causation on individual transactions where they fall within the scope of the cartel agreement in terms of content, time and geographical scope.

Similarly, the Higher Regional Court of Frankfurt am Main ruled in a recent judgment that *prima facie* evidence does not apply in cases of exchange of information between competitors.[4]

In any event, courts may rely on Section 287 German Code of Civil Procedure (*Zivilprozessordnung*—"ZPO") when assessing causation and quantum, which allows courts to estimate damages (Section 33a (3) GWB).

Economists are regularly employed in German antitrust damages cases. Parties will often submit party expert opinions in order to assert and defend against damage theories. Court-appointed experts may additionally serve in assisting the court in forming its opinion. The German Federal Court of Justice in its *Schienenkartell II* judgment however clarified that an expert opinion, whether by a party or court-appointed expert, does not replace the court's own judicial assessment of evidence.

3 CJEU, Case C-547/16, 23 November 2017, *Gasorba*, para. 29.

4 Higher Regional Court of Frankfurt a. M., Case 11 U 98/18, 12 May 2020, *Drogeriekartell*.

Defendant and concept of an undertaking

Antitrust damages claims can be directed against any company responsible for the anti-competitive conduct that infringed competition law. Several infringers acting together may be held jointly and severally liable (Section 33d (1) GWB). There are certain limitations regarding this joint and severable liability for leniency applicants (Section 33e GWB), small—and medium-sized enterprises (Section 33d (3), (4) GWB) and infringers who have reached a settlement with an injured party (Section 33f GWB).

In accordance with EU competition law the concept of an "undertaking" covers any entity engaged in an economic activity, irrespective of its legal status and financing. However, pursuant to general principles of German corporate law, only the acting legal entity is generally liable for a breach of law. In its recent ruling in Skanska, the CJEU however confirmed that the concept of "undertaking" with regard to the imposition of fines should be similarly applied to antitrust damages actions.[5] This broad interpretation in certain cases at least leads to liability of legal successors. Whether the case law will lead to an even more extensive liability of companies for infringements of competition law by any affiliated entity is the subject of ongoing discussion, especially in Germany.

3. What types of anti-competitive conduct are damages actions available for?

In Germany, antitrust damages actions are available for all infringements of EU and German competition law. This includes:

- multilateral anti-competitive conduct, such as cartel agreements and illicit exchange of competitively sensitive information (Article 101 TFEU and Section 1 GWB); and
- unilateral conduct, such as the abuse of a dominant position (Article 102 TFEU and Section 18, 19 GWB) as well as—specifically in Germany—abuse of a strong market position with regard to undertakings with relative or superior market power (Section 20 GWB).

Damages actions are also available following violations of decisions taken by a competition authority (Section 33 (1) GWB). A violation of the prohibition on gun-jumping under merger control law may also be considered as relevant anti-competitive conduct. In this context, a decision taken by a "competition authority" refers in general to German authorities, in particular to the FCO, the Federal Ministry of Economics and the German federal state cartel authorities. Although decisions of the European Commission may not be covered by the mere wording, they can be argued to be equivalent in order to ensure that the effectiveness of civil enforcement of decisions of the European Commission does not fall behind the German cartel authorities. Furthermore, it is essential that the decision of the competent competition authority is binding.

4. What forms of relief may a private claimant seek?

To remedy the immediate effects of an infringement, claimants may enforce their claim for injunction and rectification—*i.e.* can request that the court orders the infringer to cease

5 CJEU, Case C-724/17, 14 March 2019, *Skanska Industrial Solutions Oy*, para. 43-47.

the current infringement and desist from future infringements (Section 33 (1) GWB). Such actions may also take the form of interim injunctions.

To remedy damages caused by an infringement, claimants can seek relief in the form of damages (Section 33a (1) GWB).

Pursuant to Section 249 of the German Civil Code, the claim for damages constitutes *in rem* restitution—*i.e.* the restoration of the economic situation that would have existed but for the damaging event. If the competition law infringement is, for example, the unjustified refusal to deal (such as the refusal to conclude a contract), the claim for damages can be directed towards the conclusion of such a contract. If *in rem* restitution is not possible or only possible at disproportionate expense, the claim for damages aims at monetary compensation pursuant to Section 251 of the German Civil Code, including loss of profit.

5. Passing-on defence

German law acknowledges the so-called "passing-on defence", meaning defendants can argue that, in the event a claimant resold the cartelised products or services (and has passed-on any price-increase induced by the infringer to a third party), the claimant would not, in fact, have suffered any (or at least only partial) damage (Section 33c (1) s. 2 GWB). In German law, the passing-on defence is in line with the general doctrine of setting off any benefits obtained by the claimant—a loss that has been passed on does not need to be compensated.

However, the mere fact that the claimant resold the product or service does not initially preclude the claimant from having a claim (Section 33c (1) s. 1 GWB). Whether and to what extent pass-on occurred will then have to be examined by the court—likely with the help of economists. The burden to substantiate and to prove the existence and extent of any pass-on effects lies with the defendant. To do so, German case law requires defendants to demonstrate that pass-on is particularly plausible under general market conditions with reference to the price elasticity of demand, the price development and the product characteristics.[6] Furthermore, the defendant is required to show that even if the overcharge itself was in fact passed on, the claimant did not incur other disadvantages from the overcharge, such as a decline in demand (so-called volume effects).

The other side of the coin regarding pass-on naturally is the right of indirect customers to sue for antitrust damages (Section 33c (2) and (3) GWB).

6. Pre-trial discovery and disclosure, treatment of confidential information

As there is a typical information asymmetry between claimants and defendants in competition litigation cases, the Damages Directive required Member States to implement rules on disclosure of evidence. Germany has met this by incorporating such rules as part of the 9th amendment to the GWB in 2017.

6 FCJ, Case KZR 75/10, 28 June 2011, ORWI; Higher Regional Court of Karlsruhe, Case 6 U 204/15 Kart (2), 9 November 2016, *Grauzementkartell*; District Court of Frankfurt a. M., Case 2-06 O 358/14, 30 March 2016, *Schienenfreunde*; District Court of Hannover, Case 18 O 418/14, 31 May 2016.

So far there is scant case law on the rules on disclosure of evidence pursuant to the new regime incorporated in Section 33g GWB. Existing case law merely covers the question of intertemporal applicability of the framework implemented by the German legislator in 2017 with the 9th amendment to the GWB. Before the 9th amendment of the GWB entered into force, courts were very reluctant to apply general civil procedural rules ordering a production of documents, such as Section 142 German Civil Code of Procedure (*Zivilprozessordnung*—"ZPO"), in competition litigation cases.

With the new rules set out in Section 33g GWB, claimants and defendants can seek disclosure of evidence required to establish or defend a claim. Whereas claimants can choose to request such disclosure of evidence already in a pre-trial stage, defendants can only do so once a damage claim is pending against them.

In German law, the party seeking disclosure is obliged to reimburse the other party for the reasonable costs which it incurred in surrendering evidence (Section 33 (7) GWB).

As required by the Damages Directive, German law limits the disclosure of evidence on the basis of proportionality (Section 33g (3) GWB). Further, exceptions apply to evidence included in the file of a competition authority—*i.e.* leniency statements and settlement submissions (Section 33 (4), (5) GWB). If a party intentionally or with gross negligence discloses incorrect or incomplete information, this party is liable for any resulting damages under German law (Section 33g (8) GWB).

The discovery tool set out in Section 33g GWB is partly applicable in injunction proceedings: in case a decision of the competition authority has binding effect pursuant to Section 33b GWB, the defendant can be ordered by way of preliminary injunction to surrender this decision to the claimant (Section 89b (5) GWB).

The issue of protecting confidential information is dealt with under the requirement of proportionality (Section 33g (3) no. 3 GWB). Therefore, courts can dismiss a motion seeking disclosure of evidence if confidentiality issues would lead to a disproportionate outcome. Courts can also take other measures required to safeguard the protection of confidential information (Section 87 (7) GWB). However, the legislator did not further specify which measures can be taken. Practical solutions that were developed in IP law cases might, therefore, be applied accordingly to competition litigation cases in the upcoming years when disclosure of information will be applied more frequently in practice by German courts.

7. Limitation Periods

The limitation period of antitrust damage claims is governed by Section 33h GWB which implements the Damages Directive.

According to Section 33h (1), (2) GWB, the basic limitation period is five years and begins at the end of the year during which: (i) the claim arose; (ii) the claimant first obtained or should have obtained knowledge of the facts giving rise to the claim and the identity of the infringer, and (iii) the infringement was brought to an end.

There are two cut-off limitation periods.

- First, under Section 33h (3) GWB, claims will be time-barred after ten years, regardless of any knowledge by the claimant, calculated from the year-end of the year during which (i) the claim arose and (ii) the infringement ended.

- Second, there is a thirty-year cut-off limitation period beginning at the time of the competition law infringement (Section 33h (4) GWB).

Limitation is suspended during (and one year after) competition authority proceedings (Section 33h (6) No. 1, 2 GWB). Limitation is also suspended by bringing a claim for discovery (Section 33h (6) No. 3 GWB).

The limitation period regime under Section 33h GWB applies to claims arising after 26 December 2016 and to claims having arisen prior to 27 December 2016 unless they were already time-barred on 9 June 2017 (Section 186 (3) s.2 GWB). Where claimants cannot (yet) rely on the new rules on limitation, they will generally face the previously applicable three-year limitation period.

8. Appeal

Judgments by the *Landgerichte* (Regional Courts) can be appealed before the *Oberlandesgerichte* (Higher Regional Courts). Again, German federal states have the opportunity to designate one or more centrally and exclusively competent Higher Regional Court per state which will hear private antitrust actions (Section 92 GWB). Within each Higher Regional Court competent to hear antitrust damages cases, there will be a specialised antitrust division (Section 91 GWB). The judgments by the Higher Regional Courts can be appealed on points of law before the German Federal Court of Justice. At the German Federal Court of Justice, there also is a specialist antitrust panel (Section 94 GWB).

9. Class actions and collective representation

Germany does not provide for US—or UK-style class actions. There are, however, several measures under German law that address the need for a large number of potentially affected claimants to bundle their claims and benefit from collective efforts.

Currently, the most common approach in Germany is the assignment model. Individuals assign their claims to entities that will then bring a complaint in their own name. In practice, this will either be an intra-company entity that bundles claims within a group of companies, or the second option is the assignment to an external, special purpose vehicle ("SPV").

Recent case law has focused extensively on the legal requirements for such an assignment to be valid. Generally, SPVs must have sufficient funding to be able to cover costs in the event the SPV does not prevail in court. They must also be registered in the official registry for legal services as per Section 10 Legal Services Act (*Rechtsdienstleistungsgesetz*—"RDG"). Courts have also recently dealt with questions of whether, despite such registration, assignments may still be invalid. The Regional Court of Munich decided that assignments were invalid in cases where the SPV's sole purpose was the realisation of claims through court proceedings, where the SPV ran the risk of a conflict of interest in representing too many different assignors and in also having to

answer to a litigation funder that was involved. Similarly, the Regional Court of Hanover found assignments to be invalid where the SPV did not fully take on the commercial risk of enforcing the assigned claims. It remains to be seen how these cases will be dealt with on appeal and, if necessary, by the German Federal Court of Justice.

With the various assignment models under scrutiny, claimants may consider making use of the still novel Model Declaratory Action (*Musterfeststellungsklage*) established in 2018. While individual claimants still have to enforce their claims after a successful Model Declaratory Action, it may be a first step in bundling claims with more legal certainty.

Methodology for the selection of cases

The attached case database covers the most important judgments of German courts in the field of competition litigation, both in follow-on cases and stand-alone cases. Cases have been chosen on the basis of their relevance but the database does not seek to be exhaustive. The cases presented in the database originate from all three possible instances (Regional Courts, Higher Regional Courts and the Federal Court of Justice).

In general, in cases where a judgment of a lower court has been appealed, only the last judgment was included in the database. If there were additional findings of the lower court exceeding the last judgment's findings, the lower court's judgment is included in the database as well.

Country: Germany	
Case Name and Number: Truck Cartel; 9 O 49/18	
Date of judgment: 3 August 2018	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Mainz	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (stay of proceedings).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Stay of proceedings during action for annulment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant brought an action for damages against the defendant on the basis of its participation in the truck cartel. Following the conclusion of the proceedings against the initial truck manufacturers addressees, the European Commission also adopted a decision against the defendant on 27 September 2017. The defendant has brought an action against this decision before the General Court of the European Union (action for annulment), on which no decision had yet been made.

Brief summary of judgment

If an action for damages is brought on the basis of a decision of the European Commission that is not yet final, the proceedings must be suspended until the fining decision is final.

Country: Germany	
Case Name and Number: Vitamin Kartell; 6 U 183/03	
Date of judgment: 28 January 2004	
Economic activity (NACE Code): C.21.2—Manufacture of pharmaceutical preparations	
Court: Higher Regional Court of Karlsruhe	**Was pass on raised (yes/no)?** Yes
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The existence of damages was denied due to passing on defence.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The claimant sought only a declaratory judgment.
Key Legal issues: • Calculation of damages, passing on defence	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/E-1/37.512—Vitamins	

Brief summary of facts

Claimant brought an action for damages after buying (from 1989 to 1999) vitamins and vitamin mixtures for the production of food products from the defendants at a total delivery price of over 9 million German mark. The defendants participated in a worldwide price-fixing cartel for various vitamins, which led to substantial price increases of vitamins and had been fined by the European Commission in 2001. The Regional Court of Mannheim dismissed the claim as unfounded. The Regional Court ruled that there was no damage if the buyers were able to pass on the damages. As the claimants had only argued that their damage arose from the higher prices during the cartel period without substantiating that they were unable to pass on the damage, the Regional Court denied the existence of a damage. The appeal by claimants was not successful.

Brief summary of judgment

The buyers of raw materials which are sold at excessive prices due to a worldwide price cartel have no claims for damages against their suppliers if they pass on the excessive prices to the final consumers of their products. The Higher Regional Court of Karlsruhe found this in assessing the submissions of the claimant. The claimant had submitted that the damage resulted from the difference between the actual cartel prices and the hypothetical prices without the cartel. The Higher Regional Court of Karlsruhe found, however, that the economic reality of the market and the probability of passing-on higher prices regularly has to be taken into account as well. Damages can only be awarded in case the buyer could have enforced resale prices with a higher profit margin at lower purchase prices. In the case at hand, the claimant had made no submissions at all concerning its inability to pass on the cartel-related price.

Country: Germany	
Case Name and Number: ORWI; KZR 75/10	
Date of judgment: 28 June 2011	
Economic activity (NACE Code): C.17.12—Manufacture of paper and paperboard	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** Yes
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but damages are subject to the lower court's reassessment of the facts.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 223,540
Key Legal issues: • Passing-on defence • Joint and several liability of cartel members for damage caused to direct and indirect buyers • Burden of proof regarding damages of indirect buyers	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Mainly indirect claim	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/E-1/36.212—Carbonless paper	

Brief summary of facts

The defendant and nine other producers of carbonless copy paper formed an EU-wide cartel between 1992 and 1995 and were subsequently fined by the European Commission in 2001. ORWI was a producer of carbonless copy paper form sheets and had purchased input from a wholly owned subsidiary of the defendant and three other wholesalers that were supplied by cartel members.

Brief summary of judgment

In a landmark judgment the Federal Court of Justice established that not only direct but also indirect buyers of a cartel may have suffered damage and may therefore claim compensation.

Further, the Federal Court of Justice applied the passing-on defence: The benefit which the buyer obtains from passing on the cartel-related price increase to his own customers may have to be taken into account within the rules of setting off any benefits ("*Vorteilsausgleichung*"). The burden of proof regarding the fact that the price increases were passed on lies with the defendant. The defendant must firstly submit plausible evidence, based on general market conditions in the relevant sales market, in particular the elasticity of demand, price development and product characteristics, that the cartel-induced price increase could at least be seriously passed on. Secondly, it must be shown and, if necessary, proven that the passing on of the cartel-related prices is not counterbalanced by any disadvantage of the customer, in particular no decline in demand by which the price increase has been compensated (in whole or in part). The defendant must thirdly demonstrate how the reselling customer`s own added value may affect the compensation of benefits. The claimant may have a secondary burden of producing evidence where the defendant has no access to information regarding circumstances within the sphere of the claimant.

For damages caused by a cartel, all cartel participants are jointly and severally liable. The defendant in this case was held liable for damages to the claimant because of purchases from the defendant's subsidiary and from wholesalers who were supplied by other cartel members.

Country: Germany	
Case Name and Number: Calciumcarbid-Kartell II; KZR 15/12	
Date of judgment: 18 November 2014	
Economic activity (NACE Code): C.20.13—Manufacture of other inorganic basic chemicals, C.24.45—Other non-ferrous metal production	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** Yes
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A—concerns question of joint and severable liability among defendants.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A (this case concerns a joint and several compensation only. The amount in dispute is EUR 6.8 million)
Key Legal issues: • Compensation between joint debtors • Applicable law	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: N/A	**Method of calculation of damages:** N/A
Individual or collective claims? N/A	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/39.396—Calcium Carbide and magnesium based reagents for the steel and gas industries	

Brief summary of facts

Claimant has been the sole shareholder of two subsidiaries that had already been participating for several months in cartel agreements. In 2009 the European Commission imposed a fine of EUR 13.3 million on all three undertakings jointly and severally. Claimant paid approximately EUR 6.8 million on the fine and was seeking reimbursement of that amount from the defendants jointly and severally.

Brief summary of judgment

The allocation of responsibility between joint and severally liable debtors is subject to German law because the parties have invoked this law. Under German law, Section 426 BGB is the relevant provision for the allocation of responsibility and the basis for determining the individual amount of damages to be paid by each of the defendants where there are several defendants who have caused the damage. Where the joint and severally liable debtors have not reached an agreement on such allocation, this is to be assessed according to the circumstances of the individual case, in particular on the basis of the individual causation and fault contributions of the parties involved and the facts relevant for the assessment of the fine.

Country: Germany	
Case Name and Number: CDC; VI-U (Kart) 3/14	
Date of judgment: 18 February 2015	
Economic activity (NACE Code): C.23.51—Manufacture of cement	
Court: Higher Regional Court of Dusseldorf	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of standing (assignment model) and statute of limitations.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 130 million
Key Legal issues: • Invalid assignment of claims	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available.	

Brief summary of facts

Following the German Federal Cartel Office's fine against cement manufacturers in 2003, claimant brought an action for damages in August 2005 against six cement manufacturers on the basis of claims assigned by 36 cement buying companies through assignment agreements. The action claimed damages in a minimum amount of more than EUR 130 million.

Brief summary of judgment

If injured buyers of a price-fixing cartel assign their claims for damages to a company for the purpose of legal action (special purpose vehicle), such assignments are ineffective if the special purpose vehicle does not have financial resources that fully cover the legal costs to be borne in the event of loss of proceedings, in particular the claims for reimbursement of costs. On this basis, the Higher Regional Court of Dusseldorf found the claims to be partially time barred and inadmissible since the assignment agreements were invalid. In particular, it had been proven that the special purpose vehicle did not have sufficient financial resources to cover legal costs at the moment the claim was brought.

Country: Germany	
Case Name and Number: Trinkwasserpreise; KVR 55/14	
Date of judgment: 14 July 2015	
Economic activity (NACE Code): E.36.00—Water collection, treatment and supply	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A—this is an administrative law case regarding access to file.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The decision deals with a discovery motion only.
Key Legal issues: • Access to files in preparation to damage claims	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) based on commitment decision pursuant to Section 32b GWB, Case III 78 k 20—01 / 563—09.	

Brief summary of facts

Claimant seeks access to the files of an investigation concerning abuse of a dominant position carried out by the Hessian competition authority. Claimant is preparing a competition damages claim against a local energy supplier.

Brief summary of judgment

Anyone who asserts a substantial interest in inspecting the files of the competition authority which cannot be satisfied otherwise can have a right to a decision free of discretionary errors by the authority, which is inherent in German administrative law, regarding his request to access the competition authority's files. This applies in particular to competition proceedings which have ended with a commitment decision, as was the case here following an investigation into an alleged abuse of a dominant position. The decision taken by the Hessian competition authority by which it denied the claimant access to the file was therefore erroneous. Consequently, the court of first instance repealed the decision by the Hessian competition authority and ordered it to take a new decision taking the ruling of the court into account.

Country: Germany	
Case Name and Number: Lottoblock II; KZR 25/14	
Date of judgment: 12 July 2016	
Economic activity (NACE Code): R.92.0—Gambling and betting activities	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but damages are subject to the lower court's reassessment of the facts.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 8.25 million
Key Legal issues: • Binding effect of decisions • Standard of proof	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Deutscher Lotto—und Totoblock (DLTB) und Landeslottogesellschaften—B10-148/05	

Brief summary of facts

Beginning in April 2005 the claimant tried to build an on-premise network, e.g. in supermarkets or gas stations, for brokering the local public lottery. The German Lotto and Toto Block, which is the umbrella organization of all public lottery companies owned and operated by German States, decided to request its members not to accept turnover generated on such premises. The German Federal Cartel Office found that the German Lotto and Toto Block had violated (then) Article 81 EC and ordered it to revise their decision. The German Lotto and Toto Block filed a complaint against the decision. The Federal Court of Justice ultimately held up the Higher Regional Court of Dusseldorf's dismissal of the complaint. Claimant started to broker lottery tickets, but public lotteries refused to pay the commission. Claimant had to change business strategy. Until the end of 2008 the claimant was in business with one state-operated lottery provider. The claimant discontinued its business after it only received licenses for lottery brokering in Nordrhein-Westfalen and Schleswig-Holstein. The claimant then brought an action for lost profits of EUR 8.25 million against the concerted refusal of the public lotteries to do business.

Brief summary of judgment

The Federal Court of Justice set aside and remanded the appellate court's decision, in which claimant was granted damages based on the decisions in the complaint proceedings. The court clarified that the binding effect pursuant to Section 33 (4) GWB (old version) does not automatically encompass the time period after the decisions in the complaint proceedings. The scope of the binding effect pursuant to Section 33 (4) GWB (old version) depends on the extent to which an infringement has been established in the operative part or in the supporting reasons of the legally binding or final decision of the complaint court or the competition authority. In case of an appeal against the decision of the complaint court, the binding effect pursuant to Section 33 (4) GWB (old version) applies solely to those factual findings of the court which are free of legal errors and which support the decision of the Federal Court of Justice.

However, the Federal Court of Justice held that there is a factual presumption that an agreement regarding anti-competitive conduct continues to affect the cartel members' future behaviour. In the case, the defendant was unable to refute the presumption even though the German Lotto and Toto Block and its members openly resolved not to engage in the conduct in question after the German Federal Cartel Office's decision.

The Federal Court of Justice further held that it must be determined under the strict standard of proof of Section 286 ZPO whether the claimant is affected by the infringement of competition law. In contrast, for the question of whether and to what extent damage has been caused by a breach of competition law, the reduced standard of proof of Section 287 (1) ZPO applies. Thus, courts may render a decision based on sufficiently reliable probability calculations. In order to do so, courts need to develop a plausible hypothetical scenario based on commercially reasonable conduct by the market participants. Because it was not unlikely that public lottery companies would have been reluctant to award lottery brokering licenses to the claimant even without the cartel agreement, the Federal Court of Justice sent the case back to the appellate court to further clarify the matter.

Country: Germany	
Case Name and Number: Zuckerkartell; 18 AR 7/17	
Date of judgment: 6 July 2017	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Higher Regional Court of Celle	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (jurisdiction).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The decision deals with a procedural question only.
Key Legal issues: • Competence of Regional Court for claims against several cartel members as co-debtors	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Zuckerhersteller—B2—36/09	

Brief summary of facts

Claimant brought an action for damages against three defendants on the basis of their participation in the sugar cartel, which was established by the German Federal Cartel Office in its fining decision of 18 February 2014. Claimant brought that action before the Regional Court of Hanover on the basis of assigned rights. Only one of the three defendants had its seat within the jurisdiction of the Regional Court of Hanover. After filing the action, claimant applied to the Higher Regional Court of Celle for the designation of a specific jurisdiction common to all three defendants in accordance with Section 36 (1) No. 3 ZPO.

Brief summary of judgment

If it is not possible to establish beyond doubt a specific jurisdiction common to all defendants in case of an action against several cartel participants jointly and severally, the Higher Regional Court seized by the Regional Court may designate a Regional Court as the competent court for the legal dispute against all the defendants, according to considerations of expediency as well as by taking into account the economic efficiency of the proceedings.

Country: Germany	
Case Name and Number: Schienenkartell; 8 O 30/16 [Kart]	
Date of judgment: 13 September 2017	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Regional Court of Dortmund	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due lack of admissibility of the action (arbitration clause).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** The decision deals with a procedural question only.
Key Legal issues: • Arbitration clauses and antitrust damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant brought an action for damages against the defendant on the basis of its participation in the rail cartel, which was established by the German Federal Cartel Office. Claimant had purchased railway track materials from the defendant during the cartel period. Two of the supply contracts contained arbitration clauses for all disputes arising from the respective contract. The defendant considered the action to be inadmissible because of the arbitration clause. Claimant stated that the arbitration clause did not apply to claims for damages under competition law in light of the Court of Justice of the EU's case law in the *CDC Hydrogen Peroxide* case (judgment of 21 May 2015, C-352/13).

Brief summary of judgment

The Regional Court declared the action inadmissible on the basis that the arbitration clause is valid and applicable in accordance with Section 1032 (1) ZPO. In the opinion of the court, the extension of the clauses in question to claims under competition law is not prevented by the fact that the clauses do not explicitly mention claims under competition law. According to settled case-law, arbitration agreements must always be interpreted broadly and in an arbitration-friendly manner, irrespective of the type of clause. Against this background, the application of an arbitration clause is not limited to claims which are contractual in the dogmatic sense. Claims for damages under competition law—by their nature tort claims—are even covered by narrow arbitration clauses. This is because the damage to customers due to cartel-related price increases or less advantageous conditions could also lead to a claim for damages under Section 280 BGB, in addition to a claim under Section 33 GWB. The decision of the Court of Justice in the *CDC Hydrogen Peroxide* case does not conflict with the court's decision either. In the end, the Regional Court of Dortmund doubts the competence of the Court of Justice to interpret arbitration clauses and justifies this with the fact that arbitration law, unlike the question of derogation, is not subject to an autonomous interpretation under EU law.

Country: Germany	
Case Name and Number: Herausgabe von Beweismitteln II; VI-W (Kart) 2/18	
Date of judgment: 3 April 2018	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Higher Regional Court of Dusseldorf	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for procedure and substantive provisions concerning questions of its German implementation.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a discovery motion only.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The decision deals with a discovery motion only
Key Legal issues: • Intertemporal applicability of rules on disclosure of evidence (Section 33g GWB)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT.39824 — Trucks

Brief summary of facts

Claimants assert claims for damages against the defendants against whom the European Commission issued a fining decision in 2016. In preparation for their action for damages, claimants have sought from the defendants disclosure of the confidential and non-confidential versions of the fining decision as addressed to them within the scope of interim injunction proceedings pursuant to Section 33g GWB. This section was newly introduced as part of the implementation of the EU Damages Directive. The Court dismissed the motion by order of 3 April 2018.

Brief summary of judgment

The disclosure of the antitrust authority's decision can also be pursued in a separate proceeding against the defendants before the action is brought in the main proceedings, as long as the claim for damages has become pending after 26 December 2016. According to the Court, Section 33g and 89b (5) GWB applies only to claims for damages which arose after the 9th amendment to the GWB which came into force on 9 June 2017. It provides a right to disclosure of the binding decision of the competition authority which determines the cartel infringement of the defendant against which the claim is made. A release of the documents and other evidence referred to therein cannot be demanded.

Country: Germany	
Case Name and Number: Grauzementkartell II; KZR 56/16	
Date of judgment: 12 June 2018	
Economic activity (NACE Code): C.23.51—Manufacture of cement	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be liable for damages by declaratory judgment.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The claimant sought only a declaratory judgment.
Key Legal issues: • Intertemporal application of statute of limitations rules • Suspension of statute of limitations during investigation by the German Federal Cartel Office for cases where the damage occurred before 2005 • Damages for purchases from non-cartel members (umbrella pricing)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on NCA: Decision not publicly available	

Brief summary of facts

Claimant purchased grey cement from the defendant, two intervening parties and another entity between 1992 and 2002 for a total of EUR 10.67 million. In April 2003 the German Federal Cartel Office fined the defendant and other producers of cement for territorial and quota agreements. The cartel covered 71.3% of the market. Claimant brought an action for a declaratory judgment that the defendant must pay damages and interest for all purchases 1993 and 2002.

Brief summary of judgment

The binding effect of a national or EU competition authority`s decision according to Section 33 (4) GWB (old version of 2005) also applies if proceedings initiated by the competition authorities or court proceedings for infringements were already initiated before the 7th Amendment to the GWB came into force in 2005, but were not concluded until after it had come into force.

As concerns limitation, the rules on suspension of limitation in Section 33 (5) GWB (old version) apply to claims for damages based on infringements of competition committed before the 7th Amendment to the GWB came into force and which were not yet time-barred at that time. Since the cartel covered 71.3% of the (transparent) market, umbrella pricing was to be expected.

Country: Germany	
Case Name and Number: HEMA-Vertriebskreis; 19 O 9571/14	
Date of judgment: 18 June 2018	
Economic activity (NACE Code): C.10.5—Manufacture of dairy products	
Court: Regional Court of Nürnberg-Fürth	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for substantive provisions.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appeal was dismissed	**Amount of damages initially requested:** N/A
Key Legal issues: • Requirements of standard of producing evidence for a declaratory judgment • Cartels and *prima facie* evidence for damages • Exchange of information	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Hersteller von Konsumgütern—B11	

Brief summary of facts

The defendants were addressees of the German Federal Cartel Office's fining decision for participating in the so-called "*Hema Vertriebskreis*" cartel, in which they had informed each other about negotiations on conditions with food retailers. Claimant stated that its purchases of goods from the defendants were affected by the cartel and requested declaratory judgment of the defendants' joint and several liability for damages.

Brief summary of judgment

An action for a declaratory judgment as to the principal liability as such is not admissible when the specific transactions were not precisely presented. The court further ruled that if, according to the binding findings in the decision imposing the fine, suppliers operating in different markets only exchange rough information about forthcoming gross list price increases or sales developments without any concrete product reference, it cannot be assumed that the goods purchased from these suppliers are generally affected by the cartel.

Country: Germany	
Case Name and Number: Truck Kartell; 8 O 13/17 [Kart]	
Date of judgment: 27 June 2018	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Dortmund	**Was pass on raised (yes/no)?** Yes
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for substantive provisions concerning questions of its implementation into German law.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be liable for damages by declaratory judgment.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A
Key Legal issues: • Direct and indirect customers being affected by cartels • Binding effect of final decisions by German Federal Cartel Office • Burden of proof regarding pass-on	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT.39824 Trucks

Brief summary of facts

Claimant is a transport and logistics company that bought two trucks in 2010. It brought an action for damages against the defendants on the basis of their participation in the truck cartel, which was established by the European Commission in its decision of 19 July 2016. Claimant has brought an action for a declaratory judgment against the two defendants with the aim of having their principal obligation to pay damages determined.

Brief summary of judgment

In the field of antitrust damages actions, an action for a declaratory judgment as to the principal liability as such may be admissible despite the possibility of a quantified claim for damages, since the determination of the amount of damages typically requires considerable effort and involves considerable uncertainty. This applies in any case if the determination of the hypothetical price without the cartel is a complex undertaking due to the cartel price having influenced the market price over decades.

In general, both the direct and the indirect customer are affected by a cartel when the cartel infringement had an impact on their specific transaction. The court further states that the culpability of the cartel participants results from the facts as established in a final decision with binding effect by the competition authority. The conduct of the persons acting on behalf of the cartel participants must be imputed to the cartel participant pursuant to Section 31 BGB.

The indirect customer bears the burden of proof that a cartel-related price increase was passed on to the next market level and, where applicable, the amount of such increase.

Whether the pass-on of the price increase raised by the defendant leads to an exclusion or reduction of the damages claim may have to be taken into account within the rules of setting off any benefits ("*Vorteilsausgleichung*").

In the case at hand, the Regional Court of Dortmund found the defendants to be fully liable for the damage arising from two particular purchases of trucks. A passing-on of the higher prices for the purchased trucks was not found to be possible since there was no downstream market—the claimants were undertakings who did not further trade such trucks, but provided services with them. A market for the provision of services with the cartelised product was not equivalent to a market of further trading the product, whether with an own added value or not.

Country: Germany	
Case Name and Number: Schienenkartell; 2 U 13/14 Kart	
Date of judgment: 28 June 2018	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Higher Regional Court of Berlin (Kammergericht)	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, damages were awarded in the amount of EUR 26,039 with interests.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 31,227
Key Legal issues: • *Prima facie* evidence • Flat-rate damages in terms and conditions	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant bought railway track materials from one of the defendants in 2002 and 2003. The procurement contracts contained additional conditions which provided for a flat-rate damages compensation of 5% of the value of the contracts, with the reservation of higher damages. According to the German Federal Cartel Office's fining decision of 18 July 2013, the defendant was involved in the rail cartel, tendering agreements in the period between 2001 and 2011 together with other manufacturers and dealers. Claimant is seeking damages in the amount of 5% of the value of the contracts and a declaratory judgment on additional obligation to pay damages in excess thereof. The Regional Court has largely upheld the claim. Both parties have appealed.

Brief summary of judgment

Section 33 (4) GWB in its version of 2005 (binding effect) is also applicable to actions for damages where the damage occurred before 2005 if the proceedings by the cartel authority were only concluded after 2005. If the cartel covered an entire industry in a certain period of time, there is an indication that all procurement transactions in this period were affected by the cartel. There is also *prima facie* evidence that the procurement transactions concerned have caused damage. A lump-sum compensation in general terms and conditions in the amount of 5% for the case that "it is shown that the contractor has made agreements constituting infringements of competition law regarding the contract" is effective. The claim for a declaratory judgment of higher damages is admissible despite the fundamental priority of the action for performance if the claimant was not yet able to reasonably estimate the extent of the cartel and its impact on his procurements at the time the action was brought.

Country: Germany	
Case Name and Number: Truck Cartel; 9 O 49/18	
Date of judgment: 3 August 2008	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Mainz	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (stay of proceedings).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Stay of proceedings during action for annulment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant brought an action for damages against the defendant on the basis of its participation in the truck cartel. Following the conclusion of the proceedings against the initial truck manufacturers addressees, the European Commission also adopted a decision against the defendant on 27 September 2017. The defendant has brought an action for annulment against this decision before the General Court of the European Union, on which no decision had yet been made.

Brief summary of judgment

If an action for damages is brought on the basis of a decision of the European Commission that is not yet final, the proceedings must be suspended until the fining decision is final.

Country: Germany	
Case Name and Number: Weichenkartell; 29 U 2644/17 Kart	
Date of judgment: 28 June 2018	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Higher Regional Court of Munich	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be partially liable for damages by interlocutory judgment regarding basis of the claim.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 454,038
Key Legal issues: • Liability of cartel members	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Although the German Federal Cartel Office's fining decision on the rail cartel was not issued against the defendant, a later fining decision was issued in 2016, which is not yet final. The claimant brought an action for damages due to increased prices due to the cartel. Six procurement transactions with a total volume of more than EUR 44 million were claimed to be affected. The Regional Court of Munich considered the claims for five out of six transactions to be well founded. For the particular transaction in question, there was no proof that the participants of the cartel had directly made new and explicit agreements concerning this transaction.

Brief summary of judgment

The Higher Regional Court of Munich considered the merits of the claim for all six procurement transactions to be justified. For the liability for damages of the cartel member the individual procurement transactions did not necessarily have to be the subject of (renewed) explicit agreements with the direct participation of that cartel member.

Country: Germany	
Case Name and Number: Verkürzter Versorgungsweg VI-U (Kart) 24/17	
Date of judgment: 26 September 2018	
Economic activity (NACE Code): K.65.12—Non-life insurance	
Court: Higher Regional Court of Dusseldorf	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be liable for damages by interlocutory judgment regarding basis of the claim.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 8,991,347
Key Legal issues: • Binding effect of decisions imposing fines	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Hörgeräte—B3—134/09	

Brief summary of facts

Claimant brought an action for damages against the defendant based on a fining decision of the German Federal Cartel Office regarding the defendant's practice to induce health insurance funds not to conclude contracts under the so-called shortened care path. The Regional Court upheld the claim in principle, the defendant appealed the decision.

Brief summary of judgment

The Higher Regional Court dismissed the appeal of the defendant. In the opinion of the Higher Regional Court, the lower court had rightly come to the conclusion in the first instance that the claimant was entitled to compensation for the damage caused by the cartel. The lower court had rightly assumed that it was bound by the findings of the Federal Cartel Office in its decision of 18 November 2011 under Section 33 (4) GWB 2013. The Higher Regional Court ruled that the binding effect of the decision of the German Federal Cartel Office does not only apply regarding its executive part, but also regarding the supporting reasons, legal and factual grounds of the decision.

Country: Germany	
Case Name and Number: Zuckerkartell X ARZ 321/18	
Date of judgment: 27 November 2018	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** N/A
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (jurisdiction).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The decision deals with a procedural question only.
Key Legal issues: • Jurisdiction in competition litigation cases against several defendants	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: N/A	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Zuckerhersteller—B2—36/09	

Brief summary of facts

The German Federal Cartel Office has imposed fines against the defendants which have become final. After the third defendant argued that there is no jurisdiction of the Regional Court of Mannheim, claimant applied to the Higher Regional Court for the competent court to be determined in accordance with Section 36 (1) ZPO. Claimant appeared at the hearing date already set by the Regional Court but did not litigate. At this date, the second defendant also challenged the jurisdiction of the Regional Court of Mannheim; then the defendants jointly applied for the dismissal of the action by default judgment, which the Regional Court issued as requested, because the claimant did not litigate. Claimant has lodged an objection to this default judgment.

The Higher Regional Court of Karlsruhe wanted to reject the application for determination, but was prevented from doing so by a decision of the Higher Regional Court of Celle and therefore submitted the case to the Federal Court of Justice.

Brief summary of judgment

In the case of financial losses resulting from competition law infringements, the place where the damage occurs is generally the place of business of the company which has suffered loss. The German procedure to appoint a competent court for several defendants that have their place of business in several court districts equally applies where the claims have been assigned to a claim vehicle. The Federal Court of Justice ruled the Regional Court of Mannheim to be the competent court.

Country: Germany	
Case Name and Number: Schienenkartell I KZR 26/17	
Date of judgment: 11 December 2018	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but damages are subject to the lower court's reassessment of the facts.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 898,022 and additional damages of an unspecified amount.
Key Legal issues: • Cartels and *prima facie* evidence for damages; attribution of knowledge of employees of cartel customers and contributory negligence	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

A regional railroad operator brought an action for damages against the defendant, a producer of railway track materials, on the basis of its participation in the rail cartel (*Schienenfreunde-Kartell*—"Friends of railroads"-cartel), which was established by the Germany Federal Cartel Office in its fining decision of 18 July 2013. Claimant purchased rail material in 16 cases between 2004 and March 2011. A liquidated damages clause, which provided for damages of at least 15% of the purchase price in case the defendant engaged in anti-competitive agreements, unless other damages could be shown was included in 13 of such purchasing contracts. The participants and the structure of the horizontal price, quota and customer allocation agreements were subject to change depending on market developments. The intensity of the cartel infringements was different region-by-region. According to the agreements, customers were repeatedly assigned to their regular suppliers and potential competitors refrained from making offers or submitted offers at inflated prices. In return they would receive subcontracts or other compensatory business and their 'regular customers' were not approached. Claimant was, according to its own submission, not a 'regular customer' of the defendant.

Brief summary of judgment

While the existence of a cartel agreement is a strong indicator for damage, the standard of *prima facie* evidence applies neither to the question whether individual transactions were affected by it nor whether a damage has occurred. This is due to the diversity and complexity of cartel agreements.

Awarding contracts with calls for tenders is no case of contributory negligence. The fact that an employee of a cartel customer had knowledge of the anti-competitive agreement or may even have taken part in anti-competitive behaviour does not lead to the conclusion that the customer's internal compliance organization was faulty. In any case, such a case of contributory negligence does not have any consequences given defendant's intentional behaviour.

[Please note: In the meantime, the Federal Court of Justice has clarified its findings relating to procurement contracts in the decision "*Schienenkartell II—KZR 24/17*" (see below).]

Country: Germany	
Case Name and Number: Schienenkartell I VI-U (Kart) 18/17	
Date of judgment: 23 January 2019	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Higher Regional Court of Dusseldorf	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be liable for damages by interlocutory judgment regarding the basis of the claim.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 1.8 million. Additionally, claimant requested other damage items, *i.e.* for party expert witness and legal costs.
Key Legal issues: • Cartels and *prima facie* evidence for damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

A regional railroad operator brought an action for damages against several producers of railway track materials. The defendants participated in the rail cartel and had previously been fined by the German Federal Cartel Office in its decision of 18 July 2013.

Brief summary of judgment

The Higher Regional Court stands by its case law that a quota or customer protection cartel that has been in operation for years justifies the application of *prima facie* evidence that the cartel agreement has been applied to all procurement processes which are factually, territorially and temporally related to the anti-competitive behaviour, and that the infringement of competition has resulted in damage in the form of price increases. In this ruling, the Higher Regional Court of Dusseldorf disagrees with ruling of the Federal Court of Justice from 11 December 2018, KZR 26/17.

The defendant was found to be liable for damages.

Country: Germany	
Case Name and Number: Zuckerkartell 14 O 110/18 Kart	
Date of judgment: 23 January 2019	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Regional Court of Mannheim	**Was pass on raised (yes/no)?** N/A
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of standing (assignment model).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 19.7 million. Additionally, claimant requested other damage items, *i.e.* for party expert witness and legal costs.
Key Legal issues: • Validity of collective damage claims via intra-group assignments of claims	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant brought an action for damages against the defendants based on assigned claims. The defendants' participation in the sugar cartel was established and fined by the German Federal Cartel Office in its decision of 18 February 2014. Under the assignment agreements, the assignments were made free of charge. Claimant submits that the assignors intended to participate indirectly as limited partners through the increase in the value of the shares in the company that would accompany the collection of the claims for damages. By means of the action, claimant seeks to obtain first access to information and then, on the basis of the information provided, damages.

Brief summary of judgment

If several companies assign their alleged claims for damages arising from a cartel infringement to a company of which they are shareholders free of charge, it is an infringement of the German Legal Services Act if these claims are brought by the company in court. According to the German Legal Services Act, if the claim collection is carried out as an independent business this is deemed as a collection service within the meaning of the Legal Services Act. According to this law, such debt collection services may only be performed by persons registered with the competent authority, which the claimant is not. The assignments are therefore null and void under Section 134 BGB.

Country: Germany	
Case Name and Number: Truck Kartell 30 O 234/17	
Date of judgment: 14 March 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Stuttgart	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (stay of proceedings).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A
Key Legal issues: • Stay of proceedings during action for annulment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? N/A	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant is the insolvency administrator of a company which procured 249 trucks of various manufacturers. On the basis of the European Commission's fining decision of 19 July 2016, it brought an action for damages against one truck manufacturer. The defendant included the other alleged cartel participants in the proceedings through a third-party notice ("*Streitverkündung*"). They therefore became interveners in the proceedings. A separate fining decision was issued in 2017 against one of these interveners, against which they brought an action before the General Court of the European Union (Case T-799/17 *Scania v Commission*). They therefore requested the stay of the damages proceedings.

Brief summary of judgment

Where the European Commission has adopted two decisions imposing fines in respect of the same cartel, and only one of them is final, it may be appropriate to stay proceedings until a final decision has been taken on all decisions. This applies in any event where the undertaking concerned is an intervener in the damages proceedings.

Country: Germany	
Case Name and Number: Truck Kartell 14 O 117/18 Kart	
Date of judgment: 24 April 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Mannheim	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of liability of an affiliate.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A
Key Legal issues: • Liability of subsidiary company for actions of its parental companies	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant had leased a truck and brought an action for damages against the defendants on the basis of the participation of their parent company in the truck cartel, which the European Commission had established in its decision of 19 July 2016.

Brief summary of judgment

The Regional Court ruled a subsidiary is not liable for the damages caused by an infringement of its parent company. However, this issue is not completely resolved. In a different case, a request for a preliminary ruling is pending before the Court of Justice of the EU regarding that issue.

Country: Germany	
Case Name and Number: Schienenkartell III VI-U (Kart) 11/18	
Date of judgment: 8 May 2019	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Higher Regional Court of Dusseldorf	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, the EU Damages Directive was referred to in order to interpret Section 33c (2) GWB.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but defendant was found to be liable for damages by interlocutory judgment regarding basis of the claim.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** Claimant 1: EUR 179,644 from defendants 3-7 and EUR 813,244 from all defendants. Claimant 2: EUR 47,973 from defendants 3-7 and EUR 632,271 from all defendants. Claimant 3: EUR 150,163 from all defendants. Claimant 4: EUR 122,320 from defendants 3-7 and EUR 514,162 from all defendants. Claimant 5: EUR 459,972 from defendants 3-7 and EUR 2,497,314 from all defendants. Additionally, claimants requested other damage items, *i.e.* for party expert witness and legal costs.
Key Legal issues: • Liability for effects of umbrella-pricing; no *prima facie* evidence or factual presumption for extensive pricing by non-cartel member; *prima facie* evidence for cartel impact of specific transaction and occurrence of damage	**Is the dispute likely to be settled privately?** N/A

Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimants brought an action for damages against the defendants on the basis of their participation in the rail cartel, which the German Federal Cartel Office had fined in its decision of 18 July 2013. This claim was partially affirmed by the Regional Court. The appeal before the Higher Regional Court concerned the question whether the supply of a cartel outsider was affected by the cartel in the context of an umbrella effect.

Brief summary of judgment

The Higher Regional Court dismissed the appeal. In general, cartel members may be liable for damages which are based on the fact that a company not involved in the cartel (cartel outsider) sets its prices higher than it would have done in absence of the cartel ("umbrella effect").

The court ruled that there is no *prima facie* evidence or factual presumption that a cartel outsider under the umbrella of an existing cartel will charge its customers fees that are above the hypothetical competitive price level.

The occurrence and direction of umbrella effects in connection with cartels are not subject to any economic rule but depend on the facts and circumstances of the individual case. Relevant criteria include the degree of substitutability of the services offered by the cartelists or outsiders, the homogeneity or heterogeneity of the products concerned, the degree of product differentiation, the existence or non-existence of (material or immaterial) change costs, the type of competition, the duration of the cartel, the market transparency, the degree of market coverage, the intensity of the remaining competition among the outsiders, the production costs, any capacity restrictions or other behavioural factors.

An umbrella effect cannot be considered solely on the basis of the fact that the cartel outsider has bought the goods from a cartel member at an increased price.

Country: Germany	
Case Name and Number: Truck Kartell 14 O 117/18 Kart	
Date of judgment: 24 April 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Mannheim	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of liability of an affiliate.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A
Key Legal issues: • Liability of subsidiary company for actions of its parental companies	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimants had leased a truck and brought an action for damages against the defendants on the basis of the participation of their parent company in the truck cartel, which the European Commission had established in its decision of 19 July 2016.

Brief summary of judgment

The Regional Court ruled a subsidiary is not liable for the damages caused by an infringement of its parental company. However, this issue is not completely resolved. In a different case, a request for a preliminary ruling is pending before the Court of Justice of the EU regarding that issue.

Country: Germany	
Case Name and Number: Löschfahrzeug-Kartell 37 O 6039/18	
Date of judgment: 7 June 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Munich I	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, the EU Damages Directive was referred to in order to interpret Section 33c (2) GWB.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation and lack of liability of an affiliate.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 167,429. Additionally, claimant requested other damage items, *i.e.* for party expert witness and legal costs.
Key Legal issues: • Liability of subsidiary company	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

The defendants produce fire engines and superstructures for fire engines; the second defendant is the subsidiary company of the first defendant. Claimant bought a fire engine from the subsidiary in 2010 and two vehicles from the parent company in 2008 and 2010. The German Federal Cartel Office imposed fines in 2011 and 2012 against the subsidiary for two different cartel agreements that ended in 2007 and 2009, respectively. Claimant is of the opinion that it paid excessive prices due to the cartel and claims damages.

Brief summary of judgment

The Regional Court dismissed the action. It ruled that both defendants have no standing to be sued. As to the first defendant, the court ruled that there was no purchase between claimant and the first defendant.

As to the second defendant, the court ruled that a subsidiary is not liable for an infringement of its parent company in antitrust damages claims. However, this issue is not completely resolved. In a different case, a request for a preliminary ruling is pending before the Court of Justice of the EU regarding that issue.

Country: Germany	
Case Name and Number: Löschfahrzeug-Kartell 37 O 6039/18	
Date of judgment: 7 June 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Munich I	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, the EU Damages Directive was referred to in order to interpret Section 33c (2) GWB.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation and lack of liability of an affiliate.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 167,429. Additionally, claimant requested other damage items, *i.e.* for party expert witness and legal costs.
Key Legal issues: • Liability of subsidiary company	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

The defendants produce fire engines and superstructures for fire engines; the second defendant is the subsidiary company of the first defendant. Claimant bought a fire engine from the subsidiary in 2010 and two vehicles from the parent company in 2008 and 2010. The German Federal Cartel Office imposed fines in 2011 and 2012 against the subsidiary for two different cartel agreements that ended in 2007 and 2009, respectively. Claimant is of the opinion that it paid excessive prices due to the cartel and claims damages.

Brief summary of judgment

The Regional Court dismissed the action. It ruled that both defendants have no standing to be sued. As to the first defendant, the court ruled that there was no purchase between claimant and the first defendant.

As to the second defendant, the court ruled that a subsidiary is not liable for an infringement of its parent company in antitrust damages claims. However, this issue is not completely resolved. In a different case, a request for a preliminary ruling is pending before the Court of Justice of the EU regarding that issue.

Country: Germany	
Case Name and Number: Schienenkartell 2-06 O 649/12	
Date of judgment: 25 September 2019	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Regional Court of Frankfurt am Main	**Was pass on raised (yes/no)?** N/A
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (jurisdiction).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A (action by stages—"*unbezifferte Stufenklage*").
Key Legal issues: • Liability of parent companies for subsidiaries after the Court of Justice of the EU Skanska judgment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: In part direct, in part indirect claim	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimants brought an action for damages against the defendants on the basis of their participation in the rail cartel, which was established by the German Federal Cartel Office in its fining decisions of 3 and 5 July 2012. Until 2011, defendant No. 1 held 50% of the shares of defendant No. 2. Defendant No. 2 has its place of business in the Czech Republic. The Regional Court had to decide on the international jurisdiction of the German courts regarding defendant No. 2.

Brief summary of judgment

The Regional Court found that German courts had international jurisdiction to hear the case. A parental company can be liable for its subsidiaries. The Regional Court applied the case law of the Court of Justice of the EU in the Skanska case (Case C-724/17, *Skanska*, 14 March 2019). In its preliminary examination needed for evaluating the international jurisdiction, the Regional Court found that defendant No. 1 exercised decisive influence on defendant No. 2. In this regard, the term "undertaking" is interpreted according to EU law as meaning any entity carrying out an economic activity, regardless of its legal form and the type of its financing.

Country: Germany	
Case Name and Number: HEMA-Vertriebskreis II 3 U 1876/18	
Date of judgment: 14 October 2019	
Economic activity (NACE Code): C.10.92—Manufacture of prepared pet foods	
Court: Higher Regional Court of Nürnberg	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of standing (related to causation).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A (request for a declaratory ruling).
Key Legal issues: • Liability of parent companies for subsidiaries after the Court of Justice of the EU Skanska judgment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant brought an action for damages to the Regional Court based on purchases between 2005 and 2010 from the defendant. The defendant was later fined by the German Federal Cartel Office for participation in a cartel concerning the goods at stake. Therefore, claimant sought damages resulting from this cartel including in the form of loss of profit and interests. This action was not successful. The claimant applied to the Higher Regional Court to challenge the decision of the Regional Court. The appeal was dismissed.

Brief summary of judgment

In the event of an exchange of information contrary to competition law without reference to a specific product, there is no *prima facie* evidence that these specific product transactions at hand are affected. However, there can be a factual presumption that purchases falling within the scope of the agreements as to time, geographical scope and object were affected by them and were therefore cartel-related.

In case of such an exchange of information, however, the substantiation of the damage caused by the cartel must show that the products in question have been the subject of discussions by the cartelists. In addition, claimant must usually buy from a company receiving information. If, on the other hand, claimant only buys from the company who passed on information to the other cartelists, the damage will only be considered if the provider of information also gained knowledge which—for example when negotiating with claimant—benefited him.

Country: Germany	
Case Name and Number: Berufungszuständigkeit II KZR 60/18	
Date of judgment: 29 October 2019	
Economic activity (NACE Code): J.61 — Telecommunications	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (jurisdiction).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A (no damages requested).
Key Legal issues: • Competence of Higher Regional Courts in competition litigation cases	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The defendant operates a radio station in Potsdam and uses the terrestrial transmitters operated by claimant for the transmission. In August 2015, the Federal Network Agency approved the fees of claimant in appeal for the period from 1 January 2016 onwards. For the period from August 2015 to the end of 2015, the fees of claimant in appeal were declared ineffective and other—lower—fees were ordered. In 2015, the parties also argued on the amount of the fees and reached a settlement in court. Later claimant brought an action for payment of fees between September 2015 and April 2016, since as the defendant had not paid these. The defendant argued that the fees were still too high and constituted an abuse of a dominant position according to the GWB. The Regional Court of Bonn referred the matter as being a competition matter according to Section 87, 89 GWB to the competent Regional Court of Cologne. The Regional Court of Cologne ordered the defendant to pay the fees as claimed. The defendant appealed against this decision to the Higher Regional Court of Dusseldorf, as being competent for appeal in competition litigation matters. The decision was therefore not appealed to the generally competent Higher Regional Court of Cologne.

The Higher Regional Court of Dusseldorf found the appeal to be inadmissible because the case did not raise a question of competition law and the decision did not depend on a preliminary question concerning competition law. This judgment is the subject of the defendant's appeal, which was allowed by the Federal Court of Justice.

Brief summary of judgment

The Federal Court of Justice found that it is part of the state's guarantee of legal protection that a person seeking legal protection is enabled to find the procedural ways in which he can claim his rights. Against this background, it is not reasonable to have to lodge an appeal both with the generally competent Higher Regional Court and with the Higher Regional Court competent for competition litigation matters under the GWB. If there is any uncertainty about the appeal competence of a competent Higher Regional Court, the appeal, on which the generally competent Court of Appeal has to decide, can also be lodged with the Higher Regional Court competent for competition litigation cases within the time limit. This is particularly the case if a Regional Court which is competent according to Section 87, 89 GWB has decided in this capacity. This evaluation can only be different if there were no reasonable doubt as to the jurisdiction of the generally competent Higher Regional Court.

Country: Germany	
Case Name and Number: Truck Kartell 30 O 8/18	
Date of judgment: 19 December 2019	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Stuttgart	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes; the EU Damages Directive was referred to in order to delimit direct from indirect acquisitions.
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A (request for a declaratory ruling).
Key Legal issues: • Requirements of standard of producing evidence for a declaratory judgment	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: In part direct, in part indirect claim	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant, a transport and logistics company, had acquired trucks from the defendant. Parts of those trucks were acquired directly by claimant and other parts were acquired through leasing companies. Claimant brought an action for damages against the defendants on the basis of their participation in the truck cartel, which was established by the European Commission in its fining decision of 19 July 2016. Claimant has brought an action for a declaratory judgment against the two defendants with the aim of having their principal obligation to pay damages determined.

Brief summary of judgment

The Regional Court found that claimant did not sufficiently substantiate and prove that its individual acquisitions were affected by the cartel. In particular, claimant could not substantiate the actual purchase prices. Therefore, the action was dismissed.

Country: Germany	
Case Name and Number: Truck Kartell 29 W 1380/19 Kart	
Date of judgment: 9 January 2020	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Higher Regional Court of Munich	**Was pass on raised (yes/no)?** N/A
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the decision deals with a procedural question only (stay of proceedings).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** N/A (the decision deals with a procedural question only).
Key Legal issues: • Stay of proceedings during action for annulment; umbrella pricing	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: N/A	**Method of calculation of damages:** N/A
Individual or collective claims? N/A	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant brought an action for damages against the defendants on the basis of their participation in the truck cartel, which was established by the European Commission in its decision of 19 July 2016. Other alleged cartel participants were in the proceedings as interveners through a third-party notice ("*Streitverkündung*. Whereas the European Commission's fining decision of 2016 against the defendants is final, the European Commission's decision of 2017 against interveners was subject to pending annulment proceedings before the General Court of the European Union (Case T-799/17 *Scania v Commission*). The Regional Court of Munich has separated the proceedings concerning procurement transactions with regards to the brand of the interveners and has stayed them until the annulment proceedings have been concluded. Claimant has appealed against the stay.

Brief summary of judgment

A fining decision of the European Commission which is not yet final and subject to appeal does not have any binding effect as concerns the factual finding in the action for damages. This even applied where these findings are not challenged in the action before the General Court of the European Court. In consequence, the proceedings regarding possible damages must be suspended until the action for annulment proceedings pending before the General Court of the European Court has been concluded.

A claim for damages due to a cartel may also exist if the acquisition transactions are based on contractual relations with an outsider of the cartel (damage due to "umbrella pricing"). A claim for damages based on "umbrella pricing" requires different findings with regard to the plausibility of the occurrence of damage than in the case of an acquisition transaction from a cartel member. In a case regarding damages based on "umbrella pricing" it is irrelevant whether the cartel may have led to price increases when acquiring persons not participating in the cartel.

Country: Germany	
Case Name and Number: Schienenkartell II KZR 24/17	
Date of judgment: 28 January 2020	
Economic activity (NACE Code): C.30.2—Manufacture of railway locomotives and rolling stock	
Court: Federal Court of Justice	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, but damages are subject to the lower court's reassessment of the facts.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Initially before the Reginal Court of Erfurt: EUR 42,615 on behalf of a contractual regulation (plus request for declaratory ruling).
Key Legal issues: • Standard of proof; cartel impact; presumption of transparent pricing having an effect on pricing in general; experts opinion	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

A regional railroad operator brought an action for damages against producers of railway track materials on the basis of their participation in the rail cartel, which had been established and fined by the German Federal Cartel Office in its decision of 18 July 2013. The Regional Court upheld the claim on the merits. The Higher Regional Court of Jena dismissed the appeal; it had acknowledged *prima facie* evidence of the price-increasing effect and the impact of the cartel on the specific transactions with claimant. The Federal Court of Justice annulled the judgment on appeal and referred the case back to the Higher Regional Court of Jena for a new decision.

Brief summary of judgment

For the purpose of establishing standing, the Federal Court of Justice clarified that it is sufficient that claimant shows that the infringement is generally suitable to cause direct or indirect harm to claimant. Also, if cartel members establish a system in which a "captain" communicates the prices of "protection offers" or the intended price in the context of tenders, it is likely that such a system will have a general effect on the cartel members' bids because of the existing price transparency. The bigger the scope of quota or customer "allocation" that was practised in the market, the greater the likelihood of an effect on individual transactions. An expert opinion does not replace the court's own judicial assessment of evidence.

The Federal Court of Justice partly confirms its ruling on the *prima facie* evidence (see above "*Schienenkartell* I—KZR 26/17"). The Federal Court of Justice overruled the judgment of the Higher Regional Court of Jena as the lower court had applied the *prima facie* evidence regarding the fact that the cartel agreements generally have price-increasing effects. The Federal Court of Justice ruled that the issue whether a prohibited conduct is capable, in the context of sales transactions or otherwise, of directly or indirectly causing the claimant harm is part of the causality giving rise to liability (*haftungsbegründende Kausalität*) and is subject to the standard of proof pursuant to Section 286 of the German Code of Civil Procedure, *i.e.* it must be fully proven (*Vollbeweis*).

Country: Germany	
Case Name and Number: Truck Kartell 37 O 18934/17	
Date of judgment: 7 February 2020	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Munich I	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of standing (assignment model).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** EUR 603 million
Key Legal issues: • Bundle of claims; claim vehicle (special purpose vehicle); legal requirements; invalid assignments	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Unclear	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant, a German undertaking offering enforcement of cartel damages claims (special purpose vehicle), brought an action for damages under assigned rights against participants of the truck cartel, which was fined by the European Commission in its decision of 19 July 2016. Claimant is bringing claims on behalf of 3,235 assignors in Germany and other European countries; the alleged damages amount to at least EUR 603 million in total. As compensation, a success fee in the amount of 33% of the actual damages received has been agreed between the claim vehicle and the assignors. The Regional Court dismisses the claim as essentially unfounded.

Brief summary of judgment

The ruling concerns a case of bundling a large number of assigned cartel damage claims for judicial enforcement. Even though the court does not consider the bundling and the model of enterprise behind it to be abusive, the claim is unfounded due to multiple violations of the Legal Services Act The court ruled that the assignment structure at hand was in violation with Section 3 of the Legal Services Act, as the claim vehicle was lacking the authorisation to provide extrajudicial legal services. Further, the court held that there was a violation of Section 4 of the Legal Services Act as the legal services of the claim vehicle is incompatible with another obligation to perform. Claimant did therefore not have the legitimation needed to represent the assignors. Claimant's contractual obligations are aimed at enforcing the claims in court, not, as the special purpose vehicles' contracts said, a debt collection service. The fulfilment of the legal service is also directly influenced and endangered by other service obligations of claimant towards its customers and the financial investors financing the court proceedings.

Country: Germany	
Case Name and Number: Truck Kartell—Nigeria-Exportfahrzeuge 30 O 261/17	
Date of judgment: 5 March 2020	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Regional Court of Stuttgart	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Unknown	**Amount of damages initially requested:** EUR 20.5 million
Key Legal issues: • Scope of binding effects of a fining decision by the European Commission regarding export of goods to countries outside the EU	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT.39824 Trucks	

Brief summary of facts

Claimant had bought 2,138 trucks mainly from the brand produced by the defendant. The trucks were brought to Nigeria. Claimant brought an action for damages in the amount of EUR 20.5 million arguing that the transaction was affected by the truck cartel the European Commission had fined in its decision of 19 July 2016.

Brief summary of judgment

The Regional Court found that the action was admissible but not successful on the merits. According to the court, the European Commission's truck cartel decision of 2016 does not apply to exports of trucks to third countries. In this way, no umbrella effect can be presumed either.

Country: Germany	
Case Name and Number: Zuckerkartell 18 O 50/16	
Date of judgment: 4 May 2020	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Regional Court of Hanover	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of standing (assignment model).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** EUR 15 million
Key Legal issues: • Assignment of claims; collective damages actions	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant brought an action for damages in the amount of EUR 15 million against the defendants on the basis of their participation in the sugar cartel, which was established and fined by the German Federal Cartel Office in its decision of 18 February 2014. The claims of claimant were assigned by its subsidiaries.

Brief summary of judgment

The action was dismissed. The Regional Court ruled that the assignments were invalid according to the Legal Services Act as the economic risk relating to the claims had not been entirely transferred to claimant. There are exceptions where such assumption of risk is not necessary for assignments to be effective, for example within affiliated companies. The Regional Court ruled, however, that the claimant was not an affiliated company within the meaning of the German Stock Corporation Act. In addition, it stated that the foundation set up by claimant did not make sufficient effort in reaching an out-of-court settlement. According to the court, the assignments were primarily set up for the enforcement of claims in court.

Country: Germany	
Case Name and Number: Drogeriekartell 11 U 98/18	
Date of judgment: 12 May 2020	
Economic activity (NACE Code): G.47.75—Retail sale of cosmetic and toilet articles in specialised stores	
Court: Higher Regional Court of Frankfurt am Main	**Was pass on raised (yes/no)?** No
Claimants: Parties are anonymised in publicly available version of the judgment	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Parties are anonymised in publicly available version of the judgment	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, due to lack of proof regarding causation.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** EUR 212 million
Key Legal issues: • Damage arising from exchange of information; *prima facie* evidence	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims: Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Christian Ritz, LL.M. (USYD), Partner, christian.ritz@hoganlovells.com; Carolin Marx, Partner, carolin.marx@hoganlovells.com; Dr. Judith Solzbach, Senior Associate, judith.solzbach@hoganlovells.com; Hanna Weber, Associate (all Hogan Lovells), hanna.weber@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Decision not publicly available	

Brief summary of facts

Claimant brought an action for damages in the amount of EUR 212 million against the former suppliers of a drugstore chain. The German Federal Cartel Office had fined these suppliers for anti-competitive exchange of information.

Brief summary of judgment

The Higher Regional Court ruled that claimant had not suffered any damage as a consequence of the information exchange. According to the court, the information exchange investigated by the German Federal Cartel Office had not limited price competition among manufacturers to the detriment of the customers. With reference to the Federal Court of Justice's judgment in *Schienenkartell II* (see above KZR 24/17) the court ruled that *prima facie* evidence does also not apply in cases of exchange of information between competitors. The court based this decision on the arguments of claimant, supported by its economic research concerning the ambivalent effects of information exchanges.

ITALY

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Italy has implemented Directive no. 104/2014 of 26 November 2014 on actions for damages for infringements of EU and national competition law (the "**Directive**") by the Legislative Decree no. 3/2017 (the "**Decree**"). The Decree entered into force on 3 February 2017, and later on, Article 1 of the Decree which is related to scope was amended on 19 November 2020. However, scope remains unaffected in its essence and the Decree continues to govern actions for damages for infringements of EU and national competition law.

1. Jurisdiction

The authority primarily in charge of enforcing competition law in Italy is the Italian Competition Authority (*Autorità garante della concorrenza*, the "**ICA**"). However, the ICA is only competent for public enforcement and not for private damages actions. Final infringement decisions of the ICA may be appealed before administrative courts. Such courts, in case of appeal, have no jurisdiction to rule on actions for damages for infringement of antitrust law.

In Italian competition law ordinary courts have jurisdiction as to claims for damages for infringements of EU and national competition law under the Decree.

Specialized commercial courts of Milan, Rome, and Naples have the exclusive jurisdiction as to such claims. The parties may not contract out this jurisdiction.

Seeking damages for infringement of competition law may take the form of, either stand-alone action, brought before the competent national court regardless of a preliminary procedure initiated before a competition authority, or as a follow-on action, brought before the competent national court but based on an earlier decision of a competition authority confirming the infringement. Alternative Dispute Resolution ("ADR") is possible. Nevertheless, courts have jurisdiction if the parties do not reach a consensual solution to their dispute.

2. Relevant legislation and legal grounds

Since its entry into force (3 February 2017) the Decree is self-sufficient within its scope of application and its procedural or substantive provisions. Nevertheless and unsurprisingly for a decree implementing an EU Directive on liability, the Decree requires the application of ordinary Italian law as to the issues it does not govern directly.

Before the Decree these actions for damages were subject to tort law in the Italian Civil Code (the "**ICC**"), where compensation is due for any harm caused by others intentionally or by negligence.

Given the recent entry into force of the Decree (3 February 2017) and its non-retroactive application, most of the Italian court judgments provided in this database relate to claims that originate in facts having occurred before, and only some judgments are issued after, the entry into force of the Decree. Court judgments issued before remain of interest at present, indirectly for the consideration they granted to the Directive (in its making or after its adoption, but before its implementation in Italian law by the Decree), directly as to the issues that the Directive and then the Decree do not directly govern. Such issues, for instance the scope and quantification of damages, remain governed by "ordinary" Italian law.

3. What types of anti-competitive conduct are damages actions available for?

The Decree applies to claims for damages by an infringement of competition law committed by a company or an association of companies. If the infringement and the harm alleged are confirmed, claimant is entitled to receive full compensation covering the damage, the loss of profit and the applicable interests.

Relevant infringements of EU or national competition law for the application of the Decree are anti-competitive agreements and concerted practices or abuse of dominant position, pursuant to Articles 101 or 102 TFEU or, in Italian law, Articles 2, 3, and 4 of Law no. 287/1990. The Decree also covers infringement of national competition law provisions of other Member States that pursue mainly the same objectives as Articles 101 and 102 TFEU. Needless to say, such infringements of foreign competition law are unfrequently raised before Italian courts.

In view of the joint and several liability of the corporations having co-infringed competition law, claimant(s) can seek full compensation from any of them until the loss is fully compensated. However, a derogatory regime concerns small—and medium-sized ("SME") corporations (as defined by the EU Recommendation 2063/361) to the extent that they are subject to joint and several liability only with regard to their own direct and indirect purchasers if each corporation had 5% or less of the market share during the period of infringement and if a joint liability would cause an irreparable prejudice to the corporations' economic stability. Such a derogatory regime does not apply, and the principle of joint liability applies, if parties having suffered harm, other than the SME's direct and indirect purchasers, are not in the position to obtain full compensation, or if the SME had a leading role in the infringement.

4. What forms of relief may a private claimant seek?

First, punitive damages are not an option under Italian law.

Second, the relief for the harm suffered in direct causation from an infringement of competition law is financial compensation. Damages are quantified including actual loss (*damnum emergens*) and loss of profit (or *lucrum cessans*), plus the applicable interests. Overcompensation is not allowed. Should it be impossible to prove the actual extent of the damage, the court may decide to grant compensation on an equitable basis.[1]

To obtain full compensation the claimant shall prove:

- in stand-alone actions: (i) the competition law infringement, (ii) the existence of the harm and its amount, (iii) the causal link between the competition law infringement and the harm;
- in follow-on actions: the harm and causation (see below).

The Decree goes further than ordinary Italian law by setting the rebuttable presumption of actionable damage as soon as an infringement of competition law is due to a cartel.

5. Passing-on defence

Compensation for harm caused by infringement of competition law is due whether the claimant is a direct or indirect purchaser. Defendant may invoke the passing-on defence but carries the burden of proof to demonstrate that the claimants passed on to purchasers or customers the whole or part of the overcharge arising from the infringement thus avoiding that loss which therefore cannot be claimed.

Beyond the obvious burden of proof, the Decree establishes the rebuttable presumption of pass-on overcharge where the indirect purchaser is able to prove that (i) the defendant has committed an infringement of competition law; (ii) this infringement has led to a surcharge for the defendant's direct purchaser; and (iii) it has purchased goods or services relating to the infringement.

6. Pre-trial discovery and disclosure, treatment of confidential information

Italian courts may order disclosure of evidence by a party and third parties, upon a reasoned request submitted by one of the parties, in principle claimant. Article 3 of the Decree introduced into the Italian procedural system the possibility for a party to seek such disclosure by a court exhibition order to the other party, and the order is to identify the specific items or categories of the requested evidence by its "constitutive elements", such as nature, the timeframe concerned, subject matter and content. Courts' disclosure orders must be strictly proportionate to the decision to be adopted, in the light of the likelihood that the infringement occurred, the scope and the cost of exhibition and the rights of the disclosing party. If confidential information is involved in the request for disclosure, the

1 In greater detail, see articles 1223, 1226, 1227 of the ICC, Article10 of the Decree.

judge shall adopt appropriate measures. The Decree clarifies that its disclosure rules do not affect legal privilege.

This disclosure procedure applies only to antitrust damages action. The ordinary regime (Article 210 of the Italian Code of Civil Procedure) requirs the judge, before issuing a disclosure order, to assess whether the evidence is necessary.

Where the parties or third parties are not reasonably in the position to provide the evidence contained in the file instructed by the ICA then Article 4 of the Decree entitles national courts to order the disclosure of such evidence provided the disclosure be proportionate and the request for disclosure be specific as to, documents submitted to the ICA, the damages claim, the interest in pursuing a public law competition objective. Italian courts may not issue a disclosure order concerning leniency applications (as to the attached documents) and settlement submissions.

Pursuant to Article 7 of the Decree, final decisions (*res iudicata*, no longer subject to challenges) issued by the ICA or by an administrative court upon its review of a ICA's decision, with regard to the existence (or absence) of an infringement of competition law constitute the final determination on such infringement with regard to respondent for the damages action before an Italian court. This final determination is limited to the factual analysis of the infringement of competition law, including the nature of infringement and its scope (material, personal, temporal and territorial). Inversely, if there is no final determination, the court has jurisdiction to decide about the existence of the harm, its quantification or the causation between the harm and the infringement of competition law. The same rule applies to a final decision from a National Competition Authority, or a court, of another EU Member State though with a significant difference: before the Italian court the evidence the decision provides as to the existence and scope of the infringement may be evaluated also in light of other evidence.

Under the pre-Decree regime, a final finding of infringement by the ICA constituted *privileged evidence* only as to the existence of such infringement as well as to its nature and scope. Such final finding by the ICA did not bind the court having jurisdiction on the damages claim, it was regarded as a particularly strong evidence in that respect although it could be overcome (For instance, in the *Pfizer* decision, Commercial Court of Rome, 24 July 2017, No. 15020, *Ministry of Health and Ministry of Economy and Finance / Pfizer Italia S.r.l.*)

7. Limitation Periods

Article 8 of the Decree sets out a limitation period of five years for damages actions stemming from an antitrust infringement. As to the time when the limitation period starts to run the Decree is further detailed than the ordinary regime in Italian law (Article 2935 ICC) and requires the limitation period not to run until the infringement of competition law has ceased and the claimant knows, or can reasonably be presumed to know, the following elements: (i) the conduct and the awareness it constitutes an infringement; (ii) the infringement has caused him a harm; and (iii) the identity of the infringer.

Moreover, the five-year time limitation period shall be suspended when the ICA or the EU Commission opens an investigation or a procedure on the same infringement of competition law covered by the claim for damages. Suspension will last until a year after such investigation or procedure is concluded.

8. Appeal

The judgments of the specialized commercial courts of Milan, Rome and Naples may be appealed before the competent Courts of Appeal, whose judgment are appealable, on matters of law only, before the Italian Supreme Court.

9. Class actions and collective representation

Under the Decree, not only individual private actions are admitted, but also class actions by two or more consumers and users that are in a contractual, as well as non-contractual, relationship to companies, producers, and that are affected by anti-competitive or commercial unfair practices. They can file the class action, also without legal representation, before the ordinary court.

10. Key issues

The Decree entered into force on 3 February 2017 and does not yet apply to most antitrust damages actions brought at present in Italy. Nevertheless, as mentioned above, some of the judgments included in the database show what can be fairly described as an anticipated application of the key provisions of the Directive, to the benefit of claimants as to circumstances not covered by the Decree since its entry into force. Evidence of infringement is crucial for claimants and the key provision concerning the binding effect of the ICA's final findings of infringement of competition law was not part of Italian pre-Decree law.

Methodology for the selection of cases

The database for Italy includes the most relevant Italian antitrust damages cases, both follow-on and stand-alone. It does not attempt to be exhaustive. The judgments have been selected based on their relevance. If a judgment has been appealed references to the final judgment and indications as to its output are included in the database whenever possible.

Country: Italy	
Case Name and Number: D.F. S.r.l. / I.C.E. S.p.A. and P.C.A. S.p.A., General Registry No. 56090	
Date of judgment: 30 May 2019	
Economic activity (NACE Code): C.20—Manufacture of chemicals and chemical products	
Court: Court of Milan, Commercial, First instance	**Was pass on raised (yes/no)?** No
Claimants: Claimant is a buyer of cholic acid which serves as main raw material in manufacturing ursodeoxycholic acid (UDCA) used in liver pathologies	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes—for evidentiary and substantive reasons.
Defendants: Defendant is a supplier of cholic acid	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. Claimant failed to meet the burden of proof requirement as to the elements listed above.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 21,550,692
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Assessment from the Court considering the nature of the offense suffered by the Laboratory, Unimed's way of acting contrary to good faith, and the negative consequences on the Laboratory's business developed.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr

Follow-on (EC or NCA?) or stand-alone?
Stand-alone. The Italian Competition Authority (ICA) had considered the case, approved some parties' commitments but the procedure was closed before the ICA could reach the decision as to whether an infringement of Article 102 TFEU occurred. The difficulties in the cholic acid supply market expressed by ICA were considered by the court in departing from claimant's focus only on respondent's alleged anti-competitive conduct.

Brief summary of facts

The dispute concerns a buyer of cholic acid and an alleged abuse of dominant position (Article102 TFEU) by the supplier, the defendant, resulting in the exclusion of a main competitor in the supply of cholic acid. Defendant is in dominant position in this market, especially in Europe. Cholic acid is the main raw material (produced mostly in South America, U.S.A., Australia) in manufacturing ursodeoxycholic acid (UDCA) used in liver pathologies. The Italian Antitrust Authority considered this matter, commitments were taken between the buyer and the supplier in 2015 and approved by the Authority which declared them binding upon the parties. Claimant sought damages for the period 2008-2015 alleging various forms of abuse of dominant position, spanning from agreeing with competitors to provide less cholic acid to the market, to excluding direct transactions over more years, increasing prices artificially, discriminating on prices by using lower prices only to the benefit of some companies. When commitments are concluded and approved the Authority may conclude the procedure, and reopen it in case the commitments are breached (Article14 ter, Law n.287, 10 October 1990). In this case the procedure came to an end before the Authority could decide whether an infringement of Article 102 TFEU occurred.

Brief summary of judgment

As several others, this ruling underlines the importance of evidence and the difficulty for several claimants to satisfy their burden of proof also under the Directive. Claimant made clear that its action is "stand-alone" but, at the same time, alleged that the evidence gathered by the Authority (identification of the relevant market and claimants' parts of market being around 70-75%) until the end of its procedure should be regarded as particularly relevant. The court carefully recalled the text and the spirit of Article 4 of the Directive which aims at: (i) preventing the exercise of the right to full compensation for harm to become "*practically impossible or excessively difficult*"; (ii) facilitating establishing evidence, impacting also on ordinary Italian evidence law as to the admitted means. Nevertheless, the court stressed that it expects claimant to satisfy the burden of proof by proving at least the claim's constitutive elements that are at claimant's disposal and, in addition, a context which is consistent with the evidence gathered by the Authority. The court thus concluded, after a careful analysis and in spite of the Directive's text and spirit, that claimant had failed to satisfy its burden of proof with regard to the existence of all the

following : (i) supply relationships between the parties (and at times with third suppliers); (ii) a price so excessive to lead to an abuse of dominant position (infringing Article102 TFEU); (iii) a refusal to contract by the supplier; (iv) a discriminatory conduct; (v) a margin squeeze; (vi) the disappearance of an effective competition in the subsequent market (ursodeoxycholic acid, UDCA). All claims were rejected.

Country: Italy	
Case Name and Number: Cave Marmi Vallestrona/Iveco, No. 9759	
Date of judgment: 4 October 2018	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: Court of Milan (first instance), Section specialized in corporate matters—A	**Was pass on raised (yes/no)?** No
Claimants: Claimant is active in the purchase, concession and operation of granite and marble quarries	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes—substantive reasons.
Defendants: Manufacturer of Trucks	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Damages were not awarded, as the judgment concerned the assessment of whether or not the action brought by the claimant was time-barred.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** The amount is not specified.
Key Legal issues: • Statute of limitation rules based on the legal framework that was applicable before the EU Damages Directive and the Italian Decree No. 3/2017	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Veronica Pinotti, Partner, White & Case, veronica.pinotti@whitecase.com; Patrizia Pedretti, Associate, White & Case, patrizia.pedretti@whitecase.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT. 39824—Trucks

Brief summary of facts

A construction company brought damages actions against a member of the trucks cartel in the wake of the European Commission's decision AT. 39824, which included finding of infringement of Article 101 (1) TFEU.

Brief summary of judgment

The Court of Milan had to determine whether or not the action brought by the claimant was time-barred, based on the legal framework that was applicable before the entering into force of the EU Damages Directive and the Decree 3/2017. At the outset, the Court of Milan took the view that statute of limitation rules have a substantive nature and, consequently, are not retroactive. The defendant objected the statute of limitation period of the rights brought by the claimant on the basis of the non-applicability of the rules set forth under the EU Damages Directive and the Decree 3/2017. The defendant also submitted that the statute of limitation period had started to run from the starting date of the five-year period from the opening of the investigation by the UK Office of Fair Trading (today Competition and Markets Authority) in September 2010 or, in the alternative, from the opening of the investigation by the European Commission in January 2011.

The Court of Milan dismissed the defendant's argument and pointed out that the documents filed by the defendant reporting the opening of these investigations against the truck manufacturers could not provide reliable and complete awareness of the damage to the claimant. In particular, the press releases filed by the defendant, who bears the burden of proof, did not provide the plaintiff with any reliable and full awareness of the unlawful conduct. The Court also ruled on the binding effects of Commission settlement decisions, maintaining that they have the same binding force as infringement decisions.

Country: Italy	
Case Name and Number: Brussels Airlines SA/NV, American Airlines Inc. and Aegean Airlines SA / SEA S.p.A., No. 3011	
Date of judgment: 15 March 2018	
Economic activity (NACE Code): H.52.23—Service activities incidental to air transportation	
Court: Court of Milan, Commercial Chamber (first instance)	**Was pass on raised (yes/no)?** No
Claimants: Brussels Airlines, American Airlines, Aegean Airlines	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** The EU Damages Directive was not applicable in this case, but was referred to with respect to the limitation period issue (Article 10).
Defendants: SEA, *i.e.* the company operating the two airports of the city of Milan (namely, Linate and Malpensa)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** American Airlines: EUR 16,607 Aegean Airlines: EUR 10,594 Brussels Airlines: EUR 23,484
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** American Airlines: EUR 16,607 Aegean Airlines: EUR 10,594 Brussels Airlines: EUR 23,484
Key Legal issues: • Abuse of dominant position • Status of "privileged evidence" of the NCA's finding of infringement (also for claimants that were not parties in the proceedings before the NCA) • Limitation period	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The difference between the actual amounts paid by each claimant to SEA and the amounts that would have resulted from the application of the fees set by ENAC.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Pietro Merlino, Partner, pmerlino@orrick.com; Marianna Meriani, mmeriani@orrick.com; Lucrezia Valieri, lvalieri@orrick.com—Orrick, Herrington & Sutcliffe, Rome
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case No. A377—SEA-Tariffe aeroportuali	

Brief summary of facts

In case No. A377—SEA-Tariffe aeroportuali, decided in November 2008, the Italian Competition Authority (ICA) fined SEA, the company operating the two airports of the city of Milan (namely, Linate and Malpensa), for an abuse of dominance consisting in the application of unfair and excessive fees for: (i) access to the aircraft refuelling facilities (the fee exceeded by 55% the value identified by ENAC, *i.e.* the Italian Civil Aviation Authority); (ii) access to the facilities necessary to provide aircraft catering services (fees were three times higher than the value set by ENAC); and (iii) the lease of airport office spaces to carriers for the provision of handling services (fees were almost two times higher than those applied by SEA to handlers). The claimants leased airport office spaces in Milano Malpensa and Linate to directly carry out certain handling activities, while relying on third parties for other handling services. In March 2014, the claimants—which had not participated in the proceedings before the ICA—brought a damages action against SEA to recover the extra-amounts paid as a result of the abusive conduct.

Brief summary of judgment

The Court granted the claim. More specifically, it held that any claimant that performed handling activities at the two Milan airports could benefit from the status of privileged evidence of the ICA's finding of abuse for the purpose of obtaining damages before a civil court. As to limitation period for bringing an action for damages, the Court acknowledged that the regime set forth by the EU Damages Directive—which provides that the limitation period shall not to run before the claimant can be reasonably expected to know of: (i) the anti-competitive behaviour; (ii) the fact that it caused harm to it; and (iii) the identity of the infringer (Article 10)—did not apply *ratione temporis*. The Court held that, in a case like the one at issue where the claimants had not participated in the administrative proceedings before the ICA, the five-year limitation period—provided for by general tort liability principles—shall start running from the publication of the ICA's decision ascertaining the abusive conduct.

Country: Italy	
Case Name and Number: Ministry of Health and Ministry of Economy and Finance / Pfizer Italia S.r.l., No. 15020	
Date of judgment: 24 July 2017	
Economic activity (NACE Code): C.21—Manufacture of basic pharmaceutical products and pharmaceutical preparations	
Court: Court of Rome, Commercial Chamber (first instance)	**Was pass on raised (yes/no)?** No
Claimants: Ministry of Health Ministry of Economy and Finance	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** The EU Damages Directive was not applicable *ratione temporis* but was referred to in connection with the effect on damages actions related to a finding of competition law infringement contained in a NCA's final decision.
Defendants: Pfizer Italia	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Damages were not awarded because the Court disagreed with the ICA's finding of abuse, as upheld by the Council of State ("CoS"), and held that claimants had in any event failed (i) to demonstrate the causal link between the alleged abusive conduct and the harm suffered by the National Healthcare System ("NHS") as they did not show that, in the absence of Pfizer's conduct, the generic companies would have entered the market at an earlier date than they actually did; and (ii) to properly quantify the damages suffered by the NHS as they entirely relied on the estimate of the amount of the lost savings provided by the ICA in its decision, simply assuming that all sales of Xalatan in the relevant period had been effectively reimbursed.

Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** EUR 14,063,650 (the amount of the loss of savings for the Italian NHS estimated by the ICA in its decision).
Key Legal issues: • Abuse of dominant position • Possibility of overcoming the status of "privileged evidence" of the NCA's finding of infringement	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The alleged loss of savings suffered by the NHS was calculated as the difference between the reimbursable prices of drugs based on prostaglandin before and after market launch of generic version of Pfizer's Xalatan multiplied by the number of packages of Xalatan sold in the period in time where Pfizer's conduct would have allegedly prevented generics' market entry.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Pietro Merlino, Partner, pmerlino@orrick.com; Marianna Meriani, mmeriani@orrick.com; Lucrezia Valieri, lvalieri@orrick.com—Orrick, Herrington & Sutcliffe, Rome
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case A431—Ratiopharm/Pfizer	

Brief summary of facts

In case A431—Ratiopharm/Pfizer, decided in January 2012, the ICA found that Pfizer had abused of its dominant position in the market for drugs based on prostaglandin analogues by putting in place a strategy aimed at artificially prolonging the patent protection for its reimbursable drug Xalatan in Italy through the misuse of patent release procedures and vexatious litigation. According to the ICA, Pfizer's conduct had the effect of delaying the entry onto the market of generic, cheaper versions of Xalatan, thereby harming Italy's National Healthcare System ("NHS") which, for the period during which generic drugs were kept out of the market because of Pfizer's allegedly abusive conduct, was forced to continue to reimburse the higher price of Xalatan. On appeal, the first instance court (*i.e.* the TAR Lazio) quashed the ICA's decision holding that the ICA had failed to show the existence of an additional element necessary to consider Pfizer's behaviours—which, taken

by themselves, were all lawful and aimed at protecting rights and legitimate interests—as exclusionary and thus abusive. On further appeal, Italy's supreme administrative court (*i.e.* Council of State, "CoS") overturned the TAR Lazio's judgment, thereby reinstating the ICA's decision. The CoS qualified Pfizer's conduct as an abuse of rights, *i.e.*, a situation where a right is used instrumentally to reach a goal inconsistent with that for which the law recognises it (in this case, the exclusion of competitors from the market). Following the CoS's judgment, the Ministry of Health and the Ministry of Economy and Finance brought a claim for damages against Pfizer for the loss of savings suffered by the NHS as a result of the abusive conduct.

Brief summary of judgment

The Court dismissed the claim for damages of the Ministry of Health and the Ministry of Economy and Finance holding that:

(a) ICA's decision was not binding. As Legislative Decree no. 3/2017 transposing the EU Damages Directive did not apply *ratione temporis*, the finding of abuse, set forth in the ICA's decision and upheld by the CoS, did not have a binding effect, but only constituted a "privileged evidence", which could be overcome;

(b) Pfizer's behaviour had subsequently been cleared under intellectual property ("IP") law. In its finding of abuse, the ICA had heavily relied on the fact that, at the prolonged IP protection in Italy—had been revoked, as, in the ICA's view, this showed that Pfizer had misused the patent system with a view to obtaining an additional protection to which it was not entitled. However, after the ICA's decision, on appeal brought by Pfizer, the EPO Board of Appeals had annulled the revocation of the divisional patent confirming its validity. This circumstance belied the allegation that Pfizer had used the patent system and its IP rights for a goal inconsistent with that for which the law recognizes them and thus the existence of an abuse of dominance in the form of an abuse of rights;

(c) Claimants in any event failed to demonstrate the causal link between the alleged exclusionary abuse and the alleged harm suffered by the NHS;

(d) Claimants also failed to properly quantify the damages suffered by the NHS.

Country: Italy	
Case Name and Number: Swiss International Airline S.p.A. / SEA Società esercizi aeroportuali S.p.A.,No. 7970	
Date of judgment: 27 June 2017	
Economic activity (NACE Code): H.52.23—Service activities incidental to air transportation	
Court: Court of Milan (first instance), Section specialized in corporate matters—A	**Was pass on raised (yes/no)?** Yes
Claimants: Claimant is an airline	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: The defendant is the exclusive licensee for Malpensa Airport	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Damages were not awarded, as it was ruled that they had already been covered by the surcharge paid by the passengers in said period (so-called passing on defence).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending before the Court of Appeal	**Amount of damages initially requested:** All expenses paid by the Claimant in the period March 2002—April 2009 to the defendant.
Key Legal issues: • Abuse of dominant position • Passing-on defence	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Veronica Pinotti, Partner, White & Case, veronica.pinotti@whitecase.com; Patrizia Pedretti, Associate , White & Case, patrizia.pedretti@whitecase.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case A377—SEA-Tariffe aeroportuali	

Brief summary of facts

A Swiss airline brought a claim for damages against the Malpensa Airport service provider for the overcharges it endured between March 2002 and April 2009, as airport services were charged as if it were an extra-European airline. On 26 November 2008, the ICA resolved that SEA Società esercizi aeroportuali S.p.A. ("SEA"), Malpensa Airport service provider, has abused its dominant position deriving from being the exclusive operator, until 2041, of the management of Malpensa and Linate airports, and imposed fines for an overall amount equal to EUR 1,549,000. In particular, the company has been fined for overcharging competitors for refuelling services, excessive charges for the provision of common and individual catering infrastructure and the provision of office spaces for cargo handlers.

Brief summary of judgment

The Court of Milan ruled in favour of Claimant, given the previous agreement between the Swiss Federation and the European Community dated 21 June 1999, which granted Swiss airlines the advantage of being considered part of the EU in relation to airport services charges. In particular, the Claimant stated that, on 21 June 1999, the Swiss Federation and the European Community entered into an agreement that entailed the full equality between the Swiss and EU carriers, effective from 1 June 2002. Nevertheless, SEA, the exclusive Malpensa Airport service provider, applied to the Claimant the airport charges defined by the Ministerial Decree of 14 November 2000 for non-EU traffic, instead of those for flights within the European Community.

However, the Court did not find the defendant liable for damages, given that these had been already covered in the cost of the ticket paid by Claimant's passengers during the aforementioned period (so-called passing on defence).

Country: Italy	
Case Name and Number: Teleunit S.p.A. / Telecom Italia S.p.A. No. 8008, General Registry 76561/2008	
Date of judgment: 21 June 2016	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Teleunit, which offers fixed telephony services to businesses and residential clients	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Telecom Italia	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1,531,894
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Court of Appeal of Milan confirmed this decision by rejecting an appeal in 2018	**Amount of damages initially requested:** EUR 3,418,614 and EUR 1,500,000
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (A/357—TELE2/TIM-VODAFONE-WIND)	

Brief summary of facts

Teleunit offers fixed telephony services to businesses and residential clients. Teleunit claimed against Telecom Italia S.p.A. damages for the harm the respondent allegedly caused

by an abuse of dominant position (Article 102 TFEU) in the mobile telephony market. The abuse consisted mainly in adopting significantly lower fees to its own mobile business department than to competitors for the same service (terminating a telecommunication call to the called party). The ICA concluded in 2007 (case A/357) against Tim/Telecom e Wind (decision then confirmed by Italian administrative courts).

Brief summary of judgment

The court of Milan did not exclude the possibility of an abuse of dominant position because of the absence of a clear interconnection contract between the parties. It actually confirmed the existence of an abuse of dominant position by Telecom Italia/TIM, whose network benefits from an exclusive attribution of radiofrequencies, in the relevant market, the wholesale service of terminating a telecommunication call to the called party. The court confirmed that the abuse consisted in offering the service to its own business division at a lower fee than to competitors, thus rejecting the respondent's argument that an abuse of dominant position derives from retail offers that competitors cannot offer (except if they lose money).

The court carefully analysed the issue of quantification of damages and concluded that the damages are due according to the calculation of the possible reduction of profit that claimant suffered because of the respondent's abuse of dominant position. Such reduction amounted to claimant's impossibility to sell its services at a lower cost, a cost in line with the lower fees (price) that Telecom charged to its own business division. The court awarded damages for EUR 1,531,894.

Country: Italy	
Case Name and Number: Alpina Società Immobiliare S.R.L., Arno S.R.L., Enrico Belloti / Banco di Brescia Sanpaolo Cab S.p.A., Banca Popolare Commmercio e Industria S.p.A., No. 7884	
Date of judgment: 21 April 2016	
Economic activity (NACE Code): K.64.30 Trusts, funds and similar financial entities	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Alpina Società Immobiliare, Arno, Enrico Belloti	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Banco di Brescia Sanpaolo, Banca Popolare Commmercio e Industria	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not publically available
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT 39914 Euro Interest Rate Derivaties	

Brief summary of facts

Arno SRL had entered, with BPCI, into a loan agreement with an interest rate anchored to the EURIBOR rate, and Alpina and Enrico Belloti had given a guarantee. The loan had

subsequently been sold to BBSP. Following the assessment of the EURIBOR Cartel made by the European Commission, the claimants had asked the Court to declare the invalidity of the loan agreement.

Brief summary of judgment

The claim was rejected because it was not supported by sufficient proof. The claimants have failed to demonstrate that the defendants had been part of the "EURIBOR" Cartel (case AT.39914). Moreover, at the time of the ruling, the full Euribor decision had yet to be published.

Country: Italy	
Case Name and Number: EUTELIA S.p.A. / Vodafone Omnitel N.V. S.p.A., No. 4255	
Date of judgment: 5 April 2016	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Claimant is active in the telecommunications market	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: The defendant is a telecommunications provider	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, since the claim was rejected for lack of abusive conduct.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The amount is not specified.
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Veronica Pinotti, Partner, White & Case, veronica.pinotti@whitecase.com; Patrizia Pedretti, Associate , White & Case, patrizia.pedretti@whitecase.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

A company offering telecommunications services brought damages action against a major telecommunications provider on the allegation that the latter was charging the

former excessively for the service provided, compared with the charges internal to the telecommunications provider.

Brief summary of judgment

The Court of Milan ruled against Claimant, given it did not provide enough evidence to prove that the defendant committed an abuse of dominance. The Court of Milan found that no abusive conduct could be established since the comparison of prices provided by the applicant was not with the charges imposed on other telecommunications companies, but with the internal charges within the defendant's company. Charges imposed on the applicant were in line with market charges. The Court found the claimant liable for the legal expenses in the amount of EUR 40,000, EUR 3,000 for expenses, as well as 15% VAT for general expenses, pursuant to the law.

Country: Italy	
Case Name and Number: Franco Bartolomei / Banco Popolare soc. coop., No. 7796	
Date of judgment: 21 January 2016	
Economic activity (NACE Code): K.64.30 Trusts, funds, and similar financial entities	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Franco Bartolomei	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Banco Popolare	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not publically available.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Claimant had given a guarantee on a loan. Claimant had asked the court to declare the invalidity of the guarantee because the contract contained three clauses that were deemed the object of an anti-competitive agreement by the ICA, in a non-binding opinion (ICA case I584—ABI: *condizioni generali di contratto per la fideiussione a garanzia delle operazioni*

bancarie). The clauses were deemed anti-competitive as they were applied by all the member of the Italian Banks Association (ABI).

Brief summary of judgment

The claim was rejected because claimant has failed to demonstrate that the clauses were anti-competitive. The burden of proof lied on the claimant, as the action was a stand-alone (because there was not a ruling of the ICA but just an opinion). Claimant had not produced enough evidence that showed that banks other than Banco Popolare had contracts with the same clauses (in order to demonstrate the existence of the anti-competitive agreement).

Country: Italy	
Case Name and Number: ARSLOGICA SISTEMI S.r.l./ IBM Italia S.p.A., No. 4620	
Date of judgment: 24 December 2015	
Economic activity (NACE Code): C.26.2—Manufacture of computers and peripheral equipment	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Claimant, Arslogica Sistemi, is active in the supply, service and maintenance of hardware systems	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: The defendant, IBM, provides information technology systems	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No—claimant did not offer the court serious grounds capable of demonstrating that IBM held and abused of a dominant position on the relevant market.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 47,480 as well as EUR 2,000 per every day the IP violation occurred, as well as EUR 25,000 for compensation, on top of legal and general expenses.
Key Legal issues: • Abuse of dominant position • Intellectual Property violation	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Veronica Pinotti, Partner, White & Case, veronica.pinotti@whitecase.com; Patrizia Pedretti, Associate, White & Case, patrizia.pedretti@whitecase.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

A hardware provider, Arslogica Sistemi, brought damages claims against its past business partner, IBM, with the allegation that the defendant was restricting the claimant's opportunities to participate in bids. The defendant also requested damages for IP violations by claimant, since the latter continued to use the label of "IBM Business Partner" on its website following the termination of the partnership.

Brief summary of judgment

The Court of Milan rejected the claimant's damages request due to the lack of evidence provided to establish a clear market abuse by the defendant. The judge accepted the allegation of IBM, objecting that claimant did not offer the court serious grounds capable of demonstrating that IBM held and abused a dominant position on the relevant market. The Court of Milan instead accepted defendant's counterclaim that claimant had committed IP violations by displaying the label of "IBM Business Partner" on its website following the termination of the partnership. The Court of Milan awarded damages to the defendant in the amount of EUR 47,480 as well as EUR 2,000 per every day the IP violation occurred, as well as 25,000 for compensation, on top of legal and general expenses.

Country: Italy	
Case Name and Number: S.F. / Alleanza Toro Assicurazioni S.p.A., No. 25323	
Date of judgment: 16 December 2015	
Economic activity (NACE Code): K.65.1—Insurance	
Court: Supreme Court of Cassation	**Was pass on raised (yes/no)?** No
Claimants: Felicia Santoro	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Alleanza Toro Assicurazioni	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** The Court of Appeal had awarded EUR 637 to claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not publically available.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) ICA case I377—RC Auto	

Brief summary of facts

Alleanza Toro, an insurance company, was fined by the ICA for having participated in a horizontal anti-competitive agreement that resulted in higher premiums to consumers. The

Court of Appeal had refused the request of damages demanded by claimant, stating that the ICA decision was insufficient evidence of the anti-competitive agreement.

Brief summary of judgment

The Supreme Court quashed the ruling and deferred it back to the Court of Appeal. It stated that the ICA's decision, which established the existence of an anti-competitive conduct, constitutes sufficient evidence of the damage suffered by the consumer. The defendant can still prove otherwise, producing evidence that demonstrates that the higher premiums were not the result of the anti-competitive agreement.

Country: Italy	
Case Name and Number: S.F. / Milano Assicurazioni S.p.A., No. 24114	
Date of judgment: 25 November 2015	
Economic activity (NACE Code): K.65.1—Insurance	
Court: Supreme Court of Cassation	**Was pass on raised (yes/no)?** No
Claimants: Felicia Santoro	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Milano Assicurazioni	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** The amount is not specified.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) ICA case I377—RC Auto	

Brief summary of facts

Milano Assicurazioni, an insurance company, was fined by the ICA for having participated in a horizontal anti-competitive agreement that resulted in higher premiums to consumers.The Court of Appeal refused the request of damages demanded by claimant, stating that the ICA decision was insufficient evidence of the anti-competitive agreement.

Brief summary of judgment

The Supreme Court quashed the ruling and deferred it back to the Court of Appeal. It stated that the ICA's decision, which established the existence of an anti-competitive conduct, constitutes sufficient evidence of the damage suffered by the consumer. The defendant can still prove otherwise, producing evidence that demonstrates that the higher premiums were not the result of the anti-competitive agreement.

Country: Italy	
Case Name and Number: S.D. /. Reale Mutua Assicurazioni S.p.A., No. 17996	
Date of judgment: 11 September 2015	
Economic activity (NACE Code): K.65.1—Insurance	
Court: Supreme Court of Cassation	**Was pass on raised (yes/no)?** No
Claimants: Daniele Spedaliere	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Reale Mutua Assicurazioni	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** The Court of Appeal of Naples had awarded EUR 648 to claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not publically available.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) ICA case I377—RC Auto	

Brief summary of facts

Reale Mutua, an insurance company, was fined by the ICA for having participated in a horizontal anti-competitive agreement that resulted in higher premiums to consumers. The

Court of Appeal refused the request of damages demanded by claimant, stating that the ICA decision was insufficient evidence of the anti-competitive agreement.

Brief summary of judgment

The Supreme Court quashed the ruling and deferred it back to the Court of Appeal. It stated that the ICA's decision, which established the existence of an anti-competitive conduct, constitutes sufficient evidence of the damage suffered by the consumer. The defendant can still prove otherwise, producing evidence that demonstrates that the higher premiums were not the result of the anti-competitive agreement.

Country: Italy

Case Name and Number: BT Italia S.p.A. / Vodafone Omnitel N.V., No. 9109

https://www.giurisprudenzadelleimprese.it/wordpress/wp-content/uploads/2016/03/20150728_RG-52997-20101.pdf

Date of judgment: 28 July 2015

Economic activity (NACE Code): J.61 — Telecommunications

Court: Court of Milan, Commercial Chamber (first instance)	**Was pass on raised (yes/no)?** Yes, but rejected because pass-on was found to be both undemonstrated and in any event irrelevant because of the specific feature of a margin squeeze abuse.
Claimants: BT Italia	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** EU Damages Directive was not applicable *ratione temporis* but was referred to in connection with the limitation period issue.
Defendants: Vodafone Omnitel	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 12,000,000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The judgment was appealed before the Court of Appeal of Milan, which annulled it with judgment No. 1541 of 26 March 2018 (see *infra* for further details).	**Amount of damages initially requested:** EUR 264,290,000 plus EUR 7,100,000 for lost opportunity
Key Legal issues: • Abuse of dominant position • Relationship between commitments decisions and damages actions • Probative value of NCA's statement of objections ("SO") • Limitation period	**Is the dispute likely to be settled privately?** No

Direct or indirect claims? Direct	**Method of calculation of damages:** The Court quantified damages on an equitable basis following the proposal made by the court-appointed expert in its report, which was in turn the result of a very complex exercise that cannot be fully described here.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Pietro Merlino, Partner, pmerlino@orrick.com; Marianna Meriani, mmeriani@orrick.com; Lucrezia Valieri, lvalieri@orrick.com—Orrick, Herrington & Sutcliffe, Rome
Follow-on (EC or NCA?) or stand-alone? *Quasi* Follow-on (NCA)	

Brief summary of facts

In case A357—Tele2/TIM-Vodafone-Wind, opened in February 2005, the ICA alleged that mobile phone operators Telecom Italia, Wind and Vodafone had each abused of their dominant position on the wholesale markets for termination services on their respective networks by engaging in a margin squeeze strategy vis-à-vis their non-vertically integrated downstream competitors. While with respect to Telecom Italia and Wind, the ICA found, in a final decision, that the two companies had committed an abuse of dominance and fined them accordingly, *vis-à-vis* Vodafone, the ICA—after the issuance of a SO—in May 2007, closed the investigation with the acceptance of the commitments submitted by the company and thus with no formal finding of infringement. In July 2010, BT brought a damages claim against Vodafone for the alleged harm suffered as a result of the margin squeeze alleged by the ICA in its SO.

Brief summary of judgment

The Court granted the claim. More specifically, it held that not only commitment decisions are not a bar for private antitrust damages actions, but alsothat they represent a convincing indication that an infringement of competition rules occurred since the ICA's assessment that the commitments are such as to eliminate the antitrust concerns identified in the investigation implies the likely existence of an anti-competitive conduct Also, albeit not representing "privileged evidence" for damages action (like it was the case of final infringement decisions before the transposition of the EU Damages Directive into the Italian legal order), a SO can be relied upon as a source of relevant evidence as to the existence of an infringement of competition rules.

With respect to the limitation period, the Court, after noting that the relevant provisions of the EU Damages Directive could not apply *ratione temporis*, rejected Vodafone's argument that the start date of the five-year limitation period should be the publication date of the

ICA's decision opening the investigation against the three companies, in which case BT's action could be time-barred. The Court held that the limitation period shall start running from the moment when claimant could be expected to have become aware of the harm and of its injustice and that, in the case at issue, this should be identified with the date on which the ICA sent the SO to Vodafone, if not the date of the adoption of the commitment decision *vis-à-vis* Vodafone or of the infringement decision addressed to the other two mobile operators.

As mentioned, the Milan Court of Appeal subsequently annulled the first instance court's judgment holding that, since claimant was active in the same relevant market of the defendant and could thus be expected to be aware of market dynamics (including possible abusive behaviours aimed at harming it), the start date of the limitation period should be the date of the decision opening of the investigation with the consequence that BT's action was effectively time-barred. It is worth noting that, in order to open an investigation, the ICA is required to adopt a formal decision in this respect, which is then published on its website and bulletin.

Country: Italy	
Case Name and Number: L.L. / Fondiaria Sai S.p.A., No. 13890	
Date of judgment: 6 July 2015	
Economic activity (NACE Code): K.65.1—Insurance	
Court: Supreme Court of Cassation	**Was pass on raised (yes/no)?** No
Claimants: Fondiaria Sai	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Luigi Lupo	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** The Supreme Court confirmed the amount of damages ordered by the Court of Appeal of EUR 295 in favour of Luigi Lupo.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Not publically avaialble.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The Court quantified damages on an equitable basis following the proposal made by the court-appointed expert in its report, which was in turn the result of a very complex exercise that cannot be fully described here.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on (NCA) ICA case I377—RC Auto

Brief summary of facts

Fondiaria Sai, an insurance company, was fined by the ICA for having participated in a horizontal anti-competitive agreement that resulted in higher premiums to consumers. It considers that the Court of Appeal erred in presuming that the higher insurance premiums were determined by the horizontal agreement, sanctioned by the ICA. Claimant submitted that the Court of Appeal should have proven that the higher insurance premiums paid by the consumer were the consequence of the confidential commercial information exchanged between competitors sanctioned by the ICA.

Brief summary of judgment

The Supreme Court rejected the appeal presented by Fondiaria Sai. According to the Supreme Court, is it possible to presume the damages suffered by the consumers if the anti-competitive agreement has been sanctioned by the ICA. So, Fondiaria Sai S.p.A. could have been acquitted only if it had provided enough evidence to demonstrate that the higher insurance premiums were not determined by the infringement of the antitrust law.

Country: Italy	
Case Name and Number: Comi S.r.l. et al. / Cargest S.r.l., No. 11564	
Date of judgment: 4 June 2015	
Economic activity (NACE Code): L.68.2—Renting and operating of own or leased real estate	
Court: Supreme Court of Cassation	**Was pass on raised (yes/no)?** No
Claimants: Comi et al.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** The EU Damages Directive had not yet been transposed in the Italian legal order, but was extensively referred to, primarily with respect to a number of its procedural provisions.
Defendants: Cargest	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** As the Court of Cassation only has jurisdiction on questions of law, claimants could not request the award of damages. In any event, in earlier proceedings, claimants had not requested damages, but rather the nullity—because of their abusive nature—of the unfair contractual clauses imposed by the defendant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Court of Cassation quashed the Court of Appeal's judgment and referred the case back to it, requiring the lower court to apply the principles set forth in its judgment.	**Amount of damages initially requested:** As the Court of Cassation only has jurisdiction on questions of law, in their appeal claimants could not request the award of damages.
Key Legal issues: • Abuse of dominant position • Burden of proof in stand-alone damages actions	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Pietro Merlino, Partner, pmerlino@orrick.com; Marianna Meriani, mmeriani@orrick.com; Lucrezia Valieri, lvalieri@orrick.com—Orrick, Herrington & Sutcliffe, Rome
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

In 2007, 52 wholesale fruit and vegetable traders operating at the Rome-Guidonia agri-food wholesale market (the "Market") filed a stand-alone action against Cargest, *i.e.* the company managing the Market and leasing the space to the traders. Claimants alleged that Cargest had abused of its dominant position by imposing unfair and discriminatory conditions in connection with the lease of space in the Market and the access to and the functioning of the latter. Claimants considered that the Market constituted a separate relevant market as the other closest agri-food wholesale market could not be regarded as substitutable for the purposes of supplying the city of Rome (due to transportation costs and barriers to access). The Rome Court of Appeal dismissed the action holding that claimants had not demonstrated the existence of a properly defined relevant market and thus, as consequence, Cargest's dominant position.

Brief summary of judgment

On appeal, the Court of Cassation quashed the Court of Appeal's judgment. The Supreme Court:

i. extensively referred to the EU Damages Directive (recitals 6 and 14 and Articles 4 and 5)—notwithstanding the fact that, at the time, it had not yet been transposed in the Italian legal order—to argue that in stand-alone antitrust damages actions, whichtypically involve a complex factual and economic analysis and where the necessary evidence is often held exclusively by the defendant and is not sufficiently known by claimant, civil courts cannot limit themselves to "mechanically" apply the general rule on burden of proof as this would make the exercise of the right to full compensation excessively difficult;

ii. held that, in such cases, civil courts shall make use, also *ex officio*—and trough a broad interpretation of the relevant procedural rules—of the existing investigative tools of which they dispose pursuant to these rules to obtain and evaluate the data and information necessary to assess the existence of the alleged anti-competitive conduct provided that claimant was able to present plausible indicia in that respect;

iii. held that Court of Appeal had not done so as it had not even considered the possibility of activating its investigative powers and had dismissed the claim merely on the basis of a mechanical application of the burden of proof principle.

Country: Italy	
Case Name and Number: Best Office S.p.A. / Intesa Sanpaolo S.p.A., No. 8720	
Date of judgment: 21 May 2015	
Economic activity (NACE Code): K.64.30—Trusts, funds and similar financial entities	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Best Office	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Intesa Sanpaolo	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** Not publically available.
Key Legal issues: • Burden of proof	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jacques Moscianese, Head of Institutional Affairs, Intesa Sanpaolo, jacques.moscianese@intesasanpaolo.com; Irene de Angelis, Head of Antitrust Affairs, Intesa Sanpaolo irene.deangelis@intesasanpaolo.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Best Office S.p.A. had taken out a loan from Intesa Sanpaolo. The interest was based on the EURIBOR rate plus a fixed rate. Claimant asked to declare the invalidity of the loan or, alternatively, of the interest rate, as EURIBOR was the object of a presumed anti-competitive agreement.

Brief summary of judgment

The claim was rejected because it was not supported by sufficient proof. Claimant has failed to demonstrate that the "EURIBOR" was the object of a cartel as he only had produced press documents regarding an enquire of the European Commission. Moreover, even if EURIBOR was the object of an anti-competitive agreement, claimant had not demonstrated that Intesa Sanpaolo was part of it.

Country: Italy	
Case Name and Number: Intermatica S.p.A. / Telecom Italia S.p.A. No. 6621, General Registry 8025/2009	
Date of judgment: 14 May 2014	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Intermatica	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Telecom Italia	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 792,562
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** N/A [the judgment does not mention this information].
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Actual loss (EUR 655,010) + loss of profit (EUR 137,552)
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) Case A/357—TELE2/TIM-VODAFONE-WIND	

Brief summary of facts

Intermatica S.p.A. filed a claim before the Court of Milan against Telecom Italia S.p.A. alleging the existence of a respondent's abuse of dominant position in the mobile telephony

network market (Article 102TFEU) and a respondent's unlawful termination of a multi-business contract with claimant that was scheduled to last until May 2007, thus raising unlawful competition and/or a tortious liability under Italian law. The ICA had already concluded that respondent did abuse its dominant position in 2007 in case A/357, as owner of both a fixed and a mobile networks and having applied lower fees and prices to its own departments than to its fixed-line competitors for the service of interconnecting to the mobile network.

Brief summary of judgment

The court relied on the evidence established before the ICA, which stands as valid evidence for other courts (even as "*prova privilegiata*" as to respondent's conduct, Court of Cassation n. 3640,13 February 2009). The court found claimant's arguments well founded, including the unlawfulness of termination, which excluded claimant from the wholesale market, confirmed the existence of the abuse of dominant position and quantified damages due in EUR 792,562 (plus EUR 38,000 for litigation costs).

Country: Italy	
Case Name and Number: Airline Logistic S.r.l., Globe Air Cargo S.r.l., Swissport Cargo Services Italia S.r.l., Worldair S.r.l., Sasco S.r.l. / SEA S.p.A., No. 3324	
Date of judgment: 14 April 2014	
Economic activity (NACE Code): H.52.23—Service activities incidental to air transportation	
Court: Court of Milan, Commercial Chamber (first instance)	**Was pass on raised (yes/no)?** No
Claimants: Airline Logistic, Globe Air Cargo, Swissport Cargo, Worldair, Sasco	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: SEA	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Airline Logistic: EUR 177,618 Globe Air Cargo: EUR 164,395 Swissport Cargo: EUR 111,940 Worldair: EUR 65,931 Sasco: EUR 464,387
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** Airline Logistic: EUR 199,846 Globe Air Cargo: EUR 189,846 Swissport Cargo: EUR 113,407 Worldair: EUR 65,931 Sasco: EUR 470,650
Key Legal issues: • Abuse of dominant position • Competence to review claim • Status of "privileged evidence" of the ICA's finding of dominance and abuse • Limitation period	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The difference between the actual amounts paid by each claimant to SEA and the amounts that would have resulted from the application of the fees set by ENAC, *i.e.* the Italian civil aviation authority.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Pietro Merlino, Partner, pmerlino@orrick.com; Marianna Meriani, mmeriani@orrick.com; Lucrezia Valieri, lvalieri@orrick.com—Orrick, Herrington & Sutcliffe, Rome
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case A377—SEA-Tariffe aeroportuali	

Brief summary of facts

See above under judgment No. 3011/2018 of the Court of Milan for a description of the ICA's abuse of dominance decision against SEA in case A377—SEA-Tariffe aeroportuali. Following the ICA's decision, in 2011, claimants, which leased from SEA office spaces at the Malpensa airport where they performed certain handling activities, brought a damages action to recover from SEA the extra-amounts paid as result of its abusive conduct. With the exception of Swissport Cargo, claimants were among the complainants that triggered the ICA's investigation and thus parties in the proceedings before the same ICA.

Brief summary of judgment

The Court granted the claim. More specifically, it:

i. rejected SEA's argument that the claim should have been brought before the Milan Court of Appeal rather than before the Milan Court of First Instance owing to the rule—then in place and set forth by Article 33 of the Italian Competition Act—that established the exclusive competence of the court of appeals to review antitrust damages actions based on alleged violations of national competition rules (as opposed to violations of EU competition rules for which ordinary procedural rules applied). The Court held that the claim had be rightly brought before it as SEA's conduct was capable of affecting intra-Community trade and thus warranted the application of Article 102 TFEU (rather than Article 3 of the Italian Competition Act), as showed by the fact that the ICA had applied the former to SEA's behaviour.

ii. confirmed that the ICA's final infringement decision should be regarded as "privileged evidence" with respect to the findings of dominance and abuse, but that claimant bore the burden of proving the existence of damages (and their quantification), as well as of a causal link between the anti-competitive conduct and the damages.

iii. held that, since claimants had shown to be aware of the excessiveness of the fees applied by SEA years before the adoption of the ICA's infringement decision of November 2008, namely since December 2004, the claim based on the competition law infringement was partially time-barred, namely for the damages suffered in the period prior to the five years from the date in which the damages action was lodged.

Country: Italy	
Case Name and Number: Brennercom S.p.A /Telecom Italia S.p.A., No. 16319, General Registry 22423/2010	
Date of judgment: 27 December 2013	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Brennercom, active in the mobile telephony market at the regional level in Italy	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Telecom Italia	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 433,000
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes, but it has not been possible to retrieve data on the outcome.	**Amount of damages initially requested:** EUR 2,296,908
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** An expert quantification was submitted that the court found reasonable. The court used its discretion and noted, inter alia, the rarely active market position of claimant.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case A357—TELE2/TIM-VODAFONE-WIND	

Brief summary of facts

In March 2010 Brennercom S.p.A. filed a damages claim against Telecom Italia S.p.A. for the damage the respondent allegedly caused by an abuse of dominant position (Article 102 TFEU) in the mobile telephony wholesale market between beginning 1999 and August 2007. The abuse consisted mainly in applying significantly lower fees to its own mobile business department than to its competitors for the same service (terminating a telecommunication call to the called party). Claimant alleged that such abuse generated discrimination and an unlawful reduction of margins of the competitors in the subsequent market (fixed and mobile telephony) in which only claimant could adopt certain fees without incurring losses. Discrimination by respondent occurred also by its use of technical modalities that excluded competitors.

Brief summary of judgment

Both the ICA (Case A357) and the supreme administrative court (State Council, n.2438/2011) concluded that, undoubtedly, not only Telecom Italia/TIM but also Vodafone and WIND have a dominant position as they are all exclusive owners of their networks serving to terminate a telecommunication call to the called party. ICA went further with regard to Telecom Italia/TIM whose network benefits from an exclusive attribution of radiofrequencies, and found that it committed an abuse of dominant position through its network in the relevant market (the wholesale termination of calls) and this abuse had its effects on the offer of fixed and mobile telephony services to business (1999-2007). It is at the regional level that Telecom Italia/TIM is a competitor to Brennercom and discriminated by applying lower fees to its own business division and higher fees to Brennercom for the same service.

The court appointed two professors as expert witnesses whose mandate (agreed upon by the parties) was to ascertain the existence of damage and of causation. As to the sensitive issue of causation the court applied the "*regolarità causale*" test, *i.e.* the requirement of causation is met as soon as the damage can be considered an ordinary effect, a normal and regular consequence, of the respondent's conduct. This consequence, specifically with regard to damages for infringement of antitrust law, is thus to be determined in terms of (higher) probability or of presumption (Court of cassation, n.2305, 2 Feb. 2007) rather than in the more rigid statistic terms that are generally used in causation. The court refused to draw the existence of damage and of causation from the mere existence of an infringement of antitrust law by respondent, even if the National Authority confirmed the infringement. The court concluded that TIM/Telecom Italia S.p.A. committed an abuse of dominant position (Article102 TFEU) which caused harm to Brennercom S.p.A. and allowed damages for EUR 433,000. This ruling shows, just like other cases presented in this database, the key role of: (i) evidence in damages claims for infringement of antitrust law and, in particular, (ii) expert witnesses; (iii) proper drafting of the expert's mandate, scope and modalities of inquiry.

Country: Italy	
Case Name and Number: Viaggiare s.r.l. / Ryanair Ltd.,No. 7825	
Date of judgment: 4 June 2013	
Economic activity (NACE Code): H.51.1—Passenger air transport	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: Viaggiare s.r.l., an online travel agency ("OTA")	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Ryanair Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** The court rejected for lack of evidence part of the damages sought by claimant and quantified in EUR 50,000 damages due by respondent (plus EUR 25,000 for litigation costs).
Is/was the case subject to appeal (yes/ pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 815,000
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The court noted the insuffient effort in quantifying damages in most of claimant's alleged damages. It granted damages as to the substantiated alleged damages and recalled Italian case law on characterization of damage.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Viaggiare s.r.l., an online travel agency ("OTA"), filed a claim against Ryanair Ltd in August 2010 before the court of Milan alleging conducts infringing EU and Italian competition law. In particular, claimant alleged the existence of a dominant position (Article102 TFEU) in three markets at the EU level : (i) air transportation; (ii) related travel agency services; (iii) offer of Ryanair flights.

Brief summary of judgment

The court found that Ryanair Ltd conducted:

i. unlawful competition by misinforming the public through false and disparaging information stating (i) an unlawful conduct by OTAs (including Viaggiare s.r.l.); (ii) the existence of court judgments issued to the benefit of Ryanair Ltd; (iii) OTAs selling to the public air tickets at two or three times the price of the airlines;

ii. abuse of dominant position affecting travel agencies by excluding any intermediation in the sale of Ryanair flight services.

The court rejected for lack of evidence part of the damages sought by claimant, and quantified in EUR 50,000 damages due by respondent (plus EUR 25,000 for litigation costs).

Country: Italy	
Case Name and Number: OKCom S.p.A / Telecom Italia S.p.A, No. 2159, General Registry 76568/2008	
Date of judgment: 13 February 2013	
Economic activity (NACE Code): J.61—Telecommunications	
Court: Court of Milan	**Was pass on raised (yes/no)?** No
Claimants: OKCom S.p.A. an operator in telecommunications for fixed lines	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Telecom Italia	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1,830,000 (plus interests).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: N/A	**Amount of damages initially requested:** Not publically available.
Key Legal issues: • Abuse of dominant position	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** The allocated amount is the court's evaluation of claimant's additional costs due to respondent's conduct for the period 2003-2005.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Guido Carducci, Attorney-at-Law, Carducci Arbitration, gcarducci@noos.fr
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA): Case A357—TELE2/TIM-VODAFONE-WIND	

Brief summary of facts

OKCom S.p.A. filed a claim before the court of Milan against Telecom Italia S.p.A. alleging the existence of a respondent's abuse of dominant position in the mobile telephony network market (Article 102 TFEU) including the fact that respondent applied lower fees and prices to its own departments than to its fixed-line competitors for the service of interconnecting to the mobile network. The ICA had already concluded that respondent committed an abuse of dominant position in 2007 in case A/357 and this finding was confirmed by Italian administrative courts.

Brief summary of judgment

The court of Milan relied on the evidence established before the ICA, which stands as valid evidence for other courts (even as "*prova privilegiata*" as to respondent's conduct, Supreme Court No. 3640, 13 February 2009) although the parties are free to bring other evidence. The court confirmed the abuse of dominant position and fixed damages in EUR 1,830,000.

JAPAN

INTERNATIONAL CHAMBER OF COMMERCE

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In Japan, private antitrust litigation is subject to the jurisdiction of the judicial court. These antitrust cases include both claims based on the Antimonopoly Law ("**AML**") that follow government enforcement actions and stand-alone claims based on Civil Code as general tort. The claims based on the AML are granted benefits that reduce the claimant's burden of proof. Although there have not been as many antitrust cases in Japan as there are in other jurisdictions where those cases are prevalent, the number has been growing gradually. While bid-rigging cases have been dominant, cases based on other types of infringement, including abuse of a dominant bargaining position, have been increasing in recent years. Injunctions could also be granted if a claimant's interests are infringed upon or likely to be infringed upon by the defendant's conduct, and the claimant is thereby suffering or likely to suffer extreme damage.

1. Jurisdiction

The primary authority in charge of enforcing the Antimonopoly Law ("**AML**") in Japan is the Japan Fair Trade Commission ("**JFTC**"). However, the JFTC is only competent for administrative enforcement. Meanwhile, private damage actions are subject to the jurisdiction of the judicial court.

A court having jurisdiction over an antitrust claim for compensation for damage depends on its legal ground: an AML Article 25 action ("**AML Article 25 action**"), which builds on a JFTC order, or a stand-alone action based on Civil Code Article 709 as general tort ("**Civil Code Article 709 action**") (see section 2(1)).

The AML provides that an AML Article 25 action is subject to the exclusive jurisdiction of the Tokyo District Court.[1] A Civil Code Article 709 action, however, is subject to basic jurisdictional rules provided by the Civil Litigation Code. The Civil Litigation Code stipulates that, in principle, actions are subject to the jurisdiction of the local district court which has jurisdiction over the location of a defendant's principal office/domicile.[2] At the same time,

1 Article 85-2 of the AML.

2 Article 4(4) of the Civil Litigation Code.

the action can also be brought to the local district court which has jurisdiction over the location of the AML violation.[3]

With regard to an antitrust injunction action (AML Article 24 action, see section 2(2)), in addition to a local court having jurisdiction based on the above jurisdictional rules provided under the Civil Litigation Code, the action can also be brought to a local district court in the location where a high court is located (*i.e.* Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu).[4]

If more than one court has jurisdiction over the claim at issue, the claimant may choose the court where the claims are to be heard, in principle.[5]

2. Relevant legislation and legal grounds

The AML and the Civil Code are the relevant legislation which provide legal grounds for private antitrust litigation and damage actions.

1) Legal grounds for compensation for damage

There are two types of legal grounds for compensation for damage caused by an AML violation: (i) claims building on a JFTC order (AML Article 25 action) and (ii) stand-alone claims (Civil Code Article 709 action).

Under Article 25 of the AML, parties (companies and business associations) that were found to be engaged in, or a party to, private monopolisation[6], unreasonable restriction of trade[7], or other unfair trade practices[8] are liable to indemnify those injured by such parties (AML Article 25 action). However, the claimant is allowed to allege this claim only after the Japan Fair Trade Commission orders that either a cease-and-desist order, a surcharge payment order (a fine payable to the State of Japan) or a tribunal judgment is finalized[9] (see Sections 5 and 10 for more details).

An AML violation can also be claimed as general tort, a violation of Article 709 of the Civil Code. It stipulates that persons who violate the rights or legally protected interests of another person must pay the damages resulting from their actions; this is recognised as including anti-competitive acts (Civil Code Article 709 action). This could be claimed even in the absence of preceding JFTC orders.

3 Article 5, Item 9 of the Civil Litigation Code.

4 Article 84-2(1) of the AML.

5 Although the parties to a contract can designate an exclusive jurisdiction, which includes foreign courts, by agreement, that agreement could be challenged by arguing that the agreement violates the regulation against the abuse of a superior bargaining position, if the agreement might impose excessive disadvantages on one party (Tokyo District Court, 15 February 2016 and Tokyo High Court, 25 October, 2017).

6 As defined in Article 2(5) and prohibited in Article 3, former part of the AML.

7 As defined in Article 2(6) and prohibited in Article 3, latter part of the AML.

8 As defined in Article 2(9) and prohibited in Article 19 of the AML.

9 Article 26(2) of the AML.

2) Legal grounds for injunction

Under Article 24 of the AML, a private claimant may, in addition to seeking damages, seek an injunction (provisional as well as permanent) against certain unfair trade practices[10] (such as price discrimination, restrictions on resale pricing, below-cost sales and anti-competitive divisions of territories) in order to restore the injured party to the position held prior to the commencement of the violation ("**AML Article 24 action**"). The defendant must be engaged in the relevant unfair trade practices at the time as an AML Article 24 action is commenced. On the other hand, an AML Article 24 action cannot be brought based on unreasonable restriction of trade, which includes cartels and bid-rigging, and private monopolisation, although some unfair trade practices overlap with unreasonable restriction of trade and private monopolisation.[11] In order for injunctions to be granted, a claimant is required to prove that its interests are being infringed upon or are likely to be infringed upon by the defendant's conduct and it is thereby suffering or likely to suffer extreme damage.

3) Legal grounds for recovery of unjust enrichment

A claimant can seek monetary redress for violations of the AML on the basis of the doctrine of unjust enrichment pursuant to Articles 703 and 704 of the Civil Code.

3. What types of anti-competitive conduct are damages actions available for?

Any person who suffered damage due to conduct that constitutes an unreasonable restraint of trade, a private monopolisation or an unfair trade practice in violation of the AML is entitled to bring an action seeking compensation for damage.

1) Unreasonable restraint of trade

An "unreasonable restraint of trade" refers to business activities where enterprises mutually restrict or conduct their business activities in a way which causes a substantial restraint of competition in a particular field of trade, *i.e.* relevant market.[12] Cartels and bid-rigging are typical examples, and agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels. The AML applies to international cartels that have anti-competitive impact on the Japanese market.

2) Private monopolisation

The AML also prohibits a "private monopolisation".[13] This refers to such business activities by which an enterprise excludes or controls the business activities of other enterprises, thereby causing a substantial restraint of competition in any particular field of trade.

3) Unfair trade practice

Even in cases where a substantial restraint of competition is not caused, certain types of

10 Article 19 of the AML (for conduct of trade associations, Article 8, Item 5 of the AML).

11 In cases where an Article 24 action is not available (e.g. unreasonable restriction of trade or private monopolisation, which cannot be deemed to be unfair trade practices), injunctions based on general tort may theoretically be possible, although such cases should he very limited.

12 As defined in Article 2(6) and prohibited in Article 3, latter part of the AML.

13 As defined in Article 2(5) and prohibited in Article 3, former part of the AML.

conduct that are designated by the AML as "unfair trade practice" still violate the AML if they impede fair competition.[14] These types of conduct include, among others: (i) price discrimination, (ii) collective boycotts, (iii) restrictions on resale pricing, (iv) below-cost sales, (v) anti-competitive divisions of territories, and (vi) abuse of a superior bargaining position.

4. What forms of relief may a private claimant seek?

Claimants may request to compensate damages under Article 25 of the AML or under general tort provisions of the Civil Code: (i) they may also seek an injunction under the AML; (ii) in addition to this, specific provisions may provide a framework for compensation to shareholders; (iii) while general principles of Japanese law allow claimants to request for the invalidity of anti-competitive agreements; (iv) compensation for unjust enrichment; (v) or interim measures, (vi) punitive or treble damages are not available in Japan.

1) Damage claims pursuant to Article 25 of the AML and Article 709 of the Civil Code

As mentioned above, any person who suffered damage due to conduct that constitutes a violation of the AML (see Section 3) is entitled to a claim for compensation for damages on the grounds of either (i) Article 25 of the AML, or (ii) general tort under Article 709 of the Civil Code.

With regard to a Civil Code 709 action, a claimant is required to prove: (i) the illegality of the defendant's conduct; (ii) intent or negligence of the defendant; (iii) the amount of damages; and (iv) the reasonable causation between the defendant's conduct and the damages.

In contrast, when claiming damages based on Article 25 of the AML, a claimant need not prove intent or negligence of the defendant ((ii) above).[15] The court may also request the JFTC to provide its opinion regarding the amount of damages[16] (see also Sections 5 and 10).

Even indirect purchasers have legal standing to file a lawsuit to claim damages arising from a cartel in violation of the AML.[17]

With regard to bid-rigging, citizens of a local government may request their local administration to file a claim against infringing companies.[18]

2) Injunctions pursuant to Article 24 of the AML

Under Article 24 of the AML, any person whose interests are infringed or are likely to be infringed by a violation of Article 8, Item 5 (*i.e.* activities by a business association that cause a member company to employ unfair trade practices) or Article 19 (*i.e.* unfair trade practices by a company) is entitled to demand suspension or prevention of such infringement from

14 As defined in Article 2(9) and prohibited in Article 19 of the AML.

15 Article 25(3) of the AML.

16 Article 84 of the AML.

17 The *Tsuruoka* Kerosene case, Supreme Court, 8 December 1989.

18 Article 242 of Local Autonomy Law. Since the amendment of the Local Autonomy Act in 2002, citizens have not been able to file a claim directly against infringing companies.

a company or a business association if such person suffers or is likely to suffer material damages by such conduct.

For claims for injunction based on Article 24 of the AML, a claimant must prove that: (i) the defendant's conduct falls under certain types of unfair trade practices in violation of Article 8, Item 5 or Article 19 of the AML; (ii) the claimant's interests have been infringed or are likely to be infringed; and (iii) the claimant suffered or is likely to suffer "material" damages by such conduct.

In the event that an action for the aforementioned injunction is filed pursuant to Article 24 of the AML, the court shall send a notice to the JFTC and may request the JFTC to provide its opinion on the application of the AML and other necessary matters.[19] In order to avoid an abuse of the right to injunction, the court may order the claimant to furnish an adequate security deposit at the request of the defendant.[20]

On 30 March 2011, the Tokyo District Court issued the first decision in which a private claimant prevailed in an Article 24 injunction case. The case involved a claimant seeking an injunction against a competitor that actively sought to obstruct the dry ice business of the claimant. In addition, Utsunomiya District Court issued a permanent injunction in 8 November 2011 against a local bus company to cease providing bus operation services for free on the grounds that it constituted predatory pricing.[21]

3) Derivative shareholder actions under the Corporation Act

Although this is not exactly private antitrust litigation, derivative shareholder actions under the Corporation Act may have an impact on companies violating the AML.[22] Under Articles 423 and 847 of the Corporation Act, if a company has been found liable under the AML, the Civil Code or other laws, its shareholders[23] may sue the directors of the corporation for their intentional or negligent acts, if the corporation does not implement its own lawsuit against its directors within 60 days of receipt of the shareholders' request. Thus, if the corporation is given a surcharge payment order by the JFTC, or is liable for damages under an AML Article 25 action or a Civil Code Article 709 action, the shareholders of the corporation may file a derivative shareholder action against the directors of the corporation.

Although the number of these actions has been limited, for instance, a shareholder of Sumitomo Electric Industries, which was imposed a JPY 8.8 billion (about US$ 80 million) surcharge payment by the JFTC for its engagement in an optical cable cartel, brought derivative shareholder actions to the Osaka district court. This case was settled in 2014 with payment of JPY 520 million (about US$ 4.7 million) from the directors to the company.

19 Article 79 of the AML.

20 Article 78 of the AML.

21 The Tokyo High Court reversed this judgment in 17 April 2012 based on a finding that the defendant had already ceased its predatory pricing and thus there was no need to order an injunction.

22 A notable example of such derivative shareholder actions is the *Nomura Securities* case, Supreme Court, 7 July 2000.

23 A shareholder must continuously hold a corporation's shares for a period of six months in order to file a derivative shareholder action.

4) Civil litigation alleging invalidity of contacts violating the AML

Although this is also not exactly private antitrust litigation, if contracts are deemed to be in violation of the AML, a party may allege invalidity of such contracts pursuant to Article 90 of the Civil Code, which is a general provision invalidating any legal conduct violating public policy and morality, in civil litigation.

Unlike EU law, Japanese law does not have a specific provision which stipulates that agreements that violate antitrust law are void. However, courts can reach the same conclusion on the basis of Article 90 of the Civil Code.

5) Actions for recovery of unjust enrichment

A private action to recover unjust enrichment may be available based on Articles 703 and 704 of the Civil Code, depending on the circumstances. A party may bring a claim for recovery of profits gained by the defendant through conduct in violation of the AML.

6) Interim remedies

A claimant may file with a district court a petition for preliminary injunction to suspend or prevent the conduct that violates or is likely to violate the AML pursuant to the Civil Code and the Civil Preservation Act.

5. Burden of proof/Passing-on defence

The burden of proof in private enforcement of antitrust rules depends on the remedy and the procedures described above.

1) Damage claims pursuant to Article 25 of the AML

In an AML Article 25 action, the claimant need not prove the defendant's intent or negligence as to the harmful acts. Furthermore, although the JFTC's finding does not legally bind the courts,[24] the relevant court will rely on the JFTC's findings from the order or JFTC tribunal judgment. The claimant would, however, need to prove the amount of its damages and the reasonable causation between the defendant's conduct and the damages. The court may, therefore, request the JFTC's opinion on the scope of damages, pursuant to Article 84 of the AML (see also Section 10).[25]

Under the AML, unlike US law, the defendant is free to allege that no damages should be granted to the claimant where the claimant has already passed on the amount of the damages to its own customers.[26] It would not be a factor when considering the issue of standing however; instead, it can be argued in the context of the scope of damages. This means that under the AML, an award for damages must compensate for the injury "actually" suffered by the claimant. Thus, if a direct purchaser passed on the amount of the injury to its own customers, it may have difficulty showing the existence of an injury or proving the

24 The Naigai-Nipro case, Tokyo High Court, 21 December 2012.

25 In practice, it is questionable whether opinions of the JFTC for AML Article 25 actions are actually effective, because such opinions are generally templates based on a 'before and after analysis'.

26 Tokyo High Court, 19 September 1977, Tokyo High Court, 17 July 1981 and Supreme Court 2 July 1987.

full amount of the damages, and thus the amount of damages they can recover would be correspondingly reduced (see also Section 10).

2) General tort claims under the Civil Code

A claimant in an Civil Code Article 709 action faces a higher burden of proof than a claimant in an AML Article 25 action claimant, especially when there is no preceding finalized JFTC order. It must prove (i) the illegality of the defendant's conduct, (ii) the intent or negligence of the defendant, (iii) the amount of the damages, and (iv) the reasonable causation between the defendant's conduct and the damages. In practice, however, the burden of proof with regard to the intent or negligence of the defendant is not deemed important because violations of the AML are normally associated with, at minimum, negligence of the violators.

3) Injunctions pursuant to Article 24 of the AML

The claimant needs to prove that the defendant was engaged in unfair trade practices resulting in or threatening to cause "extreme" damages, which is a higher standard than the ordinary level of damages for claimants to prove, as well as the reasonable causation between the unfair trade practice and the extreme damagers. However, the claimant does not need to prove the defendant was negligent or intended to engage in the conduct.

An interim injunction is also available. For the interim injunction to be granted, the claimant is required to prove that the interim injunction is necessary in order to avoid any substantial detriment or imminent danger.[27]

4) Derivative shareholder actions under the Corporation Act

The claimant shareholders need to prove the intent or negligence of the defendant directors, the amount of damages, and the reasonable causation between the defendant's conduct and the damages.

5) Civil litigations alleging invalidity of contracts violating the AML

In order for a contract to be invalidated, the claimant will need to prove the relevant facts underlying the violation of the AML, e.g. a price fixing contract constituting a cartel or a sales contract that was concluded due to abuse of a supplier's superior bargaining position.

6) Unjust enrichment

A claimant can seek monetary redress for violations of the AML on the basis of the doctrine of unjust enrichment pursuant to Articles 703 and 704 of the Civil Code. The claimant must prove that the defendant received benefit without any legal cause and thereby caused loss to the claimant.

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no US-style mandatory document production or extensive discovery system in Japan, except when a court order for submission under the Civil Litigation Code is issued.

27 Art. 23(2) of Civil Provisional Remedies Act.

The statutory scope of the court order has been expanded in recent years. Under the Civil Litigation Code, courts can issue an order to submit documents not only to the counterparty, but also to third parties if a claimant identifies the requested document by providing the court with the title and subject of the document that it wants disclosed. The scope of the court order to third parties has been expanded in a recent private antitrust litigation, where a court ordered the submission of documents retained by the JFTC, such as interview records prepared by the JFTC and reports produced by the defendant in response to requests for information by the JFTC.[28] Even leniency submissions to the JFTC could be subject to the court submission order, although it is expected that the JFTC will resist such an order to disclose.

Under the Civil Litigation Code, if the court so orders, the relevant party must comply and submit requested materials.[29] If the ordered party does not submit the relevant evidence, then the other party, as well as the court, is generally entitled to deem such other party's allegations related to the content of such materials as true.[30] There are several exceptions, such as (i) documents subject to confidential obligations of public servants or professionals, (ii) documents created exclusively for self-use, and (iii) documents relating to the right to remain silent under criminal procedure.[31]

The 2009 Amendments of the AML introduced a special rule for such a court order relating to an Article 24 action, similar to the rule in intellectual property litigation. The relevant party is entitled to request that the other party submit materials as ordered by the court, except for cases in which there is a justifiable reason to reject submission of the requested materials, pursuant to Article 80 of the AML. This rule expands the scope of documents to be disclosed since it targets all documents except for those with a justifiable reason not to be submitted. However, this special rule does not apply to materials held by a third party and applies only to an Article 24 action. Even if a document necessary to establish the violation contains trade secrets, the court may order disclosure of the document. However, in that case, the disclosing party may seek a protective order, pursuant to Article 81 of the AML. Such a protective order prohibits the party that obtains the discovery, as well as any attorneys or agents of that party, from using the information in the documents for any purpose other than the lawsuit. Violations of the order will result in criminal sanctions.

A claimant in an antitrust litigation can also obtain access to documents held by the JFTC that could be evidence in the litigation by petitioning the court to commission the JFTC to send the document voluntarily.[32] Unlike an order to submit documents, the JFTC is not obliged to respond to the request of the court. However, its notice stipulates that, among documents that are collected or produced in the course of its antitrust investigations, the JFTC will submit the documents that are relevant to the existence of illegal conduct, the amount of damages and the causation between the illegal conduct and the damages, if requested, while taking the secrets of enterprises and personal privacy into consideration.[33]

28 For example, Goyo Kensetsu case, Tokyo High Court, 16 February 2007 and Osaka District Court, 15 June 2012.

29 Article 223 of the Civil Litigation Code.

30 Article 224 of the Civil Litigation Code.

31 Article 220 of the Civil Litigation Code.

32 Article 226 of the Civil Litigation Code.

33 JFTC Notice, *独占禁止法違反行為に係る損害賠償請求訴訟に関する資料の提供等について [document submission concerning lawsuits for damages related to antitrust violation]*, 15 May 1991 (last amended on 31 March 2015) https://www.jftc.go.jp/dk/dk_qa_files/siryouteikyo.pdf (accessed on 29 November 2020).

Moreover, access to documents held by the JFTC can also be requested on the basis of the Administrative Information Disclosure Act.

7. Limitation Periods

An AML Article 25 action by a private claimant must be brought within three years from the date on which the relevant JFTC order becomes final.[34] As a recent example, in 2009, some of the franchisees of a convenience store filed a lawsuit based on Article 25 of the AML against the convenience store franchiser at the Tokyo High Court[35] for its abuse of its superior bargaining position, for which the JFTC issued a cease-and-desist order on 22 June 2009. In this case, damages caused by the defendant's conduct more than three years before the filing of the lawsuit, which could not have been indemnified under a Civil Code Article 709 action, were upheld to be indemnified.

On the other hand, a Civil Code Article 709 action must be brought either within three years from the date the possible victim or claimant becoming aware of the conduct that caused the damages or within 20 years from the execution of such conduct.

Under Article 167(1) of the Civil Code, derivative shareholder actions and the lawsuits pursuant to Articles 703 and 704 must be brought within ten years from the date of the harmful act.

With regard to civil litigation alleging the invalidity of contacts violating the AML, there is no legal limitation period.

8. Appeal

An AML Article 25 action may only be brought before the Tokyo District Court, whose judgment can then be appealed to the Tokyo High Court.[36]

Filing Civil Code Article 709 actions is more convenient for parties located outside Tokyo because they can be brought before their local district courts, while an AML Article 25 action can only be filed with the Tokyo District Court. The judgment of the local district court can be appealed to the local high court and finally to the Supreme Court.

An AML Article 24 action can initially be brought before a local district court, the Tokyo District Court or a local district court in the location where a high court is located.[37] A district court's decision may be appealed to a high court, and a high court decision may be appealed to the Supreme Court.

Derivative shareholder actions are filed with the local district courts.

34 Article 26(2) of the AML.

35 The Tokyo High Court had exclusive jurisdiction of AML Article 25 Actions before the amendment of the AML in 2013.

36 Article 85-2 of the AML.

37 Article 84-2 of the AML.

Civil litigation alleging the invalidity of contacts violating the AML is filed with the local district courts.

9. Class actions and collective representation

Class actions are not available in Japan.

Certified consumer groups may, however, seek injunctions for certain types of lawsuits, for example, cases under the Consumer Contract Law. In relation to antitrust lawsuits, a consumer group established in the Hyogo prefecture has filed a lawsuit seeking an injunction for the abuse of a superior bargaining position.[38] In addition, certified consumer groups are also entitled to seek injunctions under Article 10 of the Act Against Unjustifiable Premiums and Misleading Representations. However, those certified consumer groups cannot seek damages.

On the other hand, the new two-step system for consumer group litigation in relation to suits for damages arising out of consumer contracts was introduced in 2016. In that consumer group litigation system, the consumer groups certified by the government are allowed to be the claimants in litigations for damages caused by violations of the AML, but that claim should be based on the Civil Code.

In the course of the discussions regarding the recent amendments to the AML, there was debate as to whether collective actions should be introduced in private antitrust litigation (*i.e.* AML Article 25 or 24 actions) in order to accelerate the use of private antitrust litigation and protect consumers' interests. However, such amendments were not adopted because it was thought that it would be difficult for public consumers to prove violations of the AML, as they are often conducted in a secretive manner.

The Civil Litigation Code allows for the "appointed party" system,[39] in which each claimant or defendant can appoint another claimant or defendant as its representative.[40] This is different from a class action as the appointed party does not represent a "class". Also, Article 38 of the Civil Litigation Code sets out a mechanism for joint actions, although that is not really a mechanism to pool a large number of claims, rather it is a regular action with a large number of claimants.

Furthermore, derivative shareholder actions in Japan are also different from class actions because damages are recoverable only by the company, not by the claimants.

38 ひょうご消費者ネット[Hyogo Syo-hisya net], *提訴に関する情報提供 [Information on the law suit]* (1 September 2016) http://hyogo-c-net.com/pdf/160901_montbell_press.pdf (accessed on 29 November 2020).

39 Article 30 of the Civil Litigation Code.

40 The appointed party system was actually used in Tsuruoka Kerosene case, Supreme Court, 8 December 1989.

10. Key issues

Selection of an AML Article 25 action or a Civil Code Article 709 action

As mentioned above, compared to a Civil Code Article 709 action, an AML Article 25 action provides a claimant with the following benefits:

- Actions are subject to exclusive jurisdiction of the Tokyo District Court, which is expected to have higher expertise in dealing with antitrust litigation.
- The claimant need not prove the defendant's intent or negligence as to the harmful acts. However, this benefit is not substantial given that the burden of proof with regard to the intent or negligence of the defendant would not be large because violations of the AML are normally associated with, at minimum, negligence of the violators.
- Although the JFTC's finding does not legally bind the courts, the relevant court will rely on the JFTC's findings from the finalised order or JFTC tribunal judgment in practice.
- The court may request the JFTC's opinion on the scope of damages.
- A claimant can file the case within three years from the date on which the relevant JFTC order becomes final. A claimant can therefore claim indemnification for damages that cannot be claimed on the grounds of a Civil Code 709 action, which require a claimant to file the case within three years from the date the claimant becomes aware of the illegal conduct.

Those benefits make it reasonable for claimants to choose an AML Article 25 action rather than a Civil Code Article 709 action as the method to sue infringers in many cases where there are finalized JFTC orders. However, a claimant would bring an antitrust case on the grounds of Civil Code Article 709 in cases where, for instance, there is no preceding JFTC order or a claimant wants to sue for a defendant's conduct that is not included in the subject of a preceding JFTC order or to sue an infringer that is not included in the addressees of the order.

Alleviation of burden of proof on amount of damages

A claimant often faces difficulty in proving the actual amount of damages caused by a defendant's conduct which violates the AML. To address this challenge, the Code of Civil Procedure stipulates that, if it is extremely difficult to prove the amount of damages that have been incurred, the court may reach a finding on the amount of damages that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence.[41] This provision provides the court with broad discretion in deciding the amount of damages, alleviating the claimant's burden of proof. The amount of damages in many antitrust cases has been determined on the grounds of this provision.

41 Article 248 of Civil Code Procedure.

Documents containing attorney-client confidential communications

In December 2020, the JFTC introduced a new practice in antitrust investigations, which states that investigators will not access documents containing confidential communications between the suspect enterprise and its independent attorneys regarding legal advice in relation to the conduct concerned. Although such documents are temporarily kept by the JFTC in order for the determination officer to decide whether they fall under the scope above, the JFTC may not submit them to the court even when it is requested by a court, given that those documents cannot be used for antitrust investigations to prove the existence of an illegal conduct (see also Section 6).

Methodology for the selection of cases

In Japan, the number of cases recognised as antitrust lawsuits is limited. Therefore, the cases collected relate to the Antimonopoly Act where the judgments had been disclosed. Lawsuits claims for damages under the State Redress Act against the JFTC and lawsuits claims for injunctions only were excluded. The following selection hopes to include as broadly as possible claims for damages under the Civil Code and the Article 25 of the Antimonopoly Act.

Country: Japan

Case Name and Number: Claim for Damage in 2015 (Wa) No. 2407

Date of judgment: 14 March 2019

Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores

Court: Sapporo District Court	**Was pass on raised (yes/no)?** No
Claimants: X Corporation Its Representative Director, Taro Kono (tentative name as sometimes disclosed by the court instead of the individuals' real names)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Y1 Corporation Its Representative Director Haruo Otsuyama (tentative name) Y2 Corporation Its Representative Director Natsuhiko Heikawa (tentative name) Y3 Corporation, a Successor of Y1 Corporation Its Representative Director Haruo Otsuyama (tentative name)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Sapporo District Court concluded that the charge was neither tort nor unjust enrichment.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Unknown	**Amount of damages initially requested:** JPY 1,120,714,885 (US$ 9,335,400) and interest
Key Legal issues: • Prohibition on the return of goods under the Subcontracting Act • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (JFTC) (the JFTC just gave an instruction and did not issue any decision.)	

Brief summary of facts

On 16 March 2016, the JFTC found that the defendant, a convenience store, had violated the prohibition on the return of goods under the Subcontracting Act for the return of goods. The store had returned the products without any reason that can be attributed to the claimant (who was a rice wholesaler) regarding rice supply transactions from the claimant to the defendant. The JFTC instructed the defendant (i) to pay the costs for the return, (ii) to take improvement measures, and (ii) not to engage in similar conduct in the future. However, the JFTC did not give instructions regarding the charge of sales promotion cooperation money (the money the store demands suppliers to use for their own sales promotion) and transportation expenses.

Prior to this action, the claimant filed a separate lawsuit against the defendants, claiming compensation for damages for the return of rice. On 26 April 2018, the claimant's claim was partially upheld.

Subsequently, the claimant filed this lawsuit against the defendants, claiming compensation for damages for the charge of sales promotion cooperative money and transportation expenses.

On 4 March 2019, the Sapporo District Court dismissed the claimant's claim on the ground that payment of sales promotion cooperation money and transportation expenses is not unfair, and the claimant voluntarily agreed to pay for these.

Brief summary of judgment

The Sapporo District Court found that the agreement to pay sales promotional cooperation money was not contrary to public policy and was valid under private law. The court also found that the transportation expenses were paid as consideration for transportation service that the defendant company was engaged by the claimant to provide, and it concluded that the charge was not tort or unjust enrichment.

Country: Japan	
Case Name and Number: Claim for Damage in 2017(O) No. 1085 / 2017(Ju) No. 1357 / 2017(O) No. 1086	
Date of judgment: 27 October 2017	
Economic activity (NACE Code): G46.4—Wholesale of household goods	
Court: The 2nd Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant and Complainant: Nice Corporation Its Representative Director A Appellant and Complainant: X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Defendant and opponent Hayakawa Sumiken Corporation. Its Representative Director B	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo High Court partially upheld the claimant's claim, and ordered the defendants to jointly and severally pay JPY 121,788,861 (US$ 1,095,322) and interest to the claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 375,467,643 (US$ 3,376,811) and interest
Key Legal issues: • Unfair trade practices by abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** The court held that the damage caused to the claimant was the amount paid by the claimant for the sale to the defendant Y1. The court, however, applied comparative negligence and reduced the amount by 40% because the claimant could have declined the transaction.

	In addition, the court applied profit-loss offset and deducted the amount received by the claimant through the transaction.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant purchased home appliances from the defendant Y1 and sold them to the defendant A. In the transaction, (i) the defendant Y2 (a sales office manager of the defendant Y1) concealed the defendant A's credit standing, made a false explanation on the transaction volume, made the claimant erroneously believe the defendant A's credit standing, and started the transaction while knowing that the claimant was in a difficult position to refuse, and (ii) the defendant Y2 caused accounts receivables by ordering a huge amount of money and forcing the claimant to continue the transaction.

The defendant A went bankrupt and the claimant could not collect the accounts receivables.

The claimant filed a lawsuit against the defendants, claiming compensation for damages alleging that the above conducts constitute tort.

On 29 March 2017, the Tokyo High Court partially upheld the claimant's claim and ordered defendants to jointly and severally pay JPY 112,788,861 (US$ 1,014,379) and interest to the claimant.

The defendant Y2 filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition on 27 October 2017.

Brief summary of judgment

The Tokyo High Court held that defendants were liable for tort, on the grounds that the defendant Y2's abuse of its dominant bargaining position, misrepresenting false explanations and misleading were illegal acts. Further, causing accounts receivables to be accrued by ordering a huge amount of money and forcing the claimant to continue the transaction were a violation of the obligation to restrain transactions under the doctrine of good faith and fair dealing.

The Supreme Court dismissed the final appeal of Y2 and rejected the petition.

Country: Japan

Case Name and Number: Seven-Eleven Limitation of Close-out sales Case
Claim for Damage in 2015 (O) No.316, In 2015 (O) No. 254

Date of judgment: 3 December 2015

Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores

Court: The 1st Petty Bench of the Supreme Court

Was pass on raised (yes/no)? No

Claimants: Nobeoka City, Miyazaki Prefecture (omitted below)
Claimant in Case 1: X1
Kokura Kita-ku, Kitakyushu City (omitted below)
Claimant in Case 1: X2
Hachiman Nishi-ku, Kitakyushu City (omitted below)
Claimant in Case 1: X3
Ujo City, Kumamoto Prefecture (omitted below)
Claimant in Case 1: X4
Claimant in Case 2: X5
Kokura Kita-ku, Kitakyushu City (omitted below)
Claimant in Case 2: X6
Kokura Kita-ku, Kitakyushu City (omitted below)
Claimant in Case 2: Shinozaki Joint Stock Company
Its Representative Officer X6

(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?
N/A

Defendants: Seven-Eleven Japan Co., Ltd.
Its Representative Director D

Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy? Yes. The Fukuoka High Court partially upheld the claimant X3's claim and ordered the defendant to pay JPY 1,100,000 (US$ 9,162) to the claimant X3 but dismissed the claimants' other claims.

Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** X1: JPY 24,697,336 (US$ 205,725) and interest X2: JPY 20,000,000 (US$ 166,597) and interest X3: JPY 10,000,000 (US$ 83,298) and interest X4: JPY 15,000,000 (US$ 124,947) and interest
Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure (which provides that if it is extremely difficult, from the nature of the damage to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage), the court held that JPY 1,000,000 (US$ 8,329) was appropriate as the amount of damage, considering the period during which the damage occurred, the net sales, the profit, disposition loss, the amount of disposition loss afterward, and all other circumstances in this case. In addition, the court held that JPY 100,000 (US$ 832) was appropriate as attorney's fee.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC cease-and-desist order (2009 (So) No.8) dated 22 June 2009	

Brief summary of facts

On 22 June 2009, the JFTC issued a cease-and-desist order against the defendant, Seven Eleven Japan, on the grounds that Seven Eleven Japan stopped franchisee owners from close-out sales and committed disadvantageous treatment, such as cancellation of contract if the franchisee owners did not comply, and such other acts to have franchisee owners lose their opportunities to reduce their damage equivalent to the costs pertaining to daily goods disposal based on their reasonable management decisions constituted an abuse of a dominant bargaining position.

The claimants, *i.e.* franchisee owners, filed a lawsuit against the defendant, claiming compensation for damages for tort or failure to perform an obligation.

On 7 November 2014, the Fukuoka High Court partially upheld the claimant X3's claim and ordered the defendant to pay JPY 1,100,000 (US$ 10,491) to the claimant X3 but dismissed the claimants' other claims.

A final appeal and a petition for acceptance of a final appeal were filed, but the Supreme Court dismissed the final appeal and rejected the petition on 3 December 2015.

Brief summary of judgment

The Tokyo High Court found that the defendant's operation field counselor stated that franchisee owners' discount sales was not allowed under the franchise contract when visiting claimant X3. However, franchisee owners have in fact price decision rights under the franchise contract, and the statement by the defendant's operation field counselor violated franchisees' pricing rights and constituted tort.

Country: Japan	
Case Name and Number: Shin Tetsu Taxi Case Claim for Injunction against Business Obstruction in 2014 (Ne) No. 471	
Date of judgment: 31 October 2014	
Economic activity (NACE Code): H49.3.2—Taxi operation	
Court: Osaka High Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant and Appellee: X1 Appellant: X2 Appellant and Appellee: X3	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee and Appellant: Shintetsu Taxi Co., Ltd. Its Representative Director D	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Osaka High Court partially upheld the claims of the claimant X1 and the claimant X3 and ordered an injunction against obstruction against the defendant as well as payment of JPY 330 (US$ 3.14) and interest to the claimant X1 and JPY 320 (US$ 3.05) and interest to the claimant X3.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Claimant X1: JPY 55,660 (US$ 530.85) and interest Claimant X3: JPY 55,640 (US$ 530.66) and interest
Key Legal issues: • Interference with transactions	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** The court calculated that the claimant X1's damage was JPY 330 (US$ 3.14) and the claimant X3's damage was JPY 320 (US$ 3.05). On the grounds that the claimant X1 and the claimant X3 lost at least one chance of getting passengers because of the defendant's obstruction, it was appropriate to calculate damages due to the loss of chance on the basis of marginal

	profit, and it was assumed that the profits would not be below 50% of the sales even if the above profits were estimated conservatively.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The defendant, a taxi operator and a wholly owned subsidiary of the railway company, obstructed private taxis' access to the taxi waiting area located in front of the railway station, alleging that the area was an "exclusive taxi stop" for the defendant.

The claimants, *i.e.* taxi drivers, filed a lawsuit claiming an injunction against obstruction under Article 24 of the Antimonopoly Act and compensation for damages for tort.

On 31 October 2014, the Osaka High Court partially upheld the claims of claimant X1 and X3 and ordered an injunction against obstruction against the defendant, and payment of JPY 330 (US$ 3.14) and interest to the claimant X1 and JPY 320 (US$ 3.05) and interest to the claimant X3.

The defendant filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition on 28 September 2015.

Brief summary of judgment

The Osaka High Court upheld the claimants' claim for the injunction, on the grounds that the obstruction carried out and would be expected to be carried out in the future by the defendant was an unjust interference with transactions because it obstructed passenger car transportation contracts with users by using their physical ability. Further, the damages caused by the infringement and threatened infringement of the claimants' interests by the defendant's violation were remarkable. In addition, The Osaka High Court upheld claims for compensation for damages on the grounds that the claimant X1 and the claimant X3 lost at least one chance of getting passengers because of the defendant's obstruction.

The Supreme Court dismissed the final appeal and rejected the petition.

Country: Japan	
Case Name and Number: Claim for Damage in 2012 (Wa) No. 4988	
Date of judgment: 18 July 2014	
Economic activity (NACE Code): E36—Water collection, treatment and supply	
Court: Nagoya District Court	**Was pass on raised (yes/no)?** No
Claimants: Company A (X1) Its Representative Director Ichiro Kono (tentative name as sometimes disclosed by the court instead of the individuals' real names) Company B (X2) Its Representative Director Jiro Otsuda (tentative name)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Nagoya City (Y1) Its Representative, Nagoya City Waterworks, Industrial Waterworks, and Sewerage operation manager, and Water and Sewerage director Z Company C (Y2) (tentative name) Its Representative Director Saburo Heikawa (tentative name)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Nagoya District Court held that the conclusion of the contract was not illegal, on the grounds that there was no deviation from or abuse of discretionary power, and it could not say that the discretionary contract was private monopolization or unreasonable restraint of trade.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Claimant X1: JPY 608,370 (US$ 7,718) and interest Claimant X2: JPY 105,000 (US$ 1,332) and interest
Key Legal issues: • Private monopolization • Unreasonable restraint of trade	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Regarding the public procurement for water supply system construction under the public road of the defendant Y1 (Nagoya City), the claimants X1 and X2 applied for the construction to the defendant Y1, but the defendant Y1 decided to conclude the discretionary contract with the defendant Y2 and had Y2 carry out the construction.

The claimants X1 and X2 filed a lawsuit, claiming compensation for damages and alleging that X1 and X2 were forced to spend more money compared to if Y1 had X1 carried out the construction with X2, whose construction fee is cheaper than that of Y2.

On 18 July 2014, the Nagoya District Court dismissed the claimants' claims.

Brief summary of judgment

The Nagoya District Court held that the conclusion of the contract was not illegal, on the grounds that from the viewpoint of construction execution capability and safety assurance, the conclusion of the discretionary contract with Y2, who had been engaged in the construction of water supply systems of public roads for many years, did not deviate from nor abuse discretionary power. Further it could not say that the discretionary contract was private monopolization or unreasonable restraint of trade contrary to public interest.

Country: Japan	
Case Name and Number: In 2014 (O) No. 1345 / In 1994 (Ju) No. 1736	
Date of judgment: 18 December 2014	
Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores	
Court: The 1st Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Seven-Eleven Japan Co., Ltd. Its Representative Director Z	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court held that it could not say that there were violations against the claimant in this case.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 8,751,679 (US$ 87,648) and interest
Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC cease-and-desist order (2009 (So) No.8) dated 22 June 2009	

Brief summary of facts

On 22 June 2009, the JFTC issued a cease-and-desist order against the defendant, *i.e.* Seven-Eleven Japan, on the grounds that Seven Eleven Japan stopped franchisee owners from close-out sales and committed disadvantageous treatment, such as cancellation of contract if the franchisee owners did not comply, and such other acts to have franchisee owners lose their opportunities to reduce their damage equivalent to the costs pertaining to daily goods disposal based on their reasonable management decisions constituted abuse of a dominant bargaining position. The claimant, *i.e.* a franchisee owner, filed a lawsuit against the defendant, claiming compensation for damages under Article 25 of the Antimonopoly Act.

On 30 May 2014, the Tokyo High Court dismissed the claimant's claim.

A final appeal and a petition for acceptance of a final appeal were filed, but the Supreme Court dismissed the final appeal and rejected the petition.

Brief summary of judgment

The Tokyo High Court held that claims for compensation for damages under Article 25 of the Antimonopoly Act were allowed only for acts that are in violation of a cease-and-desist order. Acts which had been found as violations in the cease-and-desist order of JFTC were limited to defendant's acts that forced the franchisee owners to discontinue the close-out sale beyond the scope of advice or instructions. However, it was not established that such acts occurred in the case of the claimant.

The Supreme Court dismissed the final appeal and rejected the petition.

Country: Japan

Case Name and Number: In 2013 (O) No. 2158 / In 2013 (Ju) No. 2661
In 2013 (O) No. 2159 / In 2013 (Ju) No. 2662

Date of judgment: 14 October 2014

Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores

Court: The 3rd Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Toyonaka City, Osaka Prefecture (omitted below) Appellant and Complainant: X1 Hakodate City (omitted below) Appellant and Complainant: X2 Hirakata City, Osaka Prefecture (omitted below) Appellant and Complainant: X3 Takarazuka City, Hyogo Prefecture (omitted below) Appellant and Complainant: X4	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Chiyoda-ku, Tokyo (omitted below) Defendant and Opponent: Seven-Eleven Japan Co., Ltd. Its Representative Director A	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo High Court partially upheld the claimants' claims and ordered the defendant to pay JPY 2,800,000 (US$ 28,970) and interest to the claimant X1; JPY 1,000,000 (US$ 10,346) and interest to the claimant X2; JPY 6,000,000 (US$ 62,079) and interest to the claimant X3; and JPY 1,600,000 (US$ 16,554) and interest to the claimant X4.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Claimant X1: JPY 3,6895,903 (US$ 381,747) and interest Claimant X2: JPY 35,902,974 (US$ 371,474) and interest Claimant X3: JPY 53,421,456 (US$ 552,731) and interest Claimant X4: JPY 13,573,251 (US$ 140,437) and interest

Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held the claimants' claim, based on all circumstances in this case, by referring to various factors that may affect the amount of profits gained through the sale of goods in its store for each claimant, *i.e.* the length of the period when close-out sale was obstructed (hereinafter referred to as the "Obstructing Period "), reference number tables for calculation of loss that listed total amount and annual averaged amount of sales, purchase of goods, disposal of goods (defective goods), etc., gross sales profits, the Seven-Eleven charge, and the profits in the Obstructing Period and after commencement of close-out sale, considering fluctuation of each amount.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC cease-and-desist order (2009 (So) No.8) dated 22 June 2009	

Brief summary of facts

On 22 June 2009, the JFTC issued a cease-and-desist order against the defendant, *i.e.* Seven-Eleven Japan, on the grounds that its acts to have franchisee owners lose their opportunities to reduce their damage equivalent to the costs pertaining to daily goods disposal based on their reasonable management decisions constituted abuse of a dominant bargaining position.

The claimants, *i.e.* franchisee owners, filed a lawsuit against the defendant, claiming compensation for damages under Article 25 of the Antimonopoly Act.

On 30 August 2013, the Tokyo High Court partially upheld the claimants' claims and ordered the defendant to pay JPY 2,800,000 (US$ 28,970) and interest to the claimant X1; JPY 1,000,000 (US$ 10,346) and interest to the claimant X2; JPY 6,000,000 (US$ 62,079) and interest to the claimant X3; and JPY 1,600,000 (US$ 16,554) and interest to the claimant X4.

The claimants filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition.

Brief summary of judgment

The Tokyo High Court held that claims for compensation for damages under Article 25 of the Antimonopoly Act were allowed only for acts which that are in violation of the cease-and-desist order. In this case, such acts cease-and-desist were limited to the defendant's acts that forced the claimant to discontinue the close-out sale beyond the scope of advice or instructions, and there were such acts against each of claimants X1 to X4, respectively.

The Supreme Court dismissed the final appeal and rejected the petition.

Country: Japan	
Case Name and Number: Confirmation of Illegality and Claim for Damage in 2011 (Gyo-U) No. 17	
Date of judgment: 8 February 2013	
Economic activity (NACE Code): E38—Waste collection, treatment and disposal activities; materials recovery	
Court: Kochi District Court	**Was pass on raised (yes/no)?** No
Claimants: Inhabitants of Sagawa City	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Mayor of Sagawa City	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Kochi District Court partially upheld the claimants' claim and ordered the defendant to claim JPY 9,400,000 (US$ 119,228) and interest to X and JPY 5,150,000 (US$ 65,322) and interest to Y.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed.	**Amount of damages initially requested:** JPY 22,414,613 (US$ 284,305) and interest against X JPY 11,782,050 (US$ 149,442) and interest against Y.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court found that the standard amount was equivalent to the difference between the service fee, which should be determined based on the assumed winning price considering contract prices in other areas, etc., and the service fee, which was determined based

	on the actual winning price resulting from bid-rigging.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimants, *i.e.* inhabitants of Sakawa-cho, Kochi Prefecture, filed a lawsuit against the defendant, *i.e.* the mayor of the town, asking the mayor to claim compensation for damages against X and Y, *i.e.* the successful bidders, alleging that there was bid-rigging on the consignment contract for solid waste collection and transportation, and that the town suffered damages as a result of the bid being awarded at an unreasonably large price.

On 8 February 2013, the Kochi District Court partially upheld the claimants' claim and ordered the defendant to claim JPY 9,400,000 (US$ 97,258) and interest against X and JPY 5,150,000 (US$ 53,285) and interest against Y.

Brief summary of judgment

The Kochi District Court found that there a bid-rigging by participating companies, on the grounds that the bid rate was extremely high in all cases, the status of presentation of the estimated amount by each company was obviously unreasonable, and it was strongly suggested that some information was exchanged for improper purposes among companies. Further, the town failed to exercise the right, although it had such right, to claim compensation for damages against the successful bidders.

Country: Japan	
Case Name and Number: Claim for Damage in 2010 (Wa) No. 47407	
Date of judgment: 18 October 2012	
Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: X1 X2	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Seven-Eleven Japan Co., Ltd. Its Representative Director Isaka Ryuichi	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo District Court found that there were no violation against claimants in this case.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** Claimant X1: JPY 16,780,000 (US$ 193,295) and interest Claimant X2: JPY 38,500,000 (US$ 443,497) and interest
Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC cease-and-desist order (2009 (So) No.8) dated 22 June 2009	

Brief summary of facts

On 22 June 2009, the JFTC issued a cease-and-desist order against the defendant, *i.e.* Seven-Eleven Japan, on the grounds that Seven Eleven Japan stopped franchisee owners from close-out sales and committed disadvantageous treatment such as cancellation of contract if the franchisee owners did not comply, and such acts to have franchisee owners lose their opportunities to reduce their damage equivalent to the costs pertaining to daily goods disposal based on their reasonable management decisions constituted abuse of a dominant bargaining position.

The claimants, *i.e.* franchisee owners, filed a lawsuit against the defendant, claiming compensation for damages for failure to perform an obligation on the grounds that management guidance by the defendant, which unjustly obstructed close-out, sales violated the obligation of management guidance.

On 8 October 2012, the Tokyo District Court dismissed the claimants' claims.

The claimants filed an appeal.

Brief summary of judgment

The Tokyo District Court found that management guidance, which could be regarded as depriving member stores of the opportunity to decide the price freely beyond the scope of the advice or instruction, violated the freedom of member stores to decide the price. However, it could not say that there were such acts against the claimants in this case, because it seemed that the request to stop close-out sales from an employee of the defendant to the claimant was not beyond the instructions and advice.

Country: Japan	
Case Name and Number: In 2013 (Ju) No. 1476	
Date of judgment: 29 October 2014	
Economic activity (NACE Code): G47.1—Retail sale in non-specialised stores	
Court: The 2nd Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Hakata-ku, Fukuoka City (omitted below) X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Chiyoda-ku, Tokyo (omitted below) Seven-Eleven Japan Co., Ltd. Its Representative Director B	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Fukuoka High Court found that there was no violation against the claimants in this case.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 26,386,682 (US$ 273,012) and interest
Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC cease-and-desist order (2009 (So) No.8) dated 22 June 2009	

Brief summary of facts

On 22 June 2009, the JFTC issued a cease-and-desist order against the defendant, *i.e.* Seven-Eleven Japan, on the grounds that Seven Eleven Japan stopped franchisee owners from close-out sales and committed disadvantageous treatment, such as cancellation of contract if the franchisee owners did not comply, and such acts to have franchisee owners lose their opportunities to reduce their damage equivalent to the costs pertaining to daily goods disposal based on their reasonable management decisions constituted abuse of a dominant bargaining position.

The claimant, *i.e.* a franchisee owner, claimed compensation for damages for tort against the defendant, alleging that the defendant's guidance to cease close-out sales constituted resale price maintenance.

On 28 March 2013, the Fukuoka High Court dismissed the claimant's claim.

The claimant filed a petition for acceptance of a final appeal, but the Supreme Court rejected the petition on 29 October 2014.

Brief summary of judgment

The Fukuoka High Court found that if the defendant asked member stores that intended to do close-out sales to suspend the sale, it was allowed within the scope of advice and instruction. In this case, the defendant advised and instructed on the revision of the method and extent of the close-out sale, and it was not found to be forcing or obstructing free decision-making, unlike other cases where the JFTC found violations.

The Supreme Court rejected the petition.

Country: Japan	
Case Name and Number: Claim for Damage in 2008 (Wa) No. 32415	
Date of judgment: 28 July 2011	
Economic activity (NACE Code): K64—Financial service activities, except insurance and pension funding	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Tokyo Star Bank, Limited Its Representative Executive Officer Masaru Irie	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: MUFG Bank, Ltd. Its Representative Director Katsunori Nagayasu	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo District Court found that the defendant's conduct did not constitute unjust refusal to deal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 217,400 (US$ 2,121) per day until the defendant's resumes to send messages, and JPY 18,500,000 million (US$ 180,558,266,640) and interest, etc.
Key Legal issues: • Unjust refusal to deal	**Is the dispute likely to be settled privately?** Yes. Settled after the appeal.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant and the defendant, which were banks, concluded basic agreements for mutual use of ATMs and were mutually engaging in a collaboration business that involved ATMs and other means held by other banks. The defendant, however, demonstrated its intention to cancel the entrustment agreement for the collaboration business and started to transmit refusal messages due to out of collaboration in response to the claimant's payment request messages.

The claimant filed a lawsuit claiming an injunction under Article 24 of the Antimonopoly Act and compensation for damages for tort or failure to perform an obligation, alleging that the cancelation was invalid and the refusal of the defendant to transmit messages constituted unjust refusal to deal.

On 28 July 2011, the Tokyo District Court dismissed the claimant's claim.

The claimant filed an appeal (settled and withdrawn afterward).

Brief summary of judgment

The Tokyo District Court found that the defendant's conduct did not constitute unjust refusal to deal, on the ground that the defendant's refusal to respond in this case upon termination of the entrustment agreement was not conducted for the purpose of achieving unjust objectives under the Antimonopoly Act. Further, it could not say that it tended to impede fair competition.

Country: Japan

Case Name and Number: Claim for infringement of trademark rights, etc. in 2009 (Ne) No. 10058 / 2009 (Ne) No. 10072

Date of judgment: 27 April 2010

Economic activity (NACE Code): C15.2—Manufacture of footwear

Court: Intellectual Property High Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant (Incidental Appellee): Royal Corporation	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee: ITOCHU Corporation Appellee: BMI Holdings Co., Ltd. (former Converse Japan Co., Ltd.) Appellee (Incidental Appellant): Converse Footwear Co., Ltd. Appellee (Incidental Appellant): Converse Japan Co., Ltd., a Successor of Appellee BMI Holdings Co., Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo District Court held that all claimant's acts were legitimate exercises of trademark rights and were not violations of the Antimonopoly Act. The Intellectual Property High Court supported the original court and dismissed the appeal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Unknown	**Amount of damages initially requested:** JPY 100,000,000 (US$ 1,080,263) and interest as a part of JPY 266,205,900 (US$ 2,875,725) per each claimant.
Key Legal issues: • Private monopolization • Unreasonable restraint of trade • Interference with transactions • Resale price maintenance	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant ITOCHU, based on its trademark right, filed a lawsuit against the defendant, claiming an injunction on the import, sale or display to sell of shoes and their packaging with the defendant's mark.

In response, the defendant filed a lawsuit, claiming an injunction and compensation for damages for tort, on the following grounds:

- The claimant ITOCHU's filing with Customs for the injunction of import of New U.S. Converse products by the defendant violated the prohibition of private monopolization.
- The promise that the claimant ITOCHU must not sell shoes outside Japan and that New U.S. Converse must not sell shoes within Japan violated unreasonable restraint of trade.
- The claimant ITOCHU's identification of the source of supply to the defendant and suspension of sales to parallel importers constituted an obstruction to a competitor's transaction.
- The claimant ITOCHU's instructions and requests to retailers selling New U.S. Converse's products to sell the products at the same price as the claimant's products constituted resale price maintenance.

On 23 July 2009, the Tokyo District Court dismissed the defendant's claim.

The defendant filed an appeal, but the Intellectual Property High Court dismissed the appeal on 27 April 2010.

Brief summary of judgment

The Tokyo District Court held that the parallel import defence by the defendant could not be accepted, and illegality of trademark infringement was not justified. All of the claimant's acts were legitimate exercises of trademark rights and were not violations of the Antimonopoly Act. In addition, the court also held that the defendant's claim for resale price maintenance had no basis because the claimants were not suppliers of the New U.S. Converse products and no defendant's interest was harmed.

The Intellectual Property High Court supported the original court and dismissed the appeal.

Country: Japan	
Case Name and Number: Claim for Damage in 2007(Wa) No.360	
Date of judgment: 5 November 2009	
Economic activity (NACE Code): F42.9.9—Construction of other civil engineering projects n.e.c.	
Court: Nagoya District Court	**Was pass on raised (yes/no)?** No
Claimants: The Nagoya City	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Construction companies	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Nagoya District Court ordered the defendants to jointly and severally pay JPY 913,500,000 (US$ 9,868,207) and interest, and JPY 1,029,000,000 (US$ 11,115,912) and interest to the claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 1,827,000,000 (US$ 15,636,768) and interest, JPY 2,058,000,000 (US$ 17,613,830) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that it was appropriate to find that the amount of damage was an amount equivalent to 5% of the contract price of the subcontract agreement for each construction in this case, even if it was considered conservatively.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC trial decision (1999 (Han) No.4) dated 27 June 2006	

Brief summary of facts

On 27 June 2006, the JFTC decided that five companies engaged in bid-rigging for the construction of stoker-fired furnace that were ordered through methods such as a designed competitive bid. The five companies filed a lawsuit with the Tokyo High Court, claiming revocation of the decision. The court dismissed the claim on 26 September 2008.

The claimant in this case, *i.e.* Nagoya City, filed a lawsuit against the defendants, *i.e.* the construction companies, claiming compensation for damages for tort, on the grounds that bid-rigging had been carried out in general competitive bidding for constructions of two domestic waste incineration facilities ordered by the city.

On 11 December 2009, the Nagoya District Court ordered the defendants to jointly and severally pay JPY 913,500,000 (US$ 9,868,207) and interest, and JPY 1,029,000,000 (US$ 11,115,912) and interest to the claimant.

The defendants filed an appeal.

Brief summary of judgment

The Nagoya District Court found that the defendants had engaged in bid-rigging, and the claimant suffered damage equivalent to the difference between the assumed winning price and the actual contract price.

Country: Japan	
Case Name and Number: Claim for Confirmation of Non-existence of Obligation in 2005 (Wa) No. 13386 / in 2005 (Wa) No. 15368	
Date of judgment: 10 December 2008	
Economic activity (NACE Code): J59.2—Sound recording and music publishing activities	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Defendant / Claimant in the Counterclaim: Can System Corporation Its Representative Director Hiroshi Kudo	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Claimant / Defendant in the Counterclaim: USEN Corporation Its Representative Director Yasuhide Uno	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo District Court ordered the claimant to pay JPY 2,051,897,081 (US$ 20,026,323) and interest to the defendant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 11,361,520,000 (US$ 104,033,696) and interest as a part of damages.
Key Legal issues: • Private monopolization • Discriminatory pricing	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** The court held that two years after the claimant's commencement its tort was appropriate for the period during which the defendant lost its profit, and the damage was the amount calculated by deducting the actual operating profit of the defendant from the operating profit earned during the last two years, which would have been assumed to have been earned by the defendant if it were not for the tort by the claimant.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC recommendation decision (2004 (Kan) No.26) dated 13 October 2004	

Brief summary of facts

On 13 October 2004, the JFTC decided that the claimant engaged in private monopolization, on the grounds that the claimant, in conspiracy with its agency Network Vision, conducted free or discount campaigns targeted only at customers of the defendants to deprive them from the defendant, and substantially restrained competition in the field of trade of music broadcasting for business stores in Japan, contrary to the public interest, by eliminating business activities related to the defendant music broadcasting businesses.

In the counterclaim, the defendant claimed compensation for damages for tort against the claimant, alleging that the claimant simultaneously pirated a large number of employees from the defendant, and then conducted campaigns using unfair trade practices to deprive customers of the defendant and cause damages to the defendant.

On 20 December 2008, the Tokyo District Court partially upheld the defendant's claim, and ordered the claimant to pay JPY 2,051,897,081 (US$ 20,026,323) and interest to the defendant.

The claimant filed an appeal.

Brief summary of judgment

The Tokyo District Court held that the claimant's acts constituted private monopolization, on the grounds that it could assume that the claimants, in conspiracy, had hired a large number of employees away from the defendant at the same time, and deprived a large number of customers of the defendant and excluded its business activities by illegal means that were the unfair trade practices called discriminatory pricing.

The court held that two years after the claimants commenced its tort was appropriate for the period during which the defendant lost its profit, and the damage was the amount calculated by deducting the actual operating profit of the defendant from the operating profit earned during the last two years, which would have been assumed to have been earned by the defendant if it were not for the tort by the claimant.

Country: Japan	
Case Name and Number: Claim for Injunction against Fair Trade Practice in 2006 (Ne) No.1078	
Date of judgment: 28 November 2007	
Economic activity (NACE Code): H53—Postal and courier activities	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant: Yamato Transport Co., Ltd. Its Representative Director X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellant: Postal Service Co., Ltd., a Successor of Japan Post Corporation Its Representative Director Y1	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court held that an additional amendment of the claim with compensation for damage for tort as a secondary claim in an appeal for a lawsuit claiming an injunction of unfair trading practices would significantly delay the litigation process for the primary claim and could not be allowed.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 3,254,390,000 (US$ 28,205,841) and interest
Key Legal issues: • Unjust low price sales • Customer inducement by unjust benefits • Interference with transactions	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant who operated a courier business filed a lawsuit against the defendant Japan Post, claiming an injunction under Article 24 of the Antimonopoly Act, on the grounds that the defendant unjustly conducted low-price sales. It provided its service via a new fee system using ordinary parcels and lured customers to become agencies for ordinary parcels by providing unjust benefits such as low rental of surplus spaces in post offices and exemption of collection fees.

On 19 January 2006, the Tokyo District Court dismissed the claimant's claim.

The claimant filed an appeal and made an additional amendment to the claim, with compensation for damage for tort as a secondary claim. The Tokyo High Court dismissed the appeal on 28 November 2007.

Brief summary of judgment

The Tokyo High Court held that an additional amendment to the claim with compensation for damage for tort as a secondary claim in an appeal for a lawsuit claiming an injunction of unfair trading practices would significantly delay the litigation process for the primary claim and could not be allowed.

Country: Japan	
Case Name and Number: Claim for Damage (Inhabitant Lawsuit) in 2007 (Gyo-Ko) No.388	
Date of judgment: 28 May 2009	
Economic activity (NACE Code): F41—Construction of buildings	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Appellee: Taro Kono (tentative name as sometimes disclosed by the court instead of the individuals' real names), and two other persons	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellant: Taisei Corporation Its Representative Director Takashi Yamauchi Appellant: Tobishima Construction Co., Ltd. Its Representative Director Toshiaki Ikehara	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo High Court ordered defendant Taisei Construction to pay JPY 63,835,208 (US$ 689,588) and interest and defendant Tobishima Construction to pay JPY 7,482,247 (US$ 80,827) and interest, respectively, to Tachikawa City.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 373,779,000 (US$ 3,199,067) and interest per each defendant.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that "winning price that would have been formed if there would be no bid-rigging" was an amount lower than the actual winning price by the amount equivalent to 4.69% of the planned work price, because the decrease rate of the average percentage of successful contracts awarded after the JFTC commenced investigation was 4.69%, compared to the average

	percentage of successful contracts awarded until the date when the JFTC commenced the investigation of the case pertaining to orders by the same orderer in this case.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC surcharge payment order (2001 (Nou) No.446-479)dated 14 December 2001	

Brief summary of facts

On 14 December 2001, the JFTC issued a surcharge payment order, on the grounds that 34 major construction companies who operated business in Tama area were among the participants of a bid for engineering work ordered by the Tokyo New Urban Construction Public Corporation. All 34 companies appealed against the decision and requested for the commencement of a hearing.

The Claimants, *i.e.* inhabitants of Tachikawa City, filed an inhabitant lawsuit on behalf of the city against defendants Taisei Construction and Tobishima Construction, alleging that the city suffered damages as a result of bid-rigging for sewage and other works ordered by the Tokyo New Urban Construction Public Corporation based on entrustment from the city, and also claiming compensation for damages.

The Tokyo High Court ordered defendant Taisei Construction to pay JPY 63,835,208 (US$ 689,588) and interest and defendant Tobishima Construction to pay JPY 7,482,247 (US$ 80,827) and interest, respectively, to Tachikawa City.

The defendants filed a final appeal and a petition for acceptance of a final appeal.

Brief summary of judgment

The Tokyo High Court found that the defendants had engaged in bid-rigging and caused the claimant damages equivalent to the difference between the assumed winning price and the actual contract price.

Country: Japan	
Case Name and Number: Claim for Damage in 2005 (Wa) No. 17348 No.388	
Date of judgment: 25 July 2007	
Economic activity (NACE Code): L68—Real estate activities	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: X Corporation Its Representative Director Taro Kono (tentative name as sometimes disclosed by the court instead of the individuals' real names)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Shiodome Corporation Its Representative Director Z1 Z1 Kyoei Trading Corporation Its Representative Director Z2	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo District Court found that there is no private monopolization, joint refusal to deal, interference with transactions, restrictive trading, or dominant bargaining position.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 486,010,800 (US$ 4,450,240) and interest.
Key Legal issues: • Private monopolization • Jointly refusal to deal • Interference with transactions • Restrictive trading • Abuse of a dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimants filed a lawsuit claiming compensation for damages for tort on the grounds that the defendants unilaterally terminated the comprehensive real estate administration contract with the claimants, thereby committing private monopolization, jointly refusal to deal, interference with transactions, restrictive trading, and abuse of a dominant bargaining position.

On 25 July 2007, the Tokyo District Court dismissed the claimant's claim.

Brief summary of judgment

The Tokyo District Court found that the defendant subcontracted the services to the claimant through a discretionary contract, and there was no free competition for the ordering of the services nor was there private monopolization. The termination of the contracts by the defendants upon expiration of the contracts is justifiable and there was no joint refusal to deal. The claimants and the defendant were not competitors and there was no interference with transactions. The court also found that there was no evidence sufficient to uphold the claimant's argument against restrictive trading and dominant bargaining position.

Country: Japan	
Case Name and Number: Claim for Damage in 2005 (Wa) No. 7089	
Date of judgment: 18 January 2007	
Economic activity (NACE Code): K64—Financial service activities, except insurance and pension funding	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Chiba City (omitted below) X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Minato-ku, Tokyo (omitted below) Tokyo Star Bank, Limited Its Representative Executive Officer A	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo District Court ruled that there was no abuse of a dominant bargaining position.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 35,000,000 (US$ 320,483) and interest as a partial claim of JPY 4,796,0557 (US$ 439,159).
Key Legal issues: • Abuse of dominant bargaining position	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant filed a lawsuit claiming compensation for damages for tort, alleging that it suffered damages as a result of the defendant, which was a bank that conducted illegal solicitation by brokering the sale of golf-club membership using a comprehensive dominant position and persistently solicited the claimant to do so, thereby exerting pressure on the claimant that if the claimant refused to comply, the claimant would face inconvenience for loan.

On 25 July 2007, the Tokyo District Court dismissed the claimant's claim.

Brief summary of judgment

The Tokyo District Court found that the defendant did not unjustly use its dominant bargaining position as a financial institution as it did not resort to any disadvantageous acts, such as not offering a loan or urging early repayment of the existing loan if the claimant purchased the golf-club membership.

Country: Japan

Case Name and Number: Tama Bid-rigging Hachioji City Inhabitant Lawsuit Claim for Damage in 2006 (Gyo-Ko) No.342

Date of judgment: 2 July 2008

Economic activity (NACE Code): F41—Construction of buildings

Court: Tokyo High Court

Was pass on raised (yes/no)? No

Claimants: Inhabitants of Hachioji City

(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)? N/A

Defendants: 10 companies, P14, and P15 Corporation, a Successor of former P15

Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy? Yes. The Tokyo High Court partially upheld the claimant's request and ordered defendant P1 to pay JPY 8,851,500 (US$ 86,389) and interest; defendant P2 to pay JPY 7,245,000 (US$ 70,710) and interest; defendant P3 to pay JPY 7,481,250 (USSD 102.46) and interest; defendant P4 to pay JPY 1,489,500 (US$ 14,537) and interest; defendant P5 to pay JPY 9,982,800 (US$ 97,431) and interest; and defendant P6 to pay JPY 2,488,500 (US$ 24,287) and interest, respectively, to Hachioji City.

Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Unknown

Amount of damages initially requested: Primary claim: JPY 85,249,750 (US$ 738,860) and interest
Secondary claim: JPY 73,088,750 (US$ 633,461) and interest

Key Legal issues:

- Bid-rigging

Is the dispute likely to be settled privately? Unknown

Direct or indirect claims? Indirect

Method of calculation of damages: Applying Article 248 of the Code of Civil Procedure, the court held that damages the city suffered was in the amount equivalent to 3% of the contract price

	of each work within the scope of the difference of the average percentage of successful contracts awarded (4.69%), because that there was a difference by 4.69% in rates of the average percentage of successful contracts awarded before and after the JFTC commenced investigation, etc.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC surcharge payment order (2001 (Nou) No.446-479) dated on 14 December 2001	

Brief summary of facts

On 14 December 2001, the JFTC issued a surcharge payment order on the grounds that 34 major construction companies who operated business in Tama area were among the bidding participants for engineering work ordered by the Tokyo New Urban Construction Public Corporation. All 34 companies appealed against the decision and requested for the commencement of a hearing.

The claimants, *i.e.* inhabitants of Hachioji City, filed an inhabitant lawsuit on behalf of the city against the defendants, claiming compensation for damages on the grounds that the city suffered damages as a result of the defendants' bid-rigging for civil engineering works ordered by the Tokyo New Urban Construction Public Corporation based on entrustment from the city.

On 2 July 2008, the Tokyo High Court partially upheld the claimants' request and ordered defendant P1 to pay JPY 8,851,500 (US$ 86,389) and interest; defendant P2 to pay JPY 7,245,000 (US$ 70,710) and interest; defendant P3 to pay JPY 7,481,250 (US$ 102.46) and interest; defendant P4 to pay JPY 1,489,500 (US$ 14,537) and interest; defendant P5 to pay JPY 9,982,800 (US$ 97,431) and interest; and defendant P6 to pay JPY 2,488,500 (US$ 24,287) and interest, respectively, to Hachioji City.

Brief summary of judgment

The Tokyo High Court found that defendants had engaged in bid-rigging and caused damage to Hachioji City, in the amount of the difference between the winning price that would have been made under fair competition and the actual contract price.

Country: Japan	
Case Name and Number: Claim for Damage in 2006 (Gyo-Ko) No. 149	
Date of judgment: 19 October 2006	
Economic activity (NACE Code): F42.9.9—Construction of other civil engineering projects n.e.c.	
Court: Tokyo High Court	**Was pass on raised (yes/no)?** No
Claimants: Inhabitants of the municipality which constitute the B Association, a partial administrative association of municipals	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: A Corporation B Association Manager	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo District Court partially upheld the claimant's claim, and ordered the defendant to pay JPY 1,286,470,000 (US$ 11,149,852) and interest to the association. The Tokyo High Court supported the original court and dismissed the appeal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Yes	**Amount of damages initially requested:** JPY 3,859,410,000 (US$ 33,449,557) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that it was appropriate to find that the amount of damage that the association suffered from the bid-rigging by the defendant was JPY 1,286,470,000 (US$ 11,149,852), which was equivalent to 5% of the contract price of the subcontract of the defendant pertaining to the construction, considering the background and situation of the basic bid-rigging and the individual bid-rigging

	by the five companies; the type, size, location and content of the construction; the scheduled price of the construction; the contract amount of the subconstruction contract pertaining to the construction; the rate of difference between the winning price and the scheduled price in a designated competitive bid for the construction of the stoker-fired furnace ordered from municipals; and all other circumstances appearing in this case.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC trial decision (1999 (Han) No.4) dated 27 June 2006	

Brief summary of facts

On 27 June 2006, the JFTC decided that the five companies engaged in bid-rigging for the creation, renewal and expansion construction of a continuous type and semi-continuous type stoker-fired furnace that were ordered by municipals.

The claimants, *i.e.* inhabitants of the municipal, filed a lawsuit claiming compensation for damages to the association, alleging that the companies who participated in designated competitive bidding engaged in bid-rigging and caused damages to the association for the construction of waste incinerators ordered by the association, which is a partial administrative association of the municipal.

The Tokyo District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 1,286,470,000 (US$ 11,149,852) and interest to the association.

The defendant filed an appeal but on 19 October 2006, the Tokyo High Court dismissed the appeal.

The defendant filed a final appeal and a petition for acceptance of a final appeal.

Brief summary of judgment

The Tokyo District Court found that the defendant and others had engaged in bid-rigging, and held that the defendant caused damages to the association for the difference between the contract price pertaining to the subconstruction contract based on the assumed winning price that which would have been formed if competition had occurred and the contract price pertaining to the actual subconstruction contract based on the contract price on the basis of the bid-rigging.

The Tokyo High Court supported the original court and dismissed the appeal.

Country: Japan	
Case Name and Number: U.S. Navy Atsugi Base Case Claim for Damage in 2002 (Ne) No. 4622	
Date of judgment: 5 October 2006	
Economic activity (NACE Code): F41—Construction of buildings	
Court: Tokyo High Court	**Was pass on raised (yes/no)?** No
Claimants: The U.S. Government	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: 53 Companies	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court supported the original court. In addition, the court also held for the secondary claim added by the claimant in the appeal that establishments of 55 bid-rigging conducts and damages were found, but damages were already recovered by settlement paid by other companies to the defendant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 681,339,484 (US$ 5,682,564) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

Seventy-three members of the Atsugi Construction Subcommittee participating in the competitive bidding of Atsugi Base formed an organization called the Atsugi Base U.S. Navy Construction Comprehensive Quality Control Training (TQC Training) and engaged in bid-rigging between 1984 and 1990. The TQC Training was formally dissolved by an indication by the JFTC in December 1988, and a notification of dissolution was submitted to the JFTC in early 1989. However, the members continued to engage in bid-rigging, especially the Construction Subcommittee, which continued to engage in bid-rigging at least until 28 March 1990.

The claimant, by a notice dated 15 March 1994, claimed compensation for damages for bid-rigging against 67 companies, including the defendant. While the claimant reached settlements with some of these companies, it filed a lawsuit claiming compensation for damages for tort against 53 companies who did not respond to the above claim.

On 15 July 2002, the Tokyo District Court dismissed the claimant's claim.

The claimant filed an appeal and added secondary claim alleging separate conduct of bid-rigging for each work (contract) and damage based on it. The Tokyo High Court dismissed the appeal on 5 October 2006.

Brief summary of judgment

The Tokyo District Court held that the claimant's arguments and proof alleging only the basic agreement as a cause of action were insufficient because it did not establish individual agreements and damages.

The Tokyo High Court supported the original court. In addition, the court also held for the secondary claim added by the claimant in the appeal that establishments of 55 bid-rigging conducts and damages were found, but damages were already recovered by settlement paid by other companies to the defendant.

Country: Japan	
Case Name and Number: Subrogation Claim for Damage in 2006 (Gyo-Ko) No.289	
Date of judgment: 29 August 2007	
Economic activity (NACE Code): F42.9.9—Construction of other civil engineering projects n.e.c.	
Court: Tokyo High Court	**Was pass on raised (yes/no)?** No
Claimants: Inhabitants of Niigata City (former Toyosaka City, Niigata Prefecture)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: P1 Corporation P2 Association Manager	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Niigata District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 48,925,000 (US$ 418,735) and interest to the association. The Tokyo High Court supported the original court and dismissed the appeal. The Supreme Court dismissed the final appeal and rejected the petition.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 254,410,000 (US$ 2,204,974) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that it was appropriate that the damage that the association suffered was JPY 4,8925,000 (US$ 424,033), which was calculated by redacting JPY 82,400,000 (US$ 714,161) (including consumption tax), discounted from the minimum bid amount, from JPY 131,325,000 (US$ 1,138,195) equivalent

	to 5% of minimum bid amount (JPY 2,626,500,000 (US$ 22,763,910)), including consumption tax submitted by the defendant P1 in the designated competitive bid, considering the order and acceptance status of construction of stoker reactors by method of designated competitive bid, etc., by local governments; the background and situation of bid-rigging pertaining to the designated competitive bid; the type, size, location and content of the construction; the scheduled price of the construction; the contract price pertaining to the construction; the fact that the contract was a discretionally contract; and all other circumstances appearing in this case.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC trial decision dated (1999 (Han) No.4) 27 June 2006	

Brief summary of facts

On 27 June 2006, the JFTC decided that five companies engaged in bid-rigging for the creation, renewal and expansion construction of continuous type and semi-continuous type stoker-fired furnace that were ordered by local governments.

The claimants, *i.e.* inhabitants of Toyosaka City, Niigata Prefecture, filed a lawsuit on behalf of the administrative association of the local government, claiming compensation for damages and alleging that the waste disposal facility expansion work subconstruction agreement was entered into between the association, which was a partial administrative association of the city, and the defendant who submitted the lowest price through the discretionary contract. As a result of the bid-rigging among participants, including the defendant, and the association suffered damages equivalent to the difference between the appropriate price that would have been formed if there was no bid-rigging.

The Niigata District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 48,925,000 (US$ 418,735) and interest to the association.

The defendant filed an appeal, but the Tokyo High Court dismissed the appeal on 29 August 2007.

The defendant filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition on 25 December 2007.

Brief summary of judgment

The Niigata District Court found that the defendant and others had engaged in bid-rigging, and that the association suffered damages due to the bid-rigging conducts by the defendant P1 equivalent in the amount of the difference between the construction price based on fair competition and the contract price.

The Tokyo High Court supported the original court and dismissed the appeal.

The Supreme Court dismissed the final appeal and rejected the petition.

Country: Japan

Case Name and Number: Kyoto City Stalker Reactor Bid-rigging Inhabitant Lawsuit Claim for Injunction of Illegal Public Money Spending, etc. in 2005 (Gyo-Ko) No. 91 / in 2005 (Gyo-Ko) 116 /in 2006 (Gyo-Ko) No. 7

Date of judgment: 14 September 2006

Economic activity (NACE Code): F42.9.9—Construction of other civil engineering projects n.e.c.

Court: Osaka High Court	**Was pass on raised (yes/no)?** No
Claimants: Inhabitants of Kyoto City	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: A Company	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Osaka High Court increased the amount of damages and ordered the defendant to pay damages of JPY 1,831,200,000 (US$ 15,871,034) to Kyoto City.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Yes	**Amount of damages initially requested:** Primary claim: JPY 24,839,475,500 (US$ 227,446,895) and interest; Secondary claim: JPY 5,732,186,653 (US$ 52,487,745) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** The court held that it was appropriate to determine that the amount of damage Kyoto City suffered from the bid-rigging by the defendant was not less than JPY 1,831,200,000 (US$ 7,611,024), which was equivalent to 8% of JPY 22,890,000,000 (US$ 209,596,190), the subconstruction contract price for the waste disposal facility construction, taking into account the result of the JFTC's empirical estimation of unjust enrichment for past

	violation cases, which showed that there was unjust enrichment of approximately 16.5% of sales in average and over 8% of sales in approximately 90% of cases.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC trial decision (1999 (Han) No.4) dated 27 June 2006	

Brief summary of facts

On 13 August 1999, the JFTC made an elimination recommendation on the grounds that five major manufacturers jointly engaged in bid-rigging for the construction of stoker furnaces ordered by local governments through methods such as a designated competitive bid. However, as the five companies did not accept the recommendation, the JFTC decided to commence a hearing on 8 September 1999 (a trial decision was made on 27 June 2006).

The claimants, *i.e.* inhabitants of Kyoto City, filed an inhabitant lawsuit against the defendant on behalf of the city, asking the defendant to pay compensation for unfair profit and interest to the city as a primary claim, and damages and interest to the city as a secondary claim, alleging that the winning price was unjustly increased as a result of illegal bid-rigging by the defendant and other participants in a general competitive bid for the subconstruction contract for the waste disposal facility construction ordered by the city.

On 31 August 2005, the Kyoto District Court dismissed the claimants' primary claim but partially upheld the secondary claim and ordered the defendant to pay damages of JPY 1,144,500,000 (US$ 10,479,809) to Kyoto City.

The defendant filed an appeal, but on 24 September 2006, the Osaka High Court increased the amount of damages and ordered the defendant to pay damages of JPY 1,831,200,000 (US$ 15,871,034) to Kyoto City.

The defendant filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition.

Brief summary of judgment

The Kyoto District Court dismissed the primary claim of the claimants on the grounds that it had not gone through a legal auditing request (the request from inhabitants to local government to exercise its right to claim damages; if the local government fails to exercise

the right despite the request, the inhabitants themselves file a law suit). However, the court found that the defendant and others engaged in bid-rigging and held the claimant's liability for tort for the secondary claim.

The Osaka High Court increased the amount of damages, taking into account the result of the JFTC's empirical estimation of unjust enrichment for past violation cases.

The Supreme Court dismissed the appeal and rejected the petition.

Country: Japan	
Case Name and Number: Kurashiki City Sewerage Bid-rigging Inhabitant Lawsuit In 2002 (Gyo-U) No. 24	
Date of judgment: 14 April 2004	
Economic activity (NACE Code): E37—Sewerage	
Court: Okayama District Court	**Was pass on raised (yes/no)?** No
Claimants: Kurashiki Citizen Ombudsman	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Yoshida-Gumi Inc.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Okayama District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 26,775,000 (US$ 249,673) and interest to Kurashiki City.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 35,700,000 (US$ 297,748) and interest.
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that it was appropriate to find that the amount of damage that Kurashiki City suffered because of the bid-rigging was 15% of the contract price (JPY 26,775,000 (US$ 223,311), considering all circumstances such as the manner and the series of bid-rigging as well as the history of the bid by the defendant and nine companies who were not subject to the lawsuit, and the contract price.

Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, "Kurashiki Citizen Ombudsman", which was organized by inhabitants of Kurashiki City, filed a lawsuit on behalf of Kurashiki City against the defendant, the successful bidder, claiming compensation for damages and alleging that in the sewage works that Kurashiki City ordered through a competitive bidding, the winning price was increased via bid-rigging by the defendant and 24 companies, which was discovered in 2010 and which as a result the city suffered damages of JPY 100,000,000 (US$ 1,151,941).

The claimant filed a letter of complaint to the JFTC for violation of the Antimonopoly Act in August 2001 and to the Okayama District Public Prosecutors Office for bid-rigging in November 2001, but no decision was reached.

The Okayama District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 26,775,000 (US$ 249,673) and interest to Kurashiki City.

Brief summary of judgment

The Okayama District Court found that construction companies in Kurashiki City gathered in name of a study group. Some of them stood as candidates for each public work and construction area, and they discussed and determined which company would become the winner and what the minimum bid price would be. Such conduct constituted illegal bid-riggings and caused damages to Kurashiki City.

Country: Japan	
Case Name and Number: Claim for Damage in 1998 (Gyo-U) No. 43 / in 1999 (Gyo-U) No. 2	
Date of judgment: 24 April 2002	
Economic activity (NACE Code): F42.2.1—Construction of utility projects for fluids	
Court: Yokohama District Court	**Was pass on raised (yes/no)?** No
Claimants: Claimant in Cases 1 and 2: X1 Claimant in Case 2: X2 Claimant in Case 2: X3	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Defendant in Cases 1: 9 Construction Companies Defendant in Case 2: 14 Construction Companies	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Yokohama District Court dismissed Case 2 but partially upheld the claimant's claim in Case 1 and ordered the defendants to jointly and severally pay JPY 1,491,000 (US$ 12,435) and interest to Zama City.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** Unknown
Key Legal issues: • Bid-rigging	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** Applying Article 248 of the Code of Civil Procedure, the court held that the amount of damage Zama City suffered was JPY 1,420,000 (US$ 12,273) (JPY 1,491,000 (US$ 12,886) including 5% consumption tax), which was calculated by deducting JPY 55,580,000 (US$ 480,380), which was 3% lower than assumed bid price, from 57,000,000 (US$ 492,653), the actual winning price. Various circumstances were considered, including that the expected bid price was assumed

	to be firmly and slightly lower, there were special circumstances where the assumed competition price did not decrease by significant amount, it was appropriate to have person who has a liability to compensate a certain amount deemed to be correct, and the amount should be appropriate under socially accepted standards.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Unknown	

Brief summary of facts

The claimants, *i.e.* inhabitants of Zama City, filed two inhabitant lawsuits (Case 1 and Case 2) on behalf of the city against the defendants, claiming compensation for damages and alleging that bid-rigging by the defendants, *i.e.* the construction companies, caused damages to the city through the sewage pipes construction and the road improvement construction ordered by the city.

On 24 April 2002, the Yokohama District Court dismissed Case 2 but partially upheld the claimants' claim in Case 1. It also ordered the defendants to jointly and severally pay JPY 1,491,000 (US$ 12,435) and interest to Zama City.

The defendants filed an appeal.

Brief summary of judgment

The Yokohama District Court held that Case 2 was illegal because it had not gone through a legal auditing request. On the other hand, the court held that it had gone through a lawful auditing request in Case 1, and bid-rigging on the construction was discovered and the defendants had liabilities for tort.

Country: Japan	
Case Name and Number: Daikoku I Case Claim for Damage, etc. under the Unfair Competition Prevention Act in 2002 (Ne) No. 1413	
Date of judgment: 29 September 2004	
Economic activity (NACE Code): G46.4.6—Wholesale of pharmaceutical goods	
Court: Tokyo High Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant: Taisho Pharmaceutical Co., Ltd.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee: Daikoku Co., Ltd. Appellee: Y	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court supported the original judgment, which found that the defendant's act did not constitute tort.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Unknown	**Amount of damages initially requested:** JPY 100,000,000 (US$ 834,028) and interest per defendant.
Key Legal issues: • Unjust low price sales	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, Taisho Pharmaceutical, concluded basic transaction agreements with the defendants, five companies that operated drug stores, and sold its products such as medicines wholesale to each defendant. The defendant Daikoku disclosed the purchase price from the claimant and made a discount sale at the price.

The JFTC made no decision regarding the "purchase price sale" in this case based on the report from the claimants. However, when a company that retailed medicines in Hiroshima City reported unjust low price sales to the JFTC, attaching a leaflet indicating Daikoku's purchase price sale, the JFTC conducted an investigation and found that there were actions that could lead to violations of the Antimonopoly Act. The JFTC warned of related parties from the perspective of preventing violations of the act in the notice to the report dated 1 October 2001, and it did not make any measures under the Antimonopoly Act.

The claimant filed a lawsuit claiming compensation for damages for tort, alleging that that the defendant Daikoku's act constituted unjust low-price sales.

On 5 February 2002, the Tokyo District Court dismissed the claimant's claim for damages.

The claimants filed an appeal, but the Tokyo High Court supported the original court and dismissed the appeal for the claim for damages on 29 September 2004.

Brief summary of judgment

The Tokyo District Court found that the defendant's act did not violate the Antimonopoly Act and did not constitute tort on the grounds that the defendant did not sell the claimant's products at a price significantly lower than the cost required for supply. Moreover, the defendant did not sell at low prices continuously.

The Tokyo High Court supported the original judgment and dismissed the appeal for the claim for damages. However, the court gave notice that the judgment was based on the number of times and the number of days, as well as the impact on retailers who were in a competitive relationship, and that it was erroneous to construe that disclosing the purchase price and selling price was basically allowed.

Country: Japan	
Case Name and Number: Claim for Damage in 2000 (Wa) No. 734	
Date of judgment: 6 September 2001	
Economic activity (NACE Code): L68—Real estate activities	
Court: Hachioji Branch of Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Koshin Real Estate Appraisal Office Limited Liability Company Its Representative Director X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: XX Association of Real Estate Appraisers Its Representative Director Ichiro Kono (tentative name as sometimes disclosed by the court instead of the individuals' real names)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 6,238,329 (US$ 47,277) and interest to the claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Yes	**Amount of damages initially requested:** JPY 22,695,443 (US$ 197,781) and interest.
Key Legal issues: • Limiting the number of enterprise by a trade association	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** (1) Inheritance Tax Valuation The amount should be calculated based on the orders received for three years of the member who had the smallest revenue among the members of the defendants registered to the Ibaraki governor. JPY 67,690 (US$ 589.89) × 3 (year) × 0.9 (expense rate 10%) = JPY 182,763 (US$ 1,592)

	(2) Fixed Assets Tax Valuation The amount should be calculated based on the 65 points, which was the smallest number dealt with by members of the defendant. 65 points × JPY 60,000 (US$ 522) × 0.9 (expense rate 10%) = JPY 3,510,000 (US$ 30,588) In addition, the claimant should be able to receive orders of time adjustment work for two years corresponding to the places where the claimant was able to receive orders of appraisal of the land value survey in FY2000, JPY 1,170,000 (US$ 10,196). (3) Short-term land price trend survey The claimant should be able to earn the same revenue as the short-term land price trend survey in FY1998, JPY 687,783 (US$ 5,944). (4) Damages caused by claimants being made subject to examination by the Disciplinary Enforcement Committee The claimant should be able to earn the same revenue as the short-term land price trend survey in FY1998, JPY 687,783 (US$ 5,944).
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, a real estate appraiser, claimed compensation for damages for tort, alleging that that the defendant, the Japan Association of Real Estate Appraisers, requiring the recommendation of two members for the claimant's admission to the defendant and delaying the admission for one year and two months constituted limiting the number of enterprise by a trade association, and it caused damages, such as the inability to be entrusted with business operations.

On 6 September 2001, the Tokyo District Court partially upheld the claimant's claim and ordered the defendant to pay JPY 6,238,329 (US$ 47,277) and interest to the claimant.

Brief summary of judgment

The Tokyo District Court held that any entrepreneur who had suffered damages from violations of the Antimonopoly Act was entitled to claim compensation for damages for tort under the Civil Code against the enterprise or trade association that committed the violation. In this case, the defendant delayed the claimant's admission to the defendant and it caused damages such as the claimant's inability to be entrusted with business, and constituted tort under the Civil Code.

Country: Japan	
Case Name and Number: Dai In 1997 (Wa) No. 1123	
Date of judgment: 30 November 1999	
Economic activity (NACE Code): G46.7.1—Wholesale of solid, liquid and gaseous fuels and related products	
Court: Urawa District Court	**Was pass on raised (yes/no)?** No
Claimants: Saisan Corporation Its Representative Director X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Maruman Gas Corporation Its Representative Director Z1 Y1	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The court dismissed the claim for compensation for damages for violation of the Antimonopoly Act.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 8,395,325 (US$ 64,529) and interest.
Key Legal issues: • Unjust low price sales • Deceptive customer inducement • Customer inducement by unjust benefit	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com

Follow-on (EC or NCA?) or stand-alone?	
Stand-alone	

Brief summary of facts

The claimant, *i.e.* a company engaged in the liquefied petroleum gas purchase and sales business, filed a lawsuit claiming compensation for damages for tort against the defendants, *i.e.* companies engaged in the same business, alleging that the claimant was deprived of customers by the defendants because of unfair law price sales, deceptive customer inducement and customer inducement by unjust benefit, and that the claimant had infringed the ownership of propane gas facilities provided to customers.

On 30 November 1999, the Urawa District Court partially upheld the claimant's claim only for infringement of ownership of gas facilities and ordered the defendants to pay JPY 1,000,000 (US$ 9,765) and interest to the claimant.

Brief summary of judgment

The Urawa District Court held that contracts were changed at the discretion of customers and that there was no illegal conduct by the defendants against the claimant. However, it found that the defendant used adjusters and meters installed by existing suppliers without permission and partially upheld the claimant's claim only for infringement of ownership of gas facilities.

Country: Japan	
Case Name and Number: Claim for Damage in 1999 (O) No. 836 / in 1999 (Ju) No. 703	
Date of judgment: 10 October 2000	
Economic activity (NACE Code): K64—Financial service activities, except insurance and pension funding	
Court: The 3rd Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant and Complainant: X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee and Opponent: Y and other 19 persons	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court held that the defendants had no liability for damages to the company, on the grounds that there were no evidence that the defendants were aware of the harm to fair and free competition protected by the Antimonopoly Act, and the defendants were not negligent for not being aware that the loss compensation violated the Antimonopoly Act. The Supreme Court dismissed the final appeal and rejected the petition.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 47,007,000,000 (US$ 459,052,734) in interest, and JPY 45,000,000 (US$ 439,453) as a fine.
Key Legal issues: • Customer inducement by unjust benefits	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A

Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC recommendation decision (1991 (Kan) No.21) dated 20 November 1991	

Brief summary of facts

From 1990 to 1991, Nikko Securities provided profits (so-called loss compensation) to some large customers.

The claimants, *i.e.* shareholders of the company, filed a shareholder lawsuit against the defendants, *i.e.* the directors of the company at the time, claiming compensation for damages based on the company's right to claim compensations for damages against directors and alleging that the above conducts loss compensation for some customers, which violated the Securities and Exchange Law and customer inducement by unjust benefits under the of Antimonopoly Act, and breached the director's duty of care, which caused damages to the company.

On 20 November 1991, the JFTC made a recommendation against Nikko Securities to make all directors, employees and customers aware that the company would not conduct similar activities. In response to the loss compensation, including the provision of profits in this case, Nikko Securities accepted the recommendation.

On 3 February 1999, the Tokyo High Court dismissed the claimant's claim.

The claimant filed a final appeal and petition for acceptance of a final appeal, but the Supreme Court dismissed the final appeal and rejected the petition on 10 October 2000.

Brief summary of judgment

The Tokyo High Court held that defendants had no liability for damages to the company, on the grounds that awareness or possibility of awareness of the specific violation of laws and regulations was required to establish the directors' liability for damages to the company. However, there were no evidence that the defendants were aware of the harm to fair and free competition protected by the Antimonopoly Act, and the defendants were not negligent for not being aware that the loss compensation violated the Antimonopoly Act.

The Supreme Court dismissed the final appeal and rejected the petition.

Country: Japan

Case Name and Number: Digicon Electronic v. Japan Playgun Cooperative Case
Claim for Damage in 1993 (Wa) No. 7544

Date of judgment: 9 April 1997

Economic activity (NACE Code): C25—Manufacture of fabricated metal products, except machinery and equipment

Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Digicon Electronics Corporation Its Representative Director X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Japan Playgun Cooperative Its Representative Director Y1 Y2 Y3	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. The Tokyo District Court partially upheld the claimant's claim and ordered the defendants to jointly and severally to pay JPY 18,461,634 (US$ 141,903) and interest to the claimant.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Appealed	**Amount of damages initially requested:** JPY 72,925,775 (US$ 651,122) and interest.
Key Legal issues: • Unreasonable restraint of trade • Inducing of unfair trade practices by a trade association	**Is the dispute likely to be settled privately?** Yes. Settled after the appeal.
Direct or indirect claims? Direct	**Method of calculation of damages:** For BB bullet, the damage was the amount of the reduction of sales of three retail stores with which the claimant lost transaction for BB bullet after the issue of the written notice of request for suspension of transactions by the defendants, with deduction of 20% from the amount, considering comprehensively the impact

	of the deterioration of the market. For airsoft gun, the damage was the amount obtained by multiplying a gross margin of 0.5 to the loss, which was the difference between the actual sales and assumed sales calculated based on the estimated share of the claimant's products and the duration of the estimated share, assuming that there was no act of obstruction.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, *i.e.* a company engaged in the airsoft gun and BB bullet manufacture and sales business, filed a lawsuit claiming damages, injunctions and advertisements for apologies for tort, alleging that the exclusion of the claimant from the joint market of airsoft gun and BB bullet by the defendants, *i.e.* the Japan Playgun Cooperative and its directors, by asking wholesalers not to purchase and sell the claimant's products and telling retailers who sold the claimant's products that the defendants would not supply other products in the name of protecting the safety of users, constituted unreasonable restraint of trade and inducing of unfair trade practices by a trade association, and it caused damages to the claimant.

In December 1990, the claimants made a petition to the JFTC to take measures against violations of the defendant cooperative, but the JFTC said that it would not take any measures.

On 9 April 1997, the Tokyo District Court dismissed the claimant's claim for injunctions and advertisements for apologies but partially upheld the claim for damages and ordered the defendants to jointly and severally pay JPY 18,461,634 (US$ 141,903) and interest to the claimant.

An appeal was filed but the case was ultimately settled.

Brief summary of judgment

The Tokyo District Court found that the purpose of the establishment of the voluntary standards by the defendant union was justifiable, and the contents of the voluntary standards were reasonable.

However, it was not determined that the distribution of the claimant's products caused a serious risk to consumers and the surrounding communities. The court held that the defendants were liable for damages on the grounds that they committed obstruction for the sole reason that the claimant had not joined the defendant union nor affixed the seal issued by the union, which constituted inducement of unfair trade practices by a trade association and unreasonable restraint of trade.

Country: Japan	
Case Name and Number: Claim for Damage in 1995 (Ne) No. 2404	
Date of judgment: 17 July 1996	
Economic activity (NACE Code): J58.1—Publishing of books, periodicals and other publishing activities	
Court: Tokyo District Court	**Was pass on raised (yes/no)?** No
Claimants: Appellant: Heibonsha Sales Tokyo Corporation Its Representative Director X	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee: Kairyudo Publishing Co., Ltd. Its Representative Director Z1 Appellee: Y1 Appellee: Y2 Appellee: Chiyoda Agency Co., Ltd. Its Representative Director Z2	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court supported the original court that did not find any liability for damages because there was no reasonable legal causation between damages and the low-price sales.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Unknown
Key Legal issues: • Unjust low price sales	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, *i.e.* Heibonsya Sales Tokyo Co., Ltd., filed a claim compensation for damages alleging that the defendants, *i.e.* Kairyudo Publishing Co., Ltd. and Chiyoda Agency Co., Ltd., sold the book ("Compendium of Practice/Problem Behavior Education"), which was legal resale price maintenance product and suffered from slow sales, with discount of 40% to brokerage dealers, without notifying the retailer in violation of a resale price maintenance contract with the dealer, and it constituted unjust low price sales and caused damages to the claimant.

On 11 May 1995, the Tokyo District Court dismissed the claimant's claim.

The claimants filed an appeal, but the Tokyo High Court dismissed the appeal on 17 July 1996.

Brief summary of judgment

The Tokyo District Court found that the sales of the book that suffered from slow sales with discount of 40% by the publisher constituted unjust low price sales and was illegal. However, the court did not find any liability for damages on the grounds that only six sets of the book were sold after the 40% discount by the publisher, and there was no reasonable legal causation between retailers' impossibility of sales of the book or damages and the low price sales.

The Tokyo High Court supported the original court and dismissed the appeal.

Country: Japan	
Case Name and Number: Tsuruoka Kerosene Case in 1985 (O) No. 933 / in 1985 (O) No. 1162	
Date of judgment: 8 December 1989	
Economic activity (NACE Code): D35—Electricity, gas, steam and air conditioning supply	
Court: The 2nd Petty Bench of the Supreme Court	**Was pass on raised (yes/no)?** Yes
Claimants: Appellant: Japan Oil Co., Ltd.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Appellee: A1 and A2	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Supreme Court held that there was no reasonable legal causation and no proof of the amount of damages.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Unknown
Key Legal issues: • Unreasonable restraint of trade	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC recommendation decision (1974 (Kan) No.6 and 7) dated 22 February 1974	

Brief summary of facts

During the first oil crisis in 1972 to 1973, 12 primary oil distributors, including the defendants, agreed and implemented price increases for petroleum products five times.

On 22 February 1974, the JFTC made the decision of recommendation that found that the conduct of the 12 primary oil distributors constituted unreasonable restraint of trade with the acceptance of each company.

The claimants, *i.e.* consumers in Tsuruoka City, Yamagata Prefecture, filed a lawsuit against the defendants, *i.e.* the primary oil distributors, claiming compensation for damages for tort on the grounds that they purchased kerosene at a higher price due to the price agreement, and that they suffered damages.

On 31 March 1981, the Yamagata District Court dismissed the claimants' claims.

The claimants filed an appeal, and the Sendai High Court on 26 March 1985 upheld the claimants' claim.

The defendants filed a final appeal, and on 8 December 1989, the Supreme Court quashed the part for which the defendants lost, and dismissed the claimants' appeal.

Brief summary of judgment

The Yamagata District Court dismissed the claimants' claim on the grounds that there was no reasonable legal causation between the defendants' productive adjustments and the damages the claimants suffered.

The Sendai High Court upheld the claimants' claim on the grounds that there was a reasonable legal causation between the defendants' productive adjustments and the damages the claimants suffered.

The Supreme Court, in general, allowed the claim for compensation for damages for tort due to violations of the Antimonopoly Act, regardless of the fact that claimants were direct or indirect counterparties of the transaction. However, the Supreme Court supported the Yamagata District Court and dismissed the claimants' appeal on the grounds that it was not permissible to infer the existence of antitrust acts described in the JFTC's written decision solely based on the fact that such recommendation decision exists, and a final consumer who was the victim should argue and prove that there was a reasonable legal causation in which an increase in the primary wholesale price of petroleum products under the price agreement resulted in an increase in the actual retail price at the final stage of consumption through transferring the increase to the wholesale price, and that a retail price lower than the actual retail price would have been formed if the price agreement was not implemented.

Country: Japan	
Case Name and Number: Matsushita Electric Illegal Resale Price Maintenance Case In 1971 (Gyo-Ke) No. 66 / in 1971 (Gyo-Ke) No. 99	
Date of judgment: 19 September 1977	
Economic activity (NACE Code): G47.4.3—Retail sale of audio and video equipment in specialised stores	
Court: Tokyo High Court	**Was pass on raised (yes/no)?** No
Claimants: 8 consumers who purchased color TVs from defendant affiliated retailers	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Matsushita Electric Industrial Co., Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court held that there was no evidence to determine damages alleged by the claimants.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Total JPY 172,300 (US$ 548.72) and interest.
Key Legal issues: • Resale price maintenance	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC consent decision (1967 (Han) No.4) dated 12 March 1971	

Brief summary of facts

On 12 March 1971, the JFTC made a consent decision that found that the defendant Matsushita Electric had traded with its agencies, on the condition restricting the agencies and its customer dealers in order to maintain the sales prices of the National Products.

Eight claimants, *i.e.* ordinary consumers who purchased color TV sets from the defendant affiliated retailers, claimed compensation for damages under Article 25 of the Antimonopoly Act, alleging that they suffered damages equivalent to the difference from the "fair price" at which they could purchase the products as a result of purchasing such products at prices that were unjustly increased by the defendant.

The Tokyo High Court dismissed the claimants' claim.

Brief summary of judgment

The Tokyo High Court dismissed the claimants' claim on the grounds that there was no evidence to determine whether or not there was a part that had been kept unreasonably high due to the defendant's violations of the Antimonopoly Act in the purchase price of the claimants and its amount, and as a result, there was no evidence to determine the damages alleged by the claimants.

Country: Japan	
Case Name and Number: In 1971 (Wa) No. 4627	
Date of judgment: 23 June 1972	
Economic activity (NACE Code): C25.2.1—Manufacture of central heating radiators and boilers	
Court: Osaka District Court	**Was pass on raised (yes/no)?** No
Claimants: An enterprise who took over Z's business	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: An enterprise who promised Z to deliver the maika for heater	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Osaka District Court dismissed the claimant's claim as illegal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? Unknown	**Amount of damages initially requested:** JPY 9,000,000 (US$ 28,662)
Key Legal issues: • Refusal to trade • Abuse of a dominant bargaining position • Interference with transactions	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimant, who took over Z's business, filed a lawsuit claiming compensation for damages and alleging that the fact that defendant promised Z to deliver the maika for heater in deferral of payment, but later urged Z to pay the accounts payable in a lump sum and stopped the delivery of the maika after Z refused to pay in a lump sum based on the promise, constituted refusal to trade, abuse of a dominant bargaining position, and interference with transactions, which made it impossible for the claimant to deliver the band heater, leading to loss of profits and damages suffered.

On 23 June 1972, the Osaka District Court dismissed the claimant's claim.

Brief summary of judgment

The Osaka District Court dismissed the claimant's claim as illegal, on the grounds that the claim compensation for damages under Article 25 of the Antimonopoly Act could be asserted in the court until after the JFTC's decision become final and binding; in this case, however, the decision was not made.

Country: Japan	
Case Name and Number: Kawasaki Kerosene Cartel Case In 1981 (Gyo-Tsu) No. 178	
Date of judgment: 2 July 1987	
Economic activity (NACE Code): D35—Electricity, gas, steam and air conditioning supply	
Court: 1st Petty Bench (Supreme Court)	**Was pass on raised (yes/no)?** No
Claimants: Consumers who purchased kerosene	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Primary oil distributors	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Supreme Court held that there was no reasonable legal causation and no proof of the amount of damages.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** Unknown
Key Legal issues: • Unreasonable restraint of trade	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to the JFTC recommendation decision (1974 (Kan) No.6 and 7) dated 22 February 1974	

Brief summary of facts

Twelve primary oil distributors engaged in the petroleum products distribution business concluded agreements regarding wholesale price increases for petroleum products, including kerosene, five times.

On 22 February 1974, the JFTC recommended that the conduct of the 12 primary oil distributors constituted unreasonable restraint of trade with the acceptance of each company.

The claimants who purchased kerosene filed a lawsuit, claiming compensation for damages under Article 25 of the Antimonopoly Act and alleging that the purchase price of kerosene had been formed by the conclusion and implementation of the price increase agreements. Further, the claimants suffered damages in the amount of the difference between the purchase price and the price at which the claimants could have purchased had it not been for the defendants' conduct.

On 17 July 1981, the Tokyo High Court dismissed the claimants' claim.

The claimant filed a final appeal, but the Supreme Court dismissed the final appeal on 2 July 1987.

Brief summary of judgment

The Tokyo High Court found that the defendants agreed not only to cooperate with administrative guidance but also avoid free competition among the companies and increase the wholesale price for petroleum products by the price increase rate at the time as prescribed in the price increase agreements, and implemented these agreements, which constituted unreasonable restraint of trade. The court, however, dismissed the claimants' claim on the grounds that it was unable to know whether or not the purchasers suffered damages due to the agreement and its implementation, and if so, how much the amount was.

The Supreme Court supported the original court and dismissed the final appeal on the grounds that the JFTC's decision could not be construed to bind the court on the existence of any violation for a lawsuit claiming compensation for damages under the provision of Article 25 of the Antimonopoly Act. In order for a final consumer to claim damages from a primary oil distributor on the grounds that the customer had suffered damage, it is necessary that there is a relation in which an increase in the primary wholesale price under the price agreement resulted in an increase in the actual retail price at the final stage of consumption through transferring the increase to the wholesale price, and that a retail price lower than the actual retail price would have been formed if the price agreement was not implemented; moreover, the consumer who was a victim had burden to argue and prove such facts.

Country: Japan	
Case Name and Number: In 1968 (Gyo-Tsu) No. 3	
Date of judgment: 16 November 1972	
Economic activity (NACE Code): G47.2—Retail sale of food, beverages and tobacco in specialised stores	
Court: 1st Petty Bench (Supreme Court)	**Was pass on raised (yes/no)?** No
Claimants: Ebisu Food Business Association	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: The JFTC	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The Tokyo High Court dismissed the claimant's claim on the grounds that a lawsuit against an administrative agency of the government as a defendant was illegal. The Supreme Court supported the original court and dismissed the final appeal.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Was the Judgment appealed? Is this appeal still pending? No	**Amount of damages initially requested:** JPY 2,460,000 (US$ 6,833) and interest
Key Legal issues: • Unreasonable restraint of trade • Unfair trade practices	**Is the dispute likely to be settled privately?** Unknown
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Akira Inoue, Partner, Baker & McKenzie Akira.Inoue@bakermckenzie.com; Yu Okamura, Senior Associate, Baker & McKenzie Yu.Okamura@bakermckenzie.com

Follow-on (EC or NCA?) or stand-alone?	
Stand-alone	

Brief summary of facts

Article 45(1) of the Antimonopoly Act provides that whenever any person believes that there is a violation of the provisions of the Act, that person may report the violation to the JFTC and ask that appropriate measures be taken. The claimant Ebisu Food Business Association filed a lawsuit claiming compensation for damages under Article 25 of the Antimonopoly Act, alleging that the defendant JFTC intentionally neglected the claimant's report for damages caused by violations of Antimonopoly Act and failed to take elimination measures under the Act, thereby causing the claimant to suffer damages.

On 15 October 1967, the Tokyo High Court dismissed the claimant's claim.

The claimant filed a final appeal, but the Supreme Court dismissed the final appeal on 16 November 1972.

Brief summary of judgment

The Tokyo High Court dismissed the claimant's claim on the grounds that a lawsuit against an administrative agency of the government as a defendant was illegal.

The Supreme Court supported the original court and held that Articles 25 and 26 of the Antimonopoly Act were only incidental provisions meant to enhance the deterrent effect on violations of the act, in combination with the elimination measures ordered in the JFTC's hearing by making it easier to compensate for damages suffered by individual victims, and that as a means for persons whose legal rights had been harmed by illegal conducts to seek relief, they may claim compensation for damages, regardless of the existence of the decision, as long as the conduct was tort under the Civil Code.

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Private antitrust enforcement in South Korea has not been very vigorous compared to other jurisdictions. This is because Korean antitrust enforcement has largely relied on the initiative of the Korea Fair Trade Commission ("**KFTC**"), which has served as the primary enforcer of Korean antitrust law including the Monopoly Regulation and Fair Trade Act ("**MRFTA**"), the basic Korean antitrust statute. With its legislative intent of promoting private as well as public antitrust enforcement, the MRFTA currently provides for a lesser burden of proof in a damages action arising from a violation of the MRFTA. In practice, however, this provision has yet to be fully adopted by Korean courts because there have been relatively few antitrust damages actions in Korea, whether initiated in the aftermath of relevant KFTC proceedings or otherwise, and because antitrust damages actions essentially remain "civil" in nature.

Under Korean civil law, neither punitive damages nor a class action is generally available. However, this long-standing characteristic of the Korean legal regime has been undergoing major changes, particularly in the antitrust sphere. For instance, a quasi-treble damages provision was introduced with the 2011 amendment of the Korean subcontracting statute,[1] which is also enforced by the KFTC.[2] A similar treble damages-like provision was added to the MRFTA in September 2018 and became effective in September 2019. Incidentally, among the proposed amendments is a provision for injunctive relief to be available to a private party against an unfair trade practice. Also in serious discussion is the proposed introduction of a class action procedure for antitrust damages claims. All these developments bode well for invigorated private antitrust litigation in Korea.

1. Jurisdiction

Because the MRFTA does not address jurisdiction over private antitrust litigation including damages actions, the Civil Procedure Act applies. Under the latter statute, a claimant alleging an antitrust injury may bring an action before the district court that has jurisdiction over (i) the defendant's domicile or (ii) the locus of the defendant's conduct at issue

1 Article 35 (2) of the Fair Transactions in Subcontract Ac provides that "If a person is injured or incurs loss as a result of conduct by a principal contractor in violation of Article 4, 8 (1), 10, 11 (1) or (2), or 12-3 (3) of this Act, the principal contractor shall be liable for the injury or loss to the extent not exceeding three times the injury or loss; provided that the foregoing provision shall not apply where the principal contractor proves the absence of intention or negligence regarding the injury or loss." In other words, the amount of damages is not automatically trebled but simply may be increased up to three times the actual damages.

2 However, a damages claim in Korea can be decided only by a Korean court, rather than the KFTC, which may only issue administrative sanctions.

(Articles 2 through 6 and 18 of the Civil Procedure Act).[3] Korean law does not provide for a court with specific jurisdiction to hear competition law cases.

2. Relevant legislation and legal grounds

To be valid, an antitrust damages claim must be based on one of the two provisions below:

i. Article 56 of the MRFTA (antitrust provision):

"Where a person suffers harm due to any violation of this Act by a business entity or trade association, the business entity or trade association is liable for the ensuing damages; provided that the foregoing shall not apply where the business entity or trade association proves the absence of intention or negligence regarding the violation."

ii. Article 750 of the Civil Code (tort provision):

"Any person who causes loss to or inflicts injury on another by unlawful conduct, whether intentionally or negligently, shall be held liable for the ensuing damages."

These two provisions serve as elective jurisdictional grounds for private antitrust litigation including damages actions. Before its 2004 amendment, the MRFTA contained a provision explicitly stating that a claim based on the MRFTA did not preclude an identical claim under the Civil Code. Even though that provision was repealed through the 2004 amendment, it has been consistently recognised that a claimant alleging an antitrust injury may rely on either Article 56 of the MRFTA or Article 750 of the Civil Code as the jurisdictional grounds for the antitrust claim at issue.

From a claimant's perspective, Article 56 of the MRFTA is more advantageous since, unlike Article 750 of the Civil Code, it shifts to the defendant the burden of proof for the absence of the defendant's wilfulness or negligence. However, there is one important caveat: under Article 56 of the MRFTA, a claimant may file a damages action only against a business entity or trade association. In contrast, Article 750 of the Civil Code allows for the filing of a damages action against individuals as well as business entities.

Irrespective of the choice of jurisdictional grounds, a claimant may initiate a private antitrust action in Korea even before the commencement of any KFTC proceedings against any defendant in the private action. Such "stand-alone" action, however, rarely takes place due to the difficulty in satisfying the burden of proof, particularly for the very first element of any private antitrust action: the presence of an antitrust violation by the defendant(s).

3. What types of anti-competitive conduct are damages actions available for?

In Korea, any antitrust violation may serve as the substantive grounds for an antitrust damages action. Thus, such an action may allege a violation ranging anywhere from cartel activity (Article 19 of the MRFTA) and abuse of dominance (Article 3-2 of the MRFTA) to unfair trade practice (Article 23 of the MRFTA), improperly benefitting a specially related

3 The *locus* could be any of the following: the place of decision; the place of implementation, and the place of effect.

party (Article 23-2 of the MRFTA), retaliatory measure (Article 23-3 of the MRFTA) and resale price maintenance (Article 29 of the MRFTA).

4. What forms of relief may a private claimant seek?

Until recently, the only relief available was compensatory damages with the notable exception of up to three times the actual damages for certain violations of the Korean subcontracting statute. On 19 September 2019, however, the following treble damages-like provision of the MRFTA (in other words, no automatic trebling of the actual damages amount but the maximum amount could be up to three times the actual damages) went into effect:

Article 56 (3): *"Notwithstanding paragraph (1), where a person sustains loss because of conduct by a business entity or an organization of business entities in violation of Article 19 (prohibition of cartel activity), Article 23-3 (prohibition of retaliatory measure) or Article 26(1)(i) (prohibition of unfair restraint on competition by an organization of business entities), the business entity or the organization is liable to the extent not exceeding three times the damages; provided that the foregoing shall not apply where the business entity or the organization proves the absence of intention or negligence regarding the violation."*

On the other hand, it is as yet unclear whether a provision for injunctive relief will be introduced into the MRFTA. Under an amendment proposed by the KFTC on August 27, 2018, a party injured by an unfair trade practice will have the right to seek to enjoin the conduct at issue even without first filing a complaint with the KFTC or waiting the KFTC's decision on the matter. This bill has been re-introduced and will likely pass sometime during the current National Assembly's term, which ends in May 2024.

5. Burden of proof/Passing-on defence

Any party injured by a violation of the MRFTA—whether a direct or indirect customer, a competitor, a supplier, or otherwise—is entitled to damages if the party proves (i) the violation of the MRFTA, *i.e.* the anti-competitive conduct; (ii) the presence and extent of injury, *i.e.* the damages; and (iii) causation between the anti-competitive conduct and the injury. Here, causation must be direct; hence, the claimant must prove that the injury at issue was caused, in its entirety, by the anti-competitive conduct at issue. As for the extent of injury, where it is practically impossible to determine the damages even though the claimant has satisfied the other two elements, the court may at its discretion award a reasonable amount of damages based on the available evidence (Article 57 of the MRFTA). In this regard, the Korean Supreme Court, while not explicitly recognizing the passing-on defence in principle, held that costs passed on to the claimant's customers after a price increase resulting from the defendant's cartel activity may be considered in limiting the damages awarded to the claimant.[4]

With respect to the burden of proof, the Korean Supreme Court held that even where the KFTC's corrective measure against a violation was judicially affirmed, the facts ascertained by the KFTC with respect to the violation are not binding in a damages action but may

4 Supreme Court Case No. 2010Da93790, decided November 29, 2012

simply constitute strong evidence of the violation. Thus, they have the effect of being deemed to be presumptive facts.[5]

Once the claimant satisfies the requisite burden of proof in a private action jurisdictionally based on antitrust grounds, the defendant is liable for the damages unless it proves that the violation at issue was neither intentional nor negligent (Article 56 (1) of the MRFTA).[6] In contrast, if the claimant initiates a damages action on tort grounds (Article 750 of the Civil Code), it must also affirmatively prove the defendant's intention or negligence.

6. Pre-trial discovery and disclosure, treatment of confidential information

Under Korean civil procedure, there is no U.S. style pre-trial discovery. Whereas discovery is allowed to a limited extent (through a document production order as explained below), depositions are prohibited. The burden of proof falls on the parties, none of whom have a general disclosure obligation. If a party seeks a document possessed by the opposing party or a third party, it may request a court order for document production pursuant to Articles 344 through 350 of the Civil Procedure Act.

However, as noted above, the facts ascertained by the KFTC are deemed to be presumptive facts in a private action. Therefore, the claimant in a private action can more easily satisfy the requisite burden of proof by citing the facts ascertained by the KFTC in its investigation and decision. Furthermore, in a damages action on antitrust grounds (Article 56 (1) of the MRFTA), the court may compel the KFTC to provide the record of the relevant case, including interview reports, expert witness reports, the stenographic record, and any other evidence (Article 56-2 of the MRFTA). On the other hand, under the amended Article 52-2(2), which will go into effect on May 20, 2021, the KFTC may refuse to provide such documents to damages claimants and third parties on grounds of Article 22-2(3), which prohibit the KFTC from disclosing information concerning a leniency application unless (i) the leniency applicant consented to disclosure, or (ii) disclosure is required for purposes of bringing a related lawsuit or carrying out related official duties.

Documents presented by the parties during the court proceedings are not available to the general public. In addition, confidential information contained in a court submission may be protected through redaction when a third-party requests access to litigation record, subject to the court's review and ruling (Article 163 of the Civil Procedure Act). The court may also decide to examine certain evidence "*in-camera*" since a court hearing in Korea is generally open to the public (Article 347(4) of the Civil Procedure Act). Such decision, however, is seldom made. However, once any information, including business secrets, is submitted to the court, the opposing party may access it. On the other hand, a party may refuse to submit certain information to the court on grounds that it constitutes business secrets (Article 344(1)(3) and Article 315(1)(2) of Civil Procedure Act).

5 Korean Supreme Court Civil Case No. 89Daka29075, decided April 10, 1990

6 However, there is no known instance in which this defence succeeded.

7. Limitation Periods

The MRFTA itself does not provide for the statute of limitations period governing private damages claims. Since the liability for damages under the MRFTA is categorized as tortious liability, Article 766 of the Civil Code is applicable.[7] Under that provision, the limitation period is three years from the date on which the injured party became aware of or should reasonably have become aware of (i) the injury and (ii) the identity of the infringer.

Specifically addressing private antitrust damages actions, the Korean Supreme Court held that even where an injured party becomes aware of a corrective order issued by the KFTC, the three-year limitation period does not begin to run until the order is confirmed by a final judgment issued by an intermediate appellate court, *i.e.*, the Seoul High Court.[8] However, if at least ten years have passed from the date of the violation, a damages action based on the violation is time-barred regardless of whether the three-year limitation period has passed.

8. Appeal

An appeal from a district court decision is heard by a high court unless the district court proceedings were before a single judge, in which case the ensuing appeal is heard by an appellate panel of the district court (Article 28 of the Court Organization Act). The proceedings of an intermediate appeal are similar to trial proceedings, and the parties are granted opportunities to raise new allegations and to produce new evidence. An intermediate appellate decision may be appealed to the Korean Supreme Court, the court of last resort (Article 14 of the Court Organization Act), which only decides issues of law and does not engage in any fact-finding (Article 432 of the Civil Procedure Act).

9. Class actions and collective representation

At present, a class action is not available for claimants alleging antitrust injury. Claimants with claims based on essentially the same factual and legal grounds can however jointly file actions in the form of a joinder of named claimants. Under this joinder procedure, such claimants may select one or more among them as their representatives (Article 53 of the Civil Procedure Act). Once this option is exercised, any judgment issued to the representative claimants are also binding with respect to the claimants who exercised the option.

7 Article 766 of the Civil Code: (1) The right to claim damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing on the date when the injured party or his/her legal representative becomes aware of the injury and of the identity of the person who caused the injury. (2) The provision of paragraph (1) shall also apply if 10 years have elapsed from the time that the unlawful act took place.

8 Korean Supreme Court Civil Case No. 2013Da215843, decided September 4, 2014

10. Key issues

Calculation of damages

Assessing the harm suffered by the victims of an MRFTA infringement is always a complex task in light of the Korean Supreme Court's adoption of the "difference-between-two-prices" theory. That is to say, the total amount of damages due to an illegal action is the difference between (i) the hypothetical financial status the victims would have been in but for the illegal conduct and (ii) their actual financial status after the illegal conduct. For example, in case of collusion, the difference between the but-for price (*i.e.* the hypothetical price but for the collusion) and the actual price (the price resulting from the collusion) is the amount of damages due to the collusion. The parties or the court usually appoints an economic expert to conduct analysis under various economic models and to calculate the but-for price.

Methodology for the selection of cases

The attached data base includes the most relevant and notable Korean Supreme Court cases with respect to antitrust damages actions in Korea.

Country: Korea	
Case Name and Number: Case No. 2012Da79446 (decided 15 February 2013), Digito.Com Inc. v. Microsoft Corporation & Microsoft Korea LLC	
Date of judgment: 15 February 2013	
Economic activity (NACE Code): C.26.2—Manufacture of computers and peripheral equipment	
Court: The Supreme Court of Korea	**Was pass on raised (yes/no)?** No
Claimants: Digito.Com Inc.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Microsoft Corporation & Microsoft Korea LLC	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the court found that the claimant failed to prove the causation requirement.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No, the Supreme Court rendered a final judgment for the defendants.	**Amount of damages initially requested:** N/A
Key Legal issues: • Burden of proof for causation between illegal conduct and damages	**Is the dispute likely to be settled privately?** No
Direct or indirect claims? Direct	**Method of calculation of damages:** Not applicable as the claimant failed to prove the causation requirement.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Cecil Chung, Partner, Yulchon cschung@yulchon.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) KFTC Case No. 2006-042, decided 24 February 2006; KFTC Case No. 2006-027, re-decided 16 June 2006	

Brief summary of facts

In 2000, the defendants started selling a PC operating system with embedded instant messaging software. In 2006, KFTC found that the conduct constituted illegal tying, and it imposed an administrative fine of KRW 27.23 billion (approx. US$ 22 million) on Microsoft Corporation and KRW 5.26 billion (approx. US$ 4.3 million) on Microsoft Korea LLC. The claimant provided an online messaging service in 1998 but went bankrupt in 2002. The claimant argued in a damages action that its bankruptcy was caused by the defendants' tying practice. The claimant sought damages of KRW 30 billion (approx. US$ 24.46 million), its enterprise value.

Brief summary of judgment

The claimant failed to carry its burden of proof for causation between damages and illegal conduct. The court found that the KFTC only acknowledged the defendants' conduct, and that the KFTC decision did not prove causation in the damages action.

Country: Korea	
Case Name and Number: Case No. 2014Da81511 (decided 24 November 2016), anonymous claimant v. SK Energy Co., Ltd. and et al	
Date of judgment: 24 November 2016	
Economic activity (NACE Code): D.35.2—Manufacture of gas; distribution of gaseous fuels through mains	
Court: The Supreme Court of Korea	**Was pass on raised (yes/no)?** No
Claimants: Multiple individuals including cargo truck drivers and other diesel oil consumers	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: SK Energy Co., Ltd. and three other Korean oil companies	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No—The case was remanded to the Seoul High Court, with an order to award a reasonable amount of damages based on the Supreme Court's ruling.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending; the Supreme Court remanded the case to the intermediate appellate court, with an order to award a reasonable amount of damages.	**Amount of damages initially requested:** N/A
Key Legal issues: • Application of Article 57 of the MRFTA	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** "Reasonable amount in the court's view on the available evidence" method because the precise damages amount cannot be calculated due to loss of relevant information.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Cecil Chung, Partner, Yulchon cschung@yulchon.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) KFTC Case No. 2007-232, decided 11 April 11 2007.	

Brief summary of facts

Four oil companies colluded to maintain a high price for diesel oil from April 2004 through June 2004. The KFTC found that whereas the price of crude oil rose by about KRW 20 (less than US$ 2) per liter during the collusion period, the price of diesel oil rose by KRW 60 per liter, and imposed a corrective order and an administrative fine of KRW 52.6 billion (approx. US$ 42 million). The claimants needed to substantiate (i) the quantity of diesel oil purchased by each plaintiff during the collusion period and (ii) the artificially elevated price for diesel oil during the collusion period. To substantiate the purchase quantity, the claimants (i) calculated the amount of average daily payment for diesel oil for each plaintiff using payment data for the first half of 2004, (ii) multiplied the amount of average daily payment for each plaintiff by the number of days in the collusion period, and (iii) divided the result of (ii) by the average diesel oil price during the collusion period.

Brief summary of judgment

The claimants, mostly truck drivers, proved their injury arising from the artificially elevated retail price for diesel oil produced by the oil companies. However, since documents evidencing the claimants purchase quantity had already been discarded by the time the trial began, it was practically impossible for the claimants to determine the amount of damages. Under the circumstances, the claimants were entitled to a reasonable amount of damages based on the available evidence.

The lower court, *i.e.* the Seoul High Court, initially found that (i) the claimants had failed to specify their oil purchase dates, their oil suppliers, and the type of oil supplied to them, and (ii) it was impossible to determine the excess price in this case. The Supreme Court, however, found that the claimants had purchased at least some of their diesel oil from the defendants. Because the purchase details could not be documented due to the passage of time, the Supreme Court found, justice required that the claimants be allowed to prove their damages in a more flexible manner.

MEXICO

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Private antitrust litigation is still in an early stage of development in Mexico. Based on the concept of civil liability, private antitrust litigation is regulated under the Federal Civil Code ("**FCC**") and the Federal Code of Civil Procedures ("**FCCP**"). As of today, only two claims have been filed in Federal Courts. However, recent developments may enhance this practice: (i) the 2012 reform to civil legislation (FCC and FCCP) introduced and regulated class actions, and (ii) the issuance in 2014 of a new Federal Law on Economic Competition included, for the first time, provisions related to the claim of damages arising from anti-competitive conducts.

1. Jurisdiction

In 2013, the Federal Government decided to conduct a full revision of the constitutional, legal and institutional framework of the Mexican antitrust system. A completely new antitrust legal and regulatory framework was developed in 2014, and the following pieces of legislation entered into force:

- amendments to Article 28 of the Federal Political Constitution of the United Mexican States ("**Mexican Constitution**") regarding monopolies and monopolistic practices, which, among others, ordered the creation of two new constitutionally autonomous regulatory and enforcing agencies: (i) the Federal Economic Competition Commission ("**COFECE**") for all antitrust issues, except for telecommunications and broadcasting, and (ii) the Federal Institute of Telecommunications ("**IFT**") for all issues relating to telecommunications and broadcasting in Mexico (the "**Antitrust Agencies**");
- the issuance of the new Federal Law on Economic Competition ("**FLEC**");
- the issuance of a new Federal Law on Telecommunications and Broadcasting;
- the issuance of new sets of Regulatory Provisions of the FLEC and non-binding explanatory guidelines; and
- amendments to Article 94 of the Mexican Constitution, ordering the creation Circuit Collegiate Tribunals and District Courts specialised in Economic Competition, Broadcasting Services and Telecommunications matters were create (together, the "**Specialized Federal Courts**").

As a result of the amendments to Article 94 of the Mexican Constitution, the Board of the Federal Judicial Council issued a decree which led to the creation of two Circuit Collegiate Tribunals (constitutional amparo trial court) and two District Courts (first instance), with exclusive authority to receive and resolve the claims on Economic Competition, Broadcasting Services and Telecommunications, including jurisdiction over amparo claims

(*i.e.* constitutional appeals) versus the Antitrust Agencies resolutions. In 2018, the Board of the Federal Judicial Council also issued a decree creating two Circuit Unitary Tribunals in Civil, Administrative and Specialized in Economic Competition, Telecommunications and Broadcasting (second instance) with exclusive jurisdiction on hear and resolve appeals to the resolutions issued by the District Courts on **private parties claims for damages**.

Under Mexican legislation, civil actions for damages arising from anti-competitive conducts can only be filed after a resolution by an Antitrust Agency finding liability has been issued and such resolution has been declared final and conclusive.

2. Relevant legislation and legal grounds

As previously mentioned, the concept of damages in Mexico is based on civil liability principles. According to the FCC, individuals and undertakings are entitled to pursue direct damages actions based on contractual and non-contractual liability.

Article 134 of the FLEC confirms forth the possibility of private parties looking redress for the damages they suffered as a result of the anti-competitive conducts committed by third parties:

"Individuals that may have suffered damages or losses deriving from a monopolistic practice or an illicit concentration have the right to file judicial actions in defence of their rights before the specialised courts in matters of economic competition, broadcasting and telecommunications, once the Commission's resolution is final and conclusive.

The statute of limitations for lodging damages claims shall be stayed by the decision to initiate an investigation.

The Economic Agent's illegal actions shall be proven with the final resolution issued under the trial-like procedure, for the effects of lodging damages claims."

3. What types of anti-competitive conduct are damages actions available for?

Article 134 of the FLEC sets forth that damages actions are available for those who have suffered damages as a result of either a monopolistic practice or an illicit concentration.

The FLEC differentiates between two different kinds of monopolistic practices:

- absolute Monopolistic Practices (similar to the "*per se*" conducts or hardcore cartel practices); and
- relative Monopolistic Practices (conducts to be evaluated under a "rule of reason analysis").

Absolute monopolistic practices consist of contracts, agreements, arrangements or combinations amongst competing Economic Agents, which have as their purpose or effect any of the following: fixing prices, market allocation, output restrictions, bid-rigging and exchanging of information with the purpose or effect of any of the previously mentioned conducts.

Relative monopolistic practices are defined by the FLEC as those acts, contracts, agreements or combinations, carried on by one or more economic agents, that severally or jointly have substantial market power in the market affected by the relative monopolistic and which aim or effect is to (i) substantially impede the access, or (ii) to establish exclusive advantages in favour of one or several economic agents, improperly impeding or displacing, in this way, other economic agents in such a market. In Mexico, relative monopolistic practices relate almost exclusively to vertical restraints.

The illicit concentrations are those concentrations that did not request or received prior authorisation from the FECC and that have the purpose or the effect of obstructing, diminishing, harming or impeding free market access and economic competition.

4. What forms of relief may a private claimant seek?

The FCC sets forth that those who were harmed or injured because of the illicit acts of another, the perpetrator is obliged to repair it, unless it proves that the damage occurred as a result of guilt or inexcusable negligence of the victim.

The prior finding of infringement by the Antitrust Authorities is a condition precedent for bringing a damages action.

Therefore, damages actions in Mexico are only intended to repair the direct damage caused by the anti-competitive conduct. Additionally, in case of contractual relationships, claimants may also seek to declare the contract or specific clauses of a determined contract null and void directly in courts without the necessity of having to wait for the resolution of the Antitrust Agencies.

Damages actions on antitrust issues can be pursued either as private actions or as class actions (described below). A private claimant seeking damages may rely on the Antitrust Authorities' finding of infringement to establish the defendant's liability but must prove beyond reasonable doubt that a causal link exists between the infringement and the loss suffered, as well as the extent of the loss itself, as general rule the burden of proof rests on the claimant.

Moreover, any evidence relevant to proving loss is admissible, such as accounts showing a decrease in income. However, losses resulting from infringements of competition law are often very difficult to quantify. Specialized Federal Courts are entitled to ask the Antitrust Authorities for an opinion to estimate the loss caused by the infringement. However, the Specialized Federal Courts are not obliged to ask for the estimate nor are they bound to accept it if provided by the Antitrust Authorities.

However, some of the latest court-issued criteria in Mexico contemplate a new form of interpretation of the concept of damages: "punitive damages", under which it has been considered that the compensation to the victim is not only intended to repair the direct damage suffered in its assets, property, feelings, emotions, beliefs, honour, reputation, private life, physical appearance, or the consideration that others have of the victim, but also to punish the misconduct or neglect of duty of care which the liable person has incurred.

In other words, the Mexican Courts set also that the defendant should not only be ordered to compensate the actual damage caused to the claimant but shall also be punished for his carelessness when he has a duty of care.

5. Burden of proof/Passing-on defence

Under Mexican legislation, the defendant will be considered liable only in relation to those damages that are the immediate and direct consequence of its anticompetitive conduct. Thus, it might be raised since the claimant can only be indemnified for the damage that he or she actually suffered.

Therefore, "passing-on" defence looks reasonable in relation to civil and competition law, given that if the FCC establishes for there to be an indemnity, there shall be a direct damage if the claimant "passed-on" that damage to its own purchasers, the claimant did not suffer any damage. As a result, there is no causation between the anti-competitive practice and the damage claimed and the claimant should not be entitled to an indemnity from the defendant. Consequently, the "passing-on defence" has not yet been formally recognised in Mexico.

6. Pre-trial discovery and disclosure, treatment of confidential information

In Mexico, there is very limited access to information since there are no rules or rights to carry out a pre-trial discovery; the only sources of information available are the non-confidential documents of the administrative proceeding before the Antitrust Agencies.

However, there are two exceptions to this rule: (i) once the damages proceeding has begun, the Specialized Federal Courts may issue an order requesting either the respective Antitrust Agency or the defendant to disclose certain information; and/or, (ii) if there is a substantial risk that the other party might destroy or modify a document that is relevant to be used as evidence, the Specialized Federal Courts may order the defendant to provide all relevant evidence or to produce any piece of documentation.

All confidential information given by/obtained from the investigated agents during the investigation carried on by the Antitrust Authorities will be kept as confidential. The Court will only disclose the information that is strictly necessary for bringing the claim or establishing the damage.

7. Limitation Periods

The statute limitation period for bringing a civil action (the individual actions) for damages is two years from the date on which the damage was caused. But as established by Article 134 of the FLEC, the statute of limitations could be suspended by the decision to initiate an investigation.

In class actions, the limitation period is three and a half years from the date on which the damage was caused (Article 584 of the FCCP).

8. Appeal

COFECE decisions may only be challenged by way of a constitutional bi-instance trial (*amparo indirecto*).

Resolutions of District Courts (first instance), which would rule on any action for damages, can be challenged or appealed before the Unitary Tribunals (second instance). The resolution rendered in the appeal may in turn be challenged through a constitutional single instance trial (*amparo directo*) before a Circuit Collegiate Tribunal, on grounds that fundamental rights of the parties have been breached.

9. Class actions and collective representation

The procedure, requirements and formalities of class actions are regulated in the Federal Code of Civil Procedures; the three different types of class actions that the FCCP considers are the following:

- diffuse actions: Restitution of things to the state where they were prior to the affectation or the substitute compliance in their case to be determined by the judge.
- collectively in the strict sense actions: the repair of the damage caused by the conduct of an action or refrain from doing so, as well as to cover the damage for each of those affected.
- individual actions: they are individuals grouped based on common circumstances, whose objective is the judicial claim of a third party of the forced fulfilment of a contract or its termination with its consequences and effects, but they have the same interest as the collectivity.

In order to start and certify a class action, the following requirements shall be met:

- acts that harm consumers or users of public or private goods or services or the environment or acts that have harmed the consumer due to the existence of illicit concentrations or monopolistic practices declared a final resolution issued by the Antitrust Agencies.
- that there are at least 30 members in the collectivity to be considered a class action and it would be up to them to demonstrate the actual damages and losses originated by the defendant.
- reasonable doubt that a causal link exists between the infringement and the loss suffered.
- that the damages suffered have not yet been analysed in previous processes.

Note: As of 2020, a few class actions have been started in Mexico and only one of them was related to cartel infringements in the health market in the State of Jalisco (started in 2019). This is why there are no legal precedents available to fully understand how private antitrust litigation will develop in this regard and what the criteria will be applied by the judiciary to quantify the damages.

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Due to its efficient and reliable judiciary, the Netherlands is an attractive jurisdiction for private antitrust litigation and damages actions. Dutch procedural law is characterised by pragmatism and cost-effectiveness. Courts fees are low, and judgments are automatically enforceable in all EU Member States.

In the Netherlands, private antitrust litigation is mainly based on (i) general rules of tort liability set out in the Dutch Civil Code (*Burgerlijk Wetboek*, "**DCC**"), (ii) the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, "**DCCP**"), (iii) competition law provisions set out in the Dutch Competition Act (*Mededingingswet*, "**DCA**"), (iv) competition law provisions set out in the Treaty on the Functioning of the European Union ("**TFEU**"), (v) in the various other EU legislative acts adopted on the basis of the TFEU, and (vi) in the EU soft law tools regarding private enforcement.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("**Damages Directive**") was implemented into Dutch law by means of a new act (Implementing Act Directive Private Enforcement of Competition law of 25 January 2017, Bulletin of Acts and Decrees (*Staatsblad*) 2017, 28, "**Implementing Act**"). The Implementing Act introduced a number of new provisions in the DCC and the DCCP. Thus far, substantive and procedural changes in Dutch law has had a relatively limited impact because many provisions of the Damages Directive are largely in line with the principles of liability and compensation applicable under Dutch law.

1. Jurisdiction

In the Netherlands, the Consumer & Market Authority (*Autoriteit Consument & Markt*, "**ACM**") is responsible for the public enforcement of competition law. Article 2 of the DCA assigns responsibility for the implementation and enforcement of the DCA to the ACM.

The ACM enforces the prohibition on restrictive agreements and the abuse of a dominant position. The ACM is also tasked with the merger control review. The ACM's duties include (i) processing complaints about alleged violations of the DCA (or the corresponding provisions of the TFEU), (ii) monitoring compliance with the DCA, (iii) detecting and investigating the possible formation of cartels and abuses of dominant positions, (iv) assessing proposed concentrations, and (v) terminating as well as imposing administrative sanctions for violations. The ACM however has no jurisdiction in relation to the private enforcement of competition law and cannot grant civil damages for violations of competition law.

Antitrust damages claims must be brought before the Dutch civil courts. The jurisdiction of the Dutch civil courts is mainly governed by the DCCP and Regulation (EU) No. 1215/2012

("**Brussel I recast**"). In general, Dutch civil courts accept jurisdiction to hear antitrust damages cases:

1) if the claims are brought against legal or natural persons domiciled in the Netherlands (Article 4 Brussel I recast; and Article 2 Brussel I (old) for proceedings initiated before 10 January 2015);

2) if a claim is sufficiently closely connected with another claim that is submitted against a defendant that is domiciled in the Netherlands ('anchor defendant') (Article 8(1) Brussel I recast); or

3) if the harmful event resulting of the unlawful conduct occurred, or may occur, in the Netherlands. This may be the case, for example, if the practice has been active in, or focused on, the Netherlands (Article 6(e) of the DCCP or Article 5(3) of Brussels I (old)). Infringements of national competition law only are not governed by the new statutory provisions of the Implementing Act yet but are expected to be included in the scope of the Implementing Act at a later stage.

Damages claims can be brought before the Dutch civil courts following a decision of a competition authority establishing an infringement of competition law (follow-on actions) or, irrespective of a public enforcement procedure or decision, based on an alleged infringement of competition law to be determined by the civil court (stand-alone actions). In civil proceedings where a party pursuant to Article 6:193k(a) DCC claims damages for an infringement of competition law, Article 161a DCCP provides that an irrevocable ACM decision establishing that infringement of competition law will form irrefutable evidence.

2. Relevant legislation and legal grounds

The legal framework for antitrust damages claims is comprised of provisions of the DCC, the DCCP, specific provisions of the DCA and the TFEU. Antitrust damages claims are generally based on tortious liability (Article 6:162 DCC): the claimant must demonstrate that (i) the defendant committed a wrongful act, (ii) the wrongful act committed is imputable to the defendant, (iii) the claimant suffered damage, and (iv) there is a causal link between the wrongful act committed and the damage suffered.

The Implementing Act created a new section in Title 3 of Book 6 of DCC establishing a specific (but non-exclusive) statutory basis for damages actions arising out of infringements of EU competition law (Articles 6:193k through 6:193t). With a few exceptions in accordance with the Damages Directive, Article 6:193m DCC provides a statutory basis for joint and several liability for undertakings involved in the EU competition law infringement.

3. What types of anti-competitive conduct are damages actions available for?

Under Dutch law, damages may be claimed for damage suffered as a result of all types of anti-competitive agreements, concerted practices or unilateral conduct, including abuse of a dominant position, provided that the claimant can demonstrate that the conditions of Article 6:162 (wrongful act) are met. An infringement of Article 101 TFEU (prohibition on anti-competitive agreements and cartels) and/or Article 102 TFEU (prohibition on the

abuse of a dominant position) constitutes a violation of an obligation imposed by law and is therefore a wrongful act.

4. What forms of relief may a private claimant seek?

Article 6:193l DCC creates the legal presumption that an antitrust infringement causes damages. The starting point under Dutch law is full compensation for damage suffered as a result of the wrongful act or negligence by another party. In this sense, Dutch private competition enforcement is fully in line with the Damages Directive which aims at achieving full compensation. A claimant may claim actual loss, loss of profits, reasonable costs incurred by the claimant to prevent or reduce the damage suffered and the statutory interest over the amount of damages claimed (Article 6:99 DCC).

Compensation may not lead to overcompensation, whether punitive, multiple or any other form of compensation. Furthermore, any profits gained by the claimant as a result of the wrongful act will be reasonably deducted from any compensation.

5. Burden of proof/Passing-on defence

Pursuant to Article 6:193p DCC, defendants have a right to invoke a passing-on defence, arguing that a claimant has not suffered any damages because it passed the price increase on within the supply chain. Defendants asserting the passing-on defence carry the burden of proof.

In a 2016 ruling, the Dutch Supreme Court confirmed that passing-on is a valid defence under Dutch law.[1] On the other hand, Dutch case law shows that Dutch courts are willing to reject a passing-on defence if it can be shown (i) that the claimant's end-user base is generally widespread, (ii) that the claims of these individual end-users are relatively minor, and (iii) that for reasons of evidentiary complexity and procedural cost effectiveness these individual end-users are unlikely to file civil damages claims proceedings of their own.

That same Dutch case law confirms that, in the event that a passing-on defence is rejected by the court and individual end-users subsequently file a civil damages claim of their own against the defendant, the defendant always retains the possibility to implead the previously successful claimant for compensation already paid to that claimant in as far as that compensation covers the new claims of the individual end-users.[2] A successful impleader would result in the defendant being able to deduct the end-consumers' damages from what the defendant previously owed to the successful claimant.

6. Pre-trial discovery and disclosure, treatment of confidential information

In the Netherlands, there is no extensive pre-trial discovery system. Parties can, however, request the disclosure of information judicially and extra-judicially. The extra judicial method

1 Dutch Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (*TenneT/ABB*).

2 District Court of Gelderland, 29 March 2017, ECLI:NL:RBGEL:2017:1724 (*Tennet/ABB*) and District Court of Gelderland, 10 June 2015, ECLI:NL:RBGEL:2015:3713 (*Tennet/Alstom*).

for obtaining disclosure of documents is for the claimant to request the competition authority ACM to disclose certain documents pursuant to the Government Information Act (*Wet Openbaarheid Bestuur*, "**GIA**"). On the basis of the GIA, any member of the public may request disclosure of information contained in files of public authorities. Although the ACM is not required to disclose any documents obtained by it within the framework of its investigation, the files of the ACM itself do fall within the scope of the GIA.

However, articles 10 and 11 of the GIA provide several exceptions, *inter alia* for business secrets, on the basis of which the ACM can deny certain requests for the disclosure of information. In addition, the Rotterdam District Court ruled in a 2015 decision that, with the exception of certain circumstances, Article 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets ("**Establishment Act**"), pursuant to which the ACM is prohibited from disclosing any information in the performance of its statutory task, prevails over the GIA.[3] In appeal, the Administrative Court for Trade and Industry (*College van Beroep voor het Bedrijfsleven*) upheld the decision of the District Court of Rotterdam and furthermore ruled that the documents requested may contain information which is not covered by Article 7 of the Establishment Act. Therefore, for each document requested, the ACM must determine which information contained therein is covered by article 7 of the Establishment Act.[4]

Another method for obtaining (limited) disclosure is for a party to conduct a preliminary examination of a witness or expert. This method is often used by a party to assess the merits of its case up front. Furthermore, it is possible to seize evidence through the filing of an *ex parte* writ with the court for that purpose. However, it must be noted that a successful seizure of evidence does not provide any legal right to inspect or take copies of such evidence. This requires filing a separate claim for disclosure on the basis of Article 843a DCCP.

Pursuant to Article 843a DCCP—a claim on the basis of which can be filed as a motion in ongoing legal proceedings or in separate legal proceedings—parties can request specific (written or digital) information from any person who is in possession of such documents. In order to be successful, the claimant must have a legitimate interest in the disclosure. Dutch Courts will deny requests for the disclosure of documents if there are compelling interests to refuse such disclosure or if the requested information is not relevant. In accordance with Chapter II of the Damages Directive, the newly enacted Articles 844-850 DCCP provide for certain deviations from, and additions to, Article 843a DCCP (e.g. in relation to leniency and settlement applications). These provisions are applicable to actions for damages of which the Dutch courts were seized after 26 December 2014.

7. Limitation Periods

Article 6:193s DCC contains two statute of limitations periods for infringements of EU competition law:

- a five-year limitation period, which will start to run from the day following the day on which the infringement has ceased and the claimant has become aware, or can

3 District court of Rotterdam, 13 May 2015, ECLI:NL:RBROT:2015:3381.

4 Administrative court of Trade and Industry, 17 June 2016, ECLI:NL:CBB:2016:169.

reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to it and the identity of the infringer; and

- a 20-year limitation period, which will start to run from the day following the day on which the infringement has ceased.

This provision does not substantially differ from, and is in accordance with, the provision included in Article 3:310 DCC, and which concerns general limitation of damages claims. Article 3:310 DC stipulates that an action for compensation of damages lapses 20 years after the event that caused the damage. It remains relevant because Article 6:193s DCC has no retroactive effect.

In principle, the limitation period for follow-on actions begins to run when the European Commission or another competition authority has issued an infringement decision or a decision imposing a fine for an infringement.[5]

Under Dutch law, it is relatively easy to interrupt and extend the limitation period by sending a letter in which a claimant unequivocally reserves its rights in relation to the claim. Furthermore, Article 6:193t DCC provides two grounds for extending the limitation period.

- The limitation period may be extended in case of non-judicial dispute resolution for the duration of the resolution process. In case of mediation, the extension will end when a party or the mediator informs the other party in writing of the termination of the mediation, or when no actions have been taken for six months during the mediation process.

- In addition, the limitation period will be extended if a competition authority takes action for the purpose of an investigation or proceedings in relation to the infringement to which the action for damages relates. The duration of the extension is one year after the infringement decision has become final or after the proceedings are otherwise terminated.

8. Appeal

Final decisions in Dutch civil cases may be appealed on the basis of Article 322 DCCP. The case is heard by the Court of Appeal that has territorial jurisdiction. In case the lower court renders an interim decision or a decision in interim relief proceedings, appeal against such a decision is only possible with leave from the lower court. The Court of Appeal will conduct a full review of the merits of the case (*i.e.* factual and/or points of law).

A decision of the competent Court of Appeal may be appealed before the Dutch Supreme Court. However, the appeal to the Supreme Court is limited to points of law and insufficient reasoning concerning the decision of the Court of Appeal.

5 District Court of East Netherlands 16 January 2013, ECLI:NL:RBONE:2013:BZ0403 (*TenneT/ABB*).

9. Class actions and collective representation

Claimants have the option of initiating individual civil proceedings and collective proceedings. Following the entry into force of the Act on Collective Settlement of Mass Damages (*Wet Afwikkeling Massaschade in Collectieve Actie*, "**WAMCA**") on 1 January 2020, the position of claimants seeking redress has improved. It has become easier for claimants to claim monetary damages in collective actions that relate to events on or after 15 November 2016. Class actions under the WAMCA can also be brought before the Netherlands Commercial Court ("**NCC**"), a new court allowing parties to resolve large and complex international commercial disputes where proceedings are conducted in English. It is expected that with this new act, which provides a U.S.—style class action, the number of representative collective actions will increase, putting the Netherlands ahead in Europe.

Under the WAMCA, class actions proceedings are subject to strict admissibility requirements in order to prevent to prevent a compensation culture. Third party litigation is possible in the Netherlands but is not regulated.

The action must have a sufficiently close connection with the Dutch jurisdiction which is presumed if any of the following requirements are met: (i) if the majority of the claimants reside in the Netherlands; (ii) if the defendant resides in the Netherlands; or (iii) if the event(s) which the class action is based on took place in the Netherlands.

Any claim organization that represents the interest of claimants will be assessed at an early stage of the proceedings (comparable to the US motion to dismiss) and must be admissible. Claim organizations must meet additional requirements in the field of representation, governance, and funding. A claim organization is only authorized to commence a class action if it has, by virtue of its articles of association, full legal capacity to protect similar interests of the claimants which it represents. In addition, claim organizations, inter alia, need to appoint a supervisory board and must operate as a non-profit.

Once all the admissibility requirements have been met, the claim organization needs to file its claim and must publish the claim in a dedicated class actions register. If there is more than one claim organization wishing to bring an action in relation to the same subject matter, the different actions will be joined and the court will appoint an Exclusive Representative to represent the interests of all the aggrieved parties in the action.

Following the appointment of the Exclusive Representative, the parties will be given the opportunity to reach a settlement. If the parties reach a settlement, the settlement agreement must be submitted to the court for approval. Members of the class will, in principle, have the opportunity to opt out within one month after publication in the class action register. Foreign claimants who are not domiciled in the Netherlands will have to opt in. If they do, they become members of the class.

The WAMCA creates a potentially powerful tool for claimants to use all types of action. Therefore, the number of collective actions pursued in the Netherlands is expected to increase

The European Commission has proposed a new Directive on representative claims for the protection of consumers' collective interests (COM(2018)184). It is still unclear whether and to what extent the proposed EU legislation will have an impact on Dutch legislation. It is however expected that the WAMCA is already largely in line with the proposed Directive.

Methodology for the selection of cases

The database includes cases in which the Dutch courts either awarded damages in relation to antitrust damages claims, or where the Dutch courts rejected the entire antitrust damages claims. The selection therefore does not cover cases that (i) were settled between the parties or (ii) are still pending before the Dutch courts. Moreover, interim judgments—mainly on procedural issues—have been excluded.

Country: Netherlands

Case Name and Number: Case ECLI:NL: RBONE:2013:BZ0403

Date of judgment: 16 January 2013

Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus

Court: District Court Oost Nederland

Was pass on raised (yes/no)? Yes

Claimants: TenneT TSO B.V., Saranne B.V.

(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)? No

Defendants: ABB B.V., ABB Holdings B.V., ABB Ltd.

Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy? Not at this stage of the proceedings—The District Court held that ABB Ltd. and ABB B.V. were both jointly and severally liable and ordered ABB Ltd. and ABB B.V. to pay damages to TenneT c.s., the amount to be determined by the Court and to settle in accordance with the law.

Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This case has been appealed, see ECLI:GHARL:2014:6766

Amount of damages initially requested: Claimants requested a referral to follow-up proceedings to determine the amount of damages.

Key Legal issues:

- Prohibition on anti—competitive agreements
- Follow-on
- Pass on
- Jurisdiction
- Obligation to furnish facts
- Joint and several liability
- Prescription
- Damages

Is the dispute likely to be settled privately? N/A

Direct or indirect claims? Direct

Method of calculation of damages: In this phase of the proceedings no calculation of damages has taken place.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

In 1993, Sep and ABB entered into an agreement which provided for the supply by ABB of a Gas Insulated Switchgear (GIS) installation to Sep that was subsequently transferred to TenneT.

In its Decision of 24 January 2007, the European Commission found that, inter alia, ABB infringed the cartel prohibition in relation to Gas Insulated Switchgear in the EEA from 15 April 1988 until 2 March 2004.

In these civil proceedings, TenneT claims that it has been harmed by the cartel arrangements. TenneT claims that it overpaid for the GIS installation as a result of the cartel and therefore held ABB B.V., ABB Holdings B.V. and ABB Ltd. (hereafter jointly referred to as: ABB) jointly and severally liable for the damage allegedly suffered. TenneT estimated the damages at approximately EUR 30 million and based its claim primarily on the wrongful act committed by the cartel.

Brief summary of judgment

The District Court held that (i) the prohibited cartel agreements of ABB and the implementation thereof on the Dutch market qualified as an unlawful act; that (ii) ABB Ltd. and ABB B.V. were jointly and severally liable for the damage resulting from that unlawful act, and (iii) that ABB's reliance on limitation periods for the claims' dismissal failed. The Court rejected the passing-on defence asserted by ABB and postponed the calculation of the damages to the follow-up proceedings.

The court treated the passing-on defence as a reliance on benefit allocation. The court rejected this defence prior to the damages quantification phase. In short, the Court found that the decisive factor for the calculation of the damages was how much TenneT overpaid ABB at the time of the infringement. This finding was not altered by the fact that TenneT included the increased purchase of the GIS installations into the prices it was charging on to indirect customers. With this consideration, the court rejected an approach to the passing-on defence on the basis of Article 6:95-6:97 DCC.

Furthermore, the Court ruled that since ABB Holdings B.V. was not an addressee of the European Commission decision and the fact that ABB Holdings B.V. did not exist at the time

of the infringement, ABB Holdings B.V. could not have been directly involved. The mere fact that it later acquired the shares in ABB B.V. in the view of the court did not provide any grounds for ABB Holdings B.V.'s liability. However, in the light of the European Court of Justice's 14 March 2019 *Skanska* judgment (C-724/17), this outcome would no longer be tenable. In the *Skanska* judgment, the European Court of Justice made it clear that the question which entities are liable for the damage sustained needs to be answered by an autonomous interpretation of the concept of 'undertaking' within the meaning of Article 101 TFEU. Under that autonomous interpretation, ABB Holdings B.V. would be considered part of the infringing 'undertaking' within the meaning of Article 101 TFEU and therefore be held liable for the damages. In a 26 November 2019 judgment between TenneT and Alstom regarding a damages claim by TenneT for the same GIS cartel, the Dutch Court of Appeal indeed followed the *Skanska* judgment.[1]

1 Court of Appeal Arnhem-Leeuwarden 26 November 2019, ECLI:NL:GHARL:2019:10165.

Country: Netherlands	
Case Name and Number: Case ECLI:NL: GHARL:2014:6766	
Date of judgment: 2 September 2014	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: Court of Appeal Arnhem-Leeuwarden	**Was pass on raised (yes/no)?** Yes
Claimants: TenneT TSO B.V., Saranne B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: ABB B.V., ABB Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not at this stage—The Court of Appeal reaffirmed the verdict of the District Court on the basis of improved grounds.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This case is the appeal of case ECLI:NL:RBONE:2013:BZ0403 and has been appealed in cassation, see: Case ECLI:NL:HR:2016:1483	**Amount of damages initially requested:** Claimants requested a referral to follow-up proceedings to determine the amount of damages.
Key Legal issues: • Prohibition on anti—competitive agreements • Pass on • Jurisdiction • Obligation to furnish facts • Joint and several liability • Prescription • Damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** In this phase of the proceedings, no calculation of damages has taken place.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

In 1993, Sep and ABB entered into an agreement which provided for the supply by ABB of a Gas Insulated Switchgear (GIS) installation to Sep that was subsequently transferred to TenneT.

In its Decision of 24 January 2007, the European Commission found that, inter alia, ABB infringed the cartel prohibition in relation to Gas Insulated Switchgear in the EEA from 15 April 1988 until 2 March 2004.

TenneT subsequently held ABB jointly and severally liable for the damage allegedly suffered.

Brief summary of judgment

The Court of Appeal concluded that, unlike the Court in first instance, the defence on passing on the costs is valid defence regarding the extent of the damage, and therefore could be part of the debate on whether or not claimants had suffered any damage at all, as part of the determination of liability.

However, it mainly ruled that parties had not sufficiently debated the allocation of the burden of proof in relation to the pass-on defence and therefore did not render a judgment in that regard.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBGEL:2015:3713	
Date of judgment: 10 June 2015	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: District Court Gelderland	**Was pass on raised (yes/no)?** Yes
Claimants: TenneT TSO B.V., Saranne B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Alstom, Alstom Grid SAS, Cogelex, Alstom Holdings	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, the District Court ordered Alstom to pay damages in the amount of EUR 14,100,000 (approximately US$ 15,903,390 based on the European Central Bank's exchange rate of 1.1279 EUR/US$ at the day of the judgment) increased by statutory interest.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The appeal in relation to this judgment is still pending.	**Amount of damages initially requested:** Claimants claimed an amount of EUR 14,100,000 relating to overcharge (approximately US$ 15,903,390 based on the European Central Bank's exchange rate of 1.1279 EUR/US$ at the day of the judgment) increased by statutory interest.
Key Legal issues: • Prohibition on anti-competitive agreements • Calculation of damages • Follow-on • Unjust enrichment • Passing-on • Assessment of damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** As information on Alstom's calculation of the price during the cartel period was not available, the amount of damages were

	calculated based on a comparison between a—to a certain extent comparable—offer of ABB (another member of the cartel) during the cartel period and an agreement that had been entered into after the termination of the cartel.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

In 1993, Sep and Alstom entered into an agreement which provided for the supply by Alstom of a Gas Insulated Switchgear (GIS) installation to Sep that was subsequently transferred to TenneT.

In its Decision of 24 January 2007, the European Commission found that, *inter alia*, Alstom et al infringed the cartel prohibition in relation to Gas Insulated Switchgear in the EEA from 15 April 1988 until 2 March 2004.

TenneT subsequently held Alstom, Alstom Grid SAS, Cogelex and Alstom Holdings jointly and severally liable for its allegedly suffered damage.

Brief summary of judgment

The District Court ruled that Alstom's and Alstom Grid's participation in the cartel qualifies as an unlawful act committed in a group, resulting in joint and several liability for damage suffered as a result thereof. It also found that there was no ground for the limitation period in respect of the claim, since the limitation period did not commence until 24 January 2007, the date of the Commission Decision.

In relation to the passing-on defence, the District Court followed the finding of the Court of Appeal Arnhem-Leeuwarden in its decision of 2 September 2014, ECLI:NL:GHARL:2014:6766, namely that the defendant could validly assert it. Referring to the provision on benefit allocation under Dutch law as well as Article 13 of the Directive, the court found that the defendant carried the burden of proof in relation to the passing-on defence.

The court found that Alstom did not adduce any facts and circumstances supporting a passing-on defence, whilst TenneT undisputedly averred that (i) the chance that any end-users could commence a claim against Alstom was negligible, and (ii) that any overcompensation paid to TenneT would ultimately benefit the end-users through lower prices or taxes since TenneT was wholly owned by the Dutch State. The court considered that, in the unlikely event any end-users would attempt to recover their damages from Alstom, Alstom would still be able to implead TenneT—who received all of the damages—under Article 210 DCCP for the repayment of those particular damages.

The District Court estimated the damages sustained by TenneT by comparing Alstom's overcharge with the prices of cartel participant ABB before and during the cartel. On the basis of this assessment, it ordered Alstom to pay damages to TenneT in the amount of EUR 14,000,000 excluding compound interest.

In relation to the award of compound interest, the District Court referred to the preamble of the Directive, which emphasizes that the payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and that this interest should be due from the time when the harm occurred until the time when compensation is paid.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:HR:2016:1483	
Date of judgment: 8 July 2016	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: Supreme Court	**Was pass on raised (yes/no)?** Yes
Claimants: TenneT TSO B.V., Saranne B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Although the case did not fall within the scope of the EU Damages Directive, the Supreme Court referred to the Damages Directive and anticipated on this Directive in such way that it considered was desirable that the outcomes of the case should be compatible with the (implementation of the) Directive.
Defendants: ABB B.V., ABB Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not at this stage—The Supreme Court rejected the appeal in cassation.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This is the appeal in cassation of case ECLI:NL:GHARL:2014:676. After the Supreme Court's judgment, the case has been referred to follow-up proceedings for the determination of damages (see Case ECLI:NL:RBGEL:2015:1724).	**Amount of damages initially requested:** Claimants requested a referral to follow-up proceedings to determine the amount of damages.
Key Legal issues: • Prohibition on anti—competitive agreements • Follow-on • Pass on • Anticipatory application of the Damages Directive	**Is the dispute likely to be settled privately?** N/A

Direct or indirect claims? Direct	**Method of calculation of damages:** In this phase of the proceedings no calculation of damages has taken place.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

In 1993, Sep and ABB entered into an agreement, which provided for the supply by ABB of a Gas Insulated Switchgear (GIS) installation to Sep that was transferred to TenneT.

In its Decision of 24 January 2007, the European Commission found that, *inter alia*, ABB infringed the cartel prohibition in relation to Gas Insulated Switchgear in the EEA from 15 April 1988 until 2 March 2004.

TenneT claims in these civil proceedings that it has been harmed by the cartel arrangements which are the subject of the European Commission's decision. TenneT argues that it overpaid for the GIS installation as a result of the cartel in question and claims that ABB B.V., ABB Holdings B.V. and ABB Ltd. (hereinafter jointly referred to as: ABB).

TenneT estimated the damages at approximately EUR 30 million and requested that the three defendant entities be ordered jointly and severally to pay damages. TenneT based its claim primarily on the wrongful act.

Brief summary of judgment

The Supreme Court rejected the ground for cassation. According to the Supreme Court, the Court of Appeal had not considered TenneT's actual loss.

Although the Damages Directive did not apply to this case, courts must anticipate on this Directive in such way that it is considered desirable to interpret 'pre-implementation law' in compliance with the rules enshrined in the EU Damages Directive with due observance of the general principles of equality and effectiveness. This requires the courts to ensure that the outcomes of the case are compatible with the Directive.

As to the passing-on defence, the Supreme Court held that, generally speaking, a passing-on defence comes down to the assumption that the scope of the injured party's right to compensation resulting from an infringement of competition law is reduced in proportion to

the amount of that loss the injured party has passed on to third parties. This argument can be applied both to the concept of loss in which the scope of the loss is determined through a comparison of the actual reality with the situation that presumably would have existed had the injurious act not taken place (Article 6:95-6:97 of the DCC), and to the deduction of benefits (Article 6:100 of the DCC). In both approaches the benefits gained by the injured party in connection with the injurious act must be factored into the damages awarded, insofar as this is reasonable.

With regard to the burden of proof, the court refers to Article 13 of the Damages Directive which provides that, in damages actions, the defendant may plead as a defence that the claimant has passed on, in whole or in part, the additional costs caused by the infringement of competition law, and that the burden of proof that the additional costs have been passed on rests with the defendant, who may reasonably claim access to the evidence from the claimant and/or from third parties.

In the present case, the additional costs were (partly) charged to SEP/TenneT's direct customers by passing on the depreciation in the transport tariffs. (...) Ultimately, it is therefore the electricity users who must be deemed to have paid the lion's share of the extra costs passed on. This means that, if the passing on defence in this case is upheld, it is mainly the end users who would be able to recover from ABB the part of the extra costs already charged. The court is of the opinion that the chance that this will happen is virtually negligible.

On the other hand, TenneT has the Dutch State as its 100% shareholder. The compensation to be paid to TenneT, whether by adjusting transmission and electricity tariffs or by distributing profits, will ultimately benefit all Dutch citizens and thus, broadly speaking, the same affected end-users. To that extent, the awarding and withholding of compensation to TenneT is fully in line with the above-mentioned principle of effectiveness, while if one or more of the end users—contrary to expectations—would attempt to recover their damages from ABB, ABB would still be able to implead TenneT—who received all of the damages—under Article 210 DCCP for the repayment of those particular damages.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBLIM:2016:9897 and ECLI:NL:RBLIM:2015:1791	
Date of judgment: 16 November 2016	
Economic activity (NACE Code): C.24.10—Manufacture of basic iron and steel and of ferro-alloys	
Court: District Court Limburg	**Was pass on raised (yes/no)?** No
Claimants: Deutsche Bahn A.G. c.s. (DB)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Spanstaal B.V. c.s.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes, appeal is currently pending.	**Amount of damages initially requested:** Claimants requested a referral to follow-up proceedings to determine the amount of damages.
Key Legal issues: • Prohibition on anti—competitive agreements • Follow-on • Pass on • Obligation to furnish facts • Joint and several liability • Damages • Jurisdiction	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective, Deutsche Bahn A.G. claimed that other purchasers lawfully assigned their claims to Deutsche Bahn A.G.	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/38.344—Prestressing steel)	

Brief summary of facts

In its Decision of 6 October 2010, the European Commission found that 17 producers of pre-stressing steel infringed the cartel prohibition.

Deutsche Bahn A.G. claimed it has suffered damages as a consequence of the cartel infringement. Deutsche Bahn A.G. also stated that other purchasers lawfully assigned their claims to Deutsche Bahn A.G.

Brief summary of judgment

After the District Court Limburg determined it had jurisdiction, the Court rejected the entire claim on the ground that the claims were time-barred under the applicable German statute of limitations.

Due to the claims being time-barred, the court did not address lawfulness of the assignment of the claims to Deutsche Bahn A.G. The court determined that the issue of lawfulness of the assignment of the claims to Deutsche Bahn A.G. could be addressed in the main proceedings.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBGEL:2017:1724	
Date of judgment: 29 March 2017	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: District Court Gelderland	**Was pass on raised (yes/no)?** Yes
Claimants: TenneT TSO B.V., Saranne B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: ABB B.V., ABB Ltd.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, the District Court ordered ABB to pay damages in the amount of EUR 23,100,100 (approximately US$ 24,827,987 based on the European Central Bank's exchange rate of 1.0748 EUR/US$ at the day of the judgment) to be increased by statutory interest.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This case comprises the follow-up proceedings, following the cases: ECLI:NL:RBONE:2013:BZ0403; ECLI:GHARL:2014:6766 and ECLI:NL:HR:2016:1483. The appeal in relation to this judgment is still pending.	**Amount of damages initially requested:** Claimants initially claimed an amount of EUR 29,725,227 relating to overcharge (approximately US$ 31,948,674 based on the European Central Bank's exchange rate of 1.0748 EUR/US$ at the day of the judgment).
Key Legal issues: • Prohibition on anti—competitive agreements • Damages • Prescription	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Under Dutch law, the court decides on the appropriate way to calculate damages. As the loss could not be determined

	accurately in this case, the court considered that the damages should be estimated. Claimant, TenneT, submitted an expert report in which the prices that would have been paid if there had not been a cartel infringement were estimated at approximately EUR 23,100,000. The court granted the claimed damages, as the defendant, ABB, had not submitted sufficient evidence in rebuttal in the court's view.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

In 1993, Sep and ABB entered into an agreement, which provided for the supply by ABB of a Gas Insulated Switchgear (GIS) installation to Sep that was subsequently transferred to TenneT.

In its Decision of 24 January 2007, the European Commission found that, *inter alia*, ABB infringed the cartel prohibition in relation to Gas Insulated Switchgear in the EEA from 15 April 1988 until 2 March 2004.

TenneT subsequently successfully held ABB Ltd. and ABB B.V. jointly and severally liable for its damages. These proceedings comprise the follow-up proceedings for the determination of the damage.

Brief summary of judgment

The District Court ruled that, in order to calculate the amount of the damages, a comparison must be made between the actual situation and the situation without the cartel infringement. Although ABB argued that TenneT's damages calculation was unsuitable, the District Court found that ABB did not provide a more suitable calculation. ABB should have given an insight into its pricing structure (taking into account its raw material and production costs) but failed to do so. The District Court therefore found that ABB's defence was not sufficiently substantiated. The District Court adopted the costs as stated by Sep and took into account statutory interest over these costs.

The District Court also rejected the passing-on defence. Although passing-on was assumed due to cost-based prices, the defence could not reasonably be accepted, because: (i) indirect purchasers' claims were unlikely and these indirect purchasers were presumed to benefit from the overcompensation of the direct purchaser; and (ii) the avoided fine resulting from the leniency application was much higher than the payable (additional) amount of damages.

In this respect, the court considered the principles of equivalence, effectiveness and the scope of the Directive to be guiding principles. According to the court, the meaning of EU law and the Directive is not that the infringer should be given a handle in order to escape his obligation to pay damages. It is that the compensation to be paid by the infringer should accrue to the direct and indirect purchasers in the chain to whom the additional costs have been charged.

In the present case, the additional costs were (partly) charged to SEP/TenneT's direct customers by passing on the depreciation in the transport tariffs. Ultimately, it is therefore the electricity users who must be deemed to have paid the lion's share of the extra costs passed on. This means that, if the passing on defence in this case is upheld, it is mainly the end users who would be able to recover from ABB the part of the extra costs already charged. The court is of the opinion that the chance that this will happen is virtually negligible.

On the other hand, TenneT has the Dutch State as its 100% shareholder. The compensation to be paid to TenneT, whether by adjusting transmission and electricity tariffs or by distributing profits, will ultimately benefit all Dutch citizens and thus, broadly speaking, the same affected end-users. To that extent, the awarding and withholding of compensation to TenneT is fully in line with the above-mentioned principle of effectiveness, while if one or more of the end users—contrary to expectations—would attempt to recover their damages from ABB, ABB would still be able to implead TenneT—who received all of the damages—under Article 210 DCCP for the remission of those particular damages.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBMNE:2016:4284	
Date of judgment: 20 July 2017	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: District Court Midden-Nederland	**Was pass on raised (yes/no)?** No
Claimants: East West Debt B.V. (EWD)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: United Technologie Corporaton, It is B.V., Schindler Holding Ltd, Schindler Liften B.V., ThyssenKrupp A.G., Thyssenkrupp Liften B.V., Kone Corporation, Kone B.V., Mitsubishi Elevator Europe B.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the District Court rejected EWD's claims.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes	**Amount of damages initially requested:** The claimants claimed an amount of EUR 31,573,636 (approximately US$ 36,262,321 based on the European Central Bank's exchange rate of 1.1485 EUR/US$ at the date of the judgment) increased by statutory interest.
Key Legal issues: • Prohibition on anti-competitive agreements • Follow-on • Obligation to furnish facts	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/E-1/38.823 Elevators and Escalators)	

Brief summary of facts

In its Decision of 21 February 2007, the European Commission found that manufacturers of elevators and escalators infringed the cartel prohibition.

EWD claimed that the material claimants, *i.e.* the purchasers of (services related to) escalators and elevators—which allegedly assigned their claims to EWD—suffered damage as a result of the cartel.

Brief summary of judgment

Claim vehicle EWD argued that the material claimants had assigned their claims to EWD and thus EWD brought an action for damages. The District Court dismissed the claim, because EWD failed to provide sufficient facts to substantiate its claim. The court considered that concrete information in relation to the assignments of claims had not been submitted, just as information in relation to the type of goods or services that allegedly had been purchased from the defendants.

In relation to the assignment of claims, the court noted that, despite the defendant's explicit request that the assignment deeds should be submitted into the proceedings, EWD did not comply with that request. By failing to submit the deeds of assignment, EWD deprived the defendants, as they also submitted, of the possibility to determine whether the legal requirements for a valid transfer of the claims to EWD had been complied with. The defendants have an interest in such determination, since EWD is suing them for damages.

In order to substantiate of its allegations of damage, EWD submitted spreadsheets which, according to EWD would show the total amounts of the prices charged for the purchase and installation, maintenance and modernisation of the lifts of the material claimants in the periods of infringement and in the period of after-effects. However, the court found that EWD had not sufficiently explained the amounts shown on the spreadsheets. For example, those amounts do not indicate to which agreements they related and when and under what circumstances those agreements were concluded. EWD should, in the view of the court, have explained any amount on the spreadsheets on which the calculation of damages was based and which, in EWD's view, was affected by the implementation of the cartel. Contrary to the EWD's view, the fact that the amounts (and documents) involved are substantial cannot alter this finding. EWD has a responsibility to properly substantiate its damages claim.

The court considered that the defendants were thus deprived of the opportunity to participate in an equal position in the debate between the parties, in which detailed facts and circumstances, which are available to EWD and/or the material claimants, but not to defendants, play a crucial role in relation to the required causal link between the wrongful acts on the one hand and the potential damage on the other.

Therefore, the District Court ruled that EWD had not fulfilled its obligation to furnish facts and to sufficiently substantiate its claims as a result of which the court rejected EWD's claims.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBROT:2018:8001	
Date of judgment: 26 September 2018	
Economic activity (NACE Code): C.20.13—Manufacture of other inorganic basic chemicals	
Court: District Court Rotterdam	**Was pass on raised (yes/no)?** Yes
Claimants: Van Gelder Groep B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes (Claimants stated that the Rotterdam District Court should take the Directive into account and that it could not take decisions contrary to the Directive now that the implementation period had already commenced before the start of the proceedings. Defendants argued against this).
Defendants: Shell Nederland Verkoopmaatschappij B.V. and Kuwait Petroleum B.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the proceedings were divided into two parts (a procedural and a quantum phase). This judgment concerns a judgment on the first phase in which the relevant question is whether a party could be held liable.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes	**Amount of damages initially requested:** N/A
Key Legal issues: • Prohibition on anti—competitive agreements • Joint and several liability • Obligation to furnish facts • Damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/38.456 Bitumen—NL)	

Brief summary of facts

In its Decision of 13 September 2006, the European Commission found that 8 suppliers of road construction bitumen and six main road manufacturers infringed the cartel prohibition.

Van Gelder claimed that they suffered damage as a result of the cartel because they were (i) paying prices above the market prices, and (ii) were not included in agreed discounts.

Van Gelder argued that the price agreements concluded by the cartel participants led to a higher price for bitumen in the Netherlands than in neighbouring countries. The price agreements provided for a gross price as well as a minimum discount to which all W5 road builders were entitled. According to Van Gelder the maximum discount a non W5 road builder could get was always lower than the minimum discount a W5 road builder could get. Van Gelder received directly the discount agreed with Kuwait which was lower than that of its competitors insofar as they were cartel participants.

Brief summary of judgment

Between parties there is a dispute as to whether the Damages Directive is meaningful, even though the implementation period of that Directive did not end until 27 December 2016 and the Act implementing the Damages Directive did not enter into force until 10 February 2017. Van Gelder is of the opinion that the court may not take decisions that are contrary to the Damages Directive. Shell has contested this.

The court found that, since the dispute is temporally not covered by the Damages Directive, it is not applicable. Referring to the judgment TenneT v ABB, the Court held that in such circumstances it is desirable to interpret Dutch law—with due observance of the principles of equivalence and effectiveness under EU law—in such a way that it leads to results which are compatible with the Damages Directive and the Implementing Act, which has now entered into force.

In its interim judgment, the Rotterdam District Court considered that the European Commission decision establishing an infringement of article 101 TFEU by Shell and Kuwait was binding on it. The Court should therefore assume that Shell and Kuwait infringed the cartel prohibition.

The Court ruled that the claims against Shell did not expire. The Court also considered relevant that the European Commission found that the cartel agreements had resulted in the actual distortion of competition. The Court therefore considered that it could presume competition distorting effects that could have had consequences for Van Gelder. It is for Shell and Kuwait to rebut this presumption.

Shell argued that it did not itself supply bitumen to Van Gelder. Shell submitted that it could therefore at most be liable together with others. Shell averred that it could be held jointly and severally liable on the basis of Article 6:166 DCC for the supply of bitumen at an (allegedly) too high price caused by the bitumen cartel. According to Shell, this article does not apply to the actions of Van Gelder because it is intended for situations in which damage has been caused by group actions, but it cannot be determined which action of which participant within the group has actually caused that damage. Shell maintained that this is not the situation here, since Van Gelder knew which participant in the cartel committed the allegedly damaging acts, and that was not Shell but Kuwait.

The court dismissed this defence by Shell. Taking into account that the likelihood that third parties could suffer damages as a consequence of the pricing agreements between the cartel participants has not deterred Shell to participate in these agreements. Hence, Shell was held jointly and severally liable for the damage with Kuwait.

Country: Netherlands	
Case Name and Number: Case ECLI:NL:RBMNE:2016:4284	
Date of judgment: 5 February 2019	
Economic activity (NACE Code): C.28.22—Manufacture of lifting and handling equipment	
Court: Court of Appeal Arnhem-Leeuwarden	**Was pass on raised (yes/no)?** No
Claimants: East West Debt B.V. (EWD)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: United Technologie Corporaton, It is B.V., Schindler Holding Ltd, Schindler Liften B.V., ThyssenKrupp A.G., Thyssenkrupp Liften B.V., Kone Corporation, Kone B.V., Mitsubishi Elevator Europe B.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the Court of Appeal rejected EWD's claims.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This judgment is subject to appeal in cassation.	**Amount of damages initially requested:** Claimants claimed an amount of EUR 31,573,636 (approximately US$ 36,262,321 based on the European Central Bank's exchange rate of 1.1485 EUR/US$ at the date of the judgment) increased by statutory interest.
Key Legal issues: • Prohibition on anti—competitive agreements • Follow-on • Obligation to furnish facts	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/E-1/38.823 Elevators and Escalators)	

Brief summary of facts

In its Decision of 21 February 2007, the European Commission found manufacturers of elevators and escalators infringed the cartel prohibition.

EWD claimed that the material claimants / purchasers of (services related to) escalators and elevators—which allegedly assigned their claims to EWD—suffered damage as a result of the cartel.

Brief summary of judgment

Claim vehicle EWD argued that the material claimants had assigned their claims to EWD. The District Court ruled that EWD had failed to substantiate its claim sufficiently since no concrete information had been submitted concerning the assignments of claims. EWD appealed against this decision. The Court of Appeal rejects the appeal on similar grounds as the Court of first Instance. It held that EWD failed to fulfil its obligation to furnish facts and to sufficiently substantiate its claim (EWD failed to prove a causal link (between the alleged conduct and alleged damage), and the existence of damage.

The Court of Appeal does not dispute, as EWD alleges, the lawful assignment of the claims. With this ruling it becomes clear that claim vehicles can no longer hide behind a simple assignment model. Such a model ultimately means nothing more than that a multitude of individual claims have been bundled together, but that does not detract from the obligation that follow-on cartel damages claimants must sufficiently substantiate their individual claims and present their data in an orderly fashion.

Country: Netherlands	
Case Name and Number: Case ECLI:NL: GHARL:2019:10165	
Date of judgment: 26 November 2019	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: Court of Appeal Arnhem-Leeuwarden	**Was pass on raised (yes/no)?** No
Claimants: TenneT TSO B.V., Saranne B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Alstom, Grid Solutions SAS, Cogelex, Alstom Holdings.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not at this stage—The Court of Appeal reaffirmed the verdict of the District Court on the basis of improved grounds.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: This case is the appeal of case 208814 and C/05/208814)	**Amount of damages initially requested:** Claimants requested a referral to follow-up proceedings to determine the amount of damages.
Key Legal issues: • Prohibition on anti—competitive agreements • *Skanska* judgment • Undertaking • Joint and several liability • Economic continuity • Damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** In this phase of the proceedings no calculation of damages has taken place.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision COMP/F/38.899—Gas Insulated Switchgear)	

Brief summary of facts

If this decision, the Court of Appeal Arnhem-Leeuwarden applied the *Skanska* judgment of the European Court of Justice (*i.e.* applied the competition law definition of an 'undertaking' within the meaning of Article 101 TFEU) to establish liability of a subsidiary for damages as a result of a breach of EU competition law.

In *Skanska* the European Court of Justice held that the concept of 'undertaking' within the meaning of Article 101 TFEU constitutes an autonomous concept of EU law and that EU law determines which entities are liable for damage caused by an infringement of EU competition law.

Based on this reasoning of the European Court of Justice, TenneT sued in these proceedings not only the three Alstom entities which were fined by the Commission in its Decision COMP/F/38.899, but also argued that the 48% Alstom participation Cogelex was part of the Alstom undertaking that breached EU competition law. However, Cogelex was not one of the entities fined by the Commission. In fact, Cogelex was not even included in the Commission's investigation leading to its decision.

The decision stems from a follow-on damages action of TenneT in the Gas-Insulated Switchgear cartel (GIS). In 2007, the European Commission found that Alstom had infringed Article 101(1) TFEU by colluding with several other producers of GIS. The European Commission held four entities of the Alstom group liable for the infringement.

Brief summary of judgment

The Court of Appeal ruled that (i) it follows from the *Skanska* judgment that the determination of the entity which is liable for damages caused by an infringement of Article 101 TFEU is directly governed by EU law; and (ii) that, applying the relevant principles of EU law, due to Alstom having a decisive influence (veto) in Cogelex's business, Cogelex was part of the same 'undertaking' as Alstom Holdings. The Court of Appeal dismissed the argument raised by Alstom that the application of the reasoning employed in the *Skanksa* judgment should be limited to cases of "economic continuity".

The Court concluded that, since Cogelex should be deemed to form a single undertaking with its 48% shareholder Alstom Holding, Cogelex was equally liable for the damage incurred by TenneT as a result of the GIS cartel.

Country: Netherlands	
Case Name and Number: Cases ECLI:NL:GHAMS:2020:714 and ECLI:NL:GHAMS:2020:713	
Date of judgment: 10 March 2020	
Economic activity (NACE Code): H.51—Air transport	
Court: Court of Appeal Amsterdam	**Was pass on raised (yes/no)?** No
Claimants: Stichting Cartel Compensation (SCC), Equilib Netherlands B.V.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: KLM N.V., Martinair Holland N.V., Sociéte Air France S.A., Singapore Airlines Cargo Pte LTD, Singapore Airlines Limited, Lufthansa Cargo A.G., Deutsche Lufthansa A.G., Swiss International Air lines A.G., British Airways Plc, Air Canada S.A. and Cathay Pacific Airways Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A In these cases, the airlines disputed the legal validity of the assignment of the claims to the claim vehicle and maintained that it is up to the claim vehicles to prove the legal validity of all assignments in all respects.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: These cases are the appeals of case C/13/486440 / HA ZA 11-944 and C/13/562256 / HA ZA 14-348.	**Amount of damages initially requested:** N/A
Key Legal issues: • Prohibition on anti—competitive agreements • Follow-on • Litigation vehicle	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Gerjanne te Winkel, Partner, Jones Day, gtewinkel@jonesday.com; Niels van Loon, Counsel, Jones Day, nvanloon@jonesday.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC Decision Case C.39258 Airfreight)	

Brief summary of facts

In its Decision of 17 March 2017, the European Commission found that several air carriers coordinated fuel and safety charges for flights within the European Economic area in the period of December 1999 until February 2006, and thus infringed the cartel prohibition. Claim vehicles SCC and Equilib claim a declaratory statement that the airlines are liable for attributable wrongful acts towards 670 shippers and are jointly and severally liable for the damages suffered by those shippers as a result of that wrongful act.

Brief summary of judgment

In these cases, the airlines disputed the legal validity of the assignment of the claims to the claim vehicle and maintained that it is up to the claim vehicles to prove the legal validity of all assignments in all respects. These two decisions from the Amsterdam Court of Appeal confirm that litigation vehicles need to provide documentation regarding the assignment of claims they submit.

Under Dutch law, companies and individuals are allowed to assign their claims to a 'litigation vehicle or claims vehicle' who bundles those claims into a single action. According to the Amsterdam Court of Appeal, Dutch law does not necessarily require the litigation vehicles to positively establish that the claims were successfully transferred to the litigation vehicles. Instead, the Court of Appeal considers it sufficient for the litigation vehicles to establish that the debtors can discharge their alleged debts by paying the (purported) assignees. Whether or not the debtors can discharge their alleged debts by paying the (purported) assignees is to be established in accordance with the law that governs the assigned claims (also see Article 14 Section 2 of the Rome I Regulation, No. 593/2008).

Under Dutch law, a debtor can pay the purported assignee and discharge his debt, as long as he has reasonable grounds to assume that the assignee validly acquired the claim. The debtor can thus rely on his good faith, even if it later turns out that the claims were not validly assigned.

The decision in this case shall be reserved until the oral hearing in the other case has taken place, at which point the applicable law shall, in principle, be decided. Thereafter, a party debate may follow on the possible consequences of that decision for the question whether the airlines can pay claim vehicle SCC in discharge. Following the decision on that point, the case will then be referred back to court.

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Private antitrust litigation is a relatively new concept in Poland. While in the past private enforcement was legally possible under general civil law rules, it was not exercised at all. This was due mainly to the difficulty in proving the extent of the damage (quantum) and the causal link between the damage and the breach of competition law, which is a prerequisite for obtaining compensation. On 21 April 2017, following the implementation of the Damages Directive 2014/104/EU (the "**Directive**"), the act on claims for compensation for damage caused by competition law infringements (hereinafter referred to as the "**Act**")[1] was adopted. The Act aims to regulate the legal rules of private antitrust litigation in line with European Union law. After the adoption of the Act, the first private enforcement litigations were launched. However, all of them are still pending to date.

1. Jurisdiction

The main Polish authority in charge of enforcing competition law is the Office of Competition and Consumer Protection ("**OCCP**"). Polish law also provides for specialised competition district judiciary. However, the OCCP and the specialised judiciary are only competent for public enforcement and not for private damages actions.

Private antitrust damages actions can be brought before the Polish district civil courts under the general provisions of Polish civil law and the Act. Thus, private enforcement competition cases are decided by the same civil courts which have jurisdiction over standard civil cases. Local courts depend on the seat of the defendant or the location of the damage. There are no dedicated divisions or sections which specialise in hearing such cases.

Antitrust damages actions can be brought before the competent national court both as a stand-alone action, regardless of a preliminary procedure before the OCCP, or as a follow-on action, based on a decision retaining an infringement and issued by the OCCP. The civil courts may halt a stand-alone action for damages until the competition authority has issued a decision.

2. Relevant legislation and legal grounds

Under the Act, anyone (whether they are direct or indirect customers, competitors, suppliers, and so forth) who has suffered harm caused by an infringement of competition law committed by a company or an association of companies, has the right to receive full compensation for the harm, the loss of profit, and the applicable interests.

1 *Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji.*

As mentioned above, it is not necessary for the OCCP or the European Commission to have issued a prior decision establishing that an infringement has occurred in order for the action to be admitted. This applies to either individual or class actions.

In Poland, an action for breach of competition law can be brought on the basis of competition law infringements defined in Articles 6 and 9 of the Act of 16 February 2007 on the Protection of Competition and Consumers as well as Articles 101 or 102 of the Treaty on the Functioning of the European Union (hereinafter defined as "TFEU").

The claim may rely on Article 3 of the Act (under the previous regime the claim could rely on the general provisions of civil law, *i.e.* Article 405 of Polish Civil Law, regulating claims related to unjust enrichment, or Article 415 of Polish Civil Law, regulating liability for torts). The provision of Article 3 of the Act not only establishes a new type of tort but sets its own principles of liability. The provision requires the claimant to prove: (i) the infringement of competition law, therefore proving the unlawfulness of the infringer's behaviour, (ii) damage and (iii) causation between the two.

The Act has made it much easier for claimants to establish these three elements:

- Article 3 of the Act introduced a presumption of fault of the infringer of competition law. This means that in order to be released from liability, the defendant would have to prove that its conduct did not amount to a breach of competition law.

- Article 7 of the Act applied a presumption that any infringement of competition law causes damage. In this respect the Polish regulation goes beyond the Directive, which requires such presumption only for cartels.

- Article 30 of the Act provides that findings regarding an infringement of competition law contained in a final decision delivered by the OCCP or a final ruling of a specialised judiciary (*i.e.* a decision or ruling which can no longer be appealed against/challenged under national law) are binding for the civil court in the relevant proceeding. The same goes for the European Commission's final decisions enforcing Articles 101 and 102 TFEU. As regards decisions taken in another Member State, they have the same probative value as Polish official documents (Article 1138 of Code of Civil Procedure) and can be recognised by the Polish court as evidence of an infringement on the basis of a presumption of the facts (Article 231 of Code of Civil Procedure) (*i.e.* they are taken into account as a piece of evidence but the court is not bound by the findings made in such decisions as to whether competition law has been infringed).

- Article 30 of the Act does not apply to decisions of inadmissibility, dismissal, or commitment decisions of the OCCP, since such decisions do not contain findings of an infringement. However, such decisions can still have some evidential value.

- Parties which have been granted immunity from fines under a leniency programme are not exempted from civil liability. However, they benefit from a privileged position as they will only be found jointly and severally liable outside their supply chain if it is not possible to obtain full compensation from the other infringers. Parties are also granted protection as regards access to the file. As to the application of the Act, leniency concerns cartels only (generally in Polish law, leniency is also possible for vertical agreements).

Rationae temporis application of the Act

In accordance with the general principle of non-retroactivity of the law, the new substantial provisions of the Act, and in particular the above-mentioned presumptions, are only applicable to actions for damages as a result of infringements of competition rules (*i.e.* the facts causing liability) which took place after its entry into force *i.e.* from 27 June 2017 onwards.

However, Chapter 3 of the Act regarding the procedure and rules of the production of evidence apply to all proceedings initiated since 27 June 2017, regardless of when the breach of competition law occurred (Article 36 of the Act).

Provisions extending the limitation period apply when the limitation period had not expired at the date of entry into force of the Act. In such a case, the period that has already elapsed is not taken into consideration, and the general three-year limitation period (Article 4421 § 1 of the Civil Code) started on 27 June 2017.

3. What types of anti-competitive conduct are damages actions available for?

Violations of EU or national competition law are a requirement and include those relating to anti-competitive agreements and concerted practices or abuse of a market dominant position, pursuant to Articles 101 or 102 of the TFEU or Articles 6 and 9 of the Act on the Protection of Competition and Consumers.

4. What forms of relief may a private claimant seek?

The primary objective of damages actions under civil law provisions and the Act is to obtain full compensation for the harm caused by an infringement of competition law.

A private claimant can seek compensation for the damage suffered (*damnum emergens*), as well as for the benefits that it lost as a consequence of the unlawful conduct (*lucrum cessans*).

Causation between the fault and the damage must be direct, which means that the claimant must prove that the damage suffered and/or loss of profits results entirely from the anti-competitive behaviour.

In addition, private claimants are also entitled to claim interest from the day of the decision awarding damages until the effective and full payment of the compensation.

5. Burden of proof/Passing-on defence

As mentioned above, the Act provides for some presumptions which all aim to strengthen the situation of aggrieved persons and entities, one of them being the presumption that an overcharge is passed on to indirect purchasers. This presumption can be relied on solely by the indirect purchaser. Indirect purchasers can rely on the presumption that the overcharge was passed on to them by the direct purchasers in their claims against the infringer. This

presumption is rebuttable, but the burden of proof in such respect lies entirely with the defendant (infringer).

The infringing party (defendant) cannot take advantage of this presumption as a part of the defence against the action brought by the direct order—in such cases the infringer must prove that the overcharge was fully or partially passed on.

In both situations, in order to shift the burden of proof, the defendant (infringer) must prove that there was no passing-on from the direct purchaser to the indirect purchaser (when the indirect purchaser is the claimant) or that the overcharge was passed-on to the indirect purchaser (in the event the direct purchaser acts as the claimant). In such cases, the defendant must rely on standard evidentiary methods (documentary, economic analysis, expert opinions, witness statements, and so forth).

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no typical pre-trial discovery under Polish law. However, the Act provides for a simplified procedure for obtaining evidence in support of damage claims under pending litigation. The claimant (the aggrieved party) can apply to the court to oblige the defendant, the OCCP or other third parties to disclose evidence being in their possession. The disclosure is granted based on a legally binding decision which constitutes an enforcement order.

The claimant can use the documents obtained only for the given court proceedings. The earliest moment when the disclosure procedure can start is at the filing of the lawsuit, as Polish law does not foresee any pre-trial disclosure.

The Act provides that the disclosure must be proportionate and must not relate to the leniency statements submitted under a leniency programme or settlement submissions. Misuse of disclosed evidence will result in the court handling the claim disregarding that evidence. A non-discretionary fine of up to PLN 20,000 (EUR 4,700) can be imposed on a party requesting the disclosure of evidence in bad faith.

As far as confidential information is concerned, if any such information occurs in the court files as a result of disclosure at the initiative of one of the parties, the court conducts the proceedings behind closed doors. Moreover, if such information is included in documents or other materials obtained because of the disclosure, the court limits the access to such evidence to the necessary degree or order on the specific rules of familiarization with such evidence.

7. Limitation Periods

Polish civil law regarding torts provides for a general limitation period of three years from the day on which the injured party learned about the damage and about the person liable to redress it, or might have learned about it if he/she had exercised due diligence. However, such a time limit may not be longer than ten years from the day on which the event causing the damage occurred.

By way of exception, the three-year limitation period for damages claims arising out of competition law infringements has been extended to five years. This limitation period is suspended for the duration of proceedings conducted by the OCCP or other competent authorities (e.g. the European Commission or the competition authority of another Member State). This suspension will cease one year after the date of issuance of a legally binding decision or termination of the proceedings in a different way.

8. Appeal

First-instance court judgments in private antitrust litigation are subject to appeal at second instance courts (Courts of Appeal). Court of Appeal judgments are final and binding but can be subject to appeal to the Supreme Court (limited to questions of breach of substantive law or severe procedural error which affected the outcome of the case).

9. Class actions and collective representation

In Poland, the mechanism of pursuing claims in group proceedings was introduced to the legal system by an Act of 17 December 2009. There have been very few group cases. However, in theory, it is possible for competitors of an entrepreneur who committed an act of unfair competition to make claims in group proceedings. Consumers seeking compensation for damages resulting from delicts can also make claims in group proceedings. There are only a few minor limitations of claims which cannot be subject to class actions.

Class actions are understood as proceedings where claims of the same type, based on the same or similar facts, are pursued by at least ten individuals. A representative of the group (a group member or certain authorized entity) conducts the proceedings on behalf of and for the benefit of all the group members. Although the practice has shown that it is difficult to prove that all claimants form a "class" (group), a significant number of class actions have been heard by Polish courts to date. According to publicly available data, there have been almost 300 class actions submitted to courts and the majority of them were or still are being examined as to the merits.

10. Key issues

The entry into force of the presumptions facilitating private actions

Before the Act entered into force, it was extremely difficult, if not impossible, for claimants to initiate a procedure for damage claims for competition law infringements. The burden of proof was to a large extent borne by the aggrieved party, who at the same time had no actual access to evidence. The Act introduced a new type of tort, and provided several presumptions, strengthening the situation of the injured parties and facilitating the action for claims.

Starting point of the limitation period

Pursuant to Polish law regarding torts, the starting point for a limitation period is the day on which the injured party (i) learns about the damage and about the person liable to redress it, or (ii) the day on which he/she might have learned about the damage if he/she had exercised due diligence. The question may accrue depending on how this actual moment is understood. This is particularly vital with regard to follow-on actions. Some may argue whether the starting point in such cases is the moment of initiation of the proceeding by the OCCP, the issuance of the decision or the moment when the decision becomes final. It seems that the starting point for a limitation period would be the moment when the decision becomes final, as only then can the claimants obtain full clarity on the unlawfulness of the practice and the identification of the infringer.

Calculation of damages

One of the biggest practical problems in competition law infringement is calculating the damage suffered by an aggrieved party. In this respect, the Act introduces a significant presumption that any breach of competition law causes damage. With regard to the methods of determining the amount of damage, the Act refers to the guidelines of the European Commission and indicates that the guidelines may be found helpful by Polish courts. As a rule, the calculation of damage is based on counterfactual analysis. It is necessary to make a comparison between the actual situation of the aggrieved party and the situation of the party if the infringement had not occurred. This can be done, for example, by means of comparative methods such as referring the actual situation to the period before or after the infringement or to the situation on other markets. Another way is to simulate market outcomes by use of economic models.

The Act enables courts to request assistance from the OCCP with the calculation of damages. Although not obligatory, the assistance of the OCCP, with the expertise of its employees and available tools, may prove invaluable for the aggrieved party.

11. Key cases in antitrust damages actions in Poland

As mentioned above, initiating a procedure for damage claims for competition law infringements proved difficult under the previous regime. One private enforcement case under the previous regime that is worth mentioning concerns the cement cartel case (I ACa 1322/13). A private claimant submitted a statement of claims requesting damages against a leniency applicant before the infringement decision became final. The courts of all instances confirmed that it is the claimant who must prove the antitrust infringement if there is no final infringement decision. The lawsuit was dismissed, as the courts found that the private claimant did not prove all the aspects of the alleged collusions, in particular basing its case on the fact that the leniency applicant's admitted participation in a cartel is not enough.

Since the entry into force of the Act, only a few actions have been initiated and none of them have been finally decided to date.

As for Polish courts, private enforcement still seems to be a sort of *terra incognita*. A number of Polish entrepreneurs who were affected by international cartels have sought

damages in countries with a much greater tradition and experience in that area *i.e.* in France, Germany or the United Kingdom.

The following paragraphs outline actions initiated after the entry into force of the Act and do not attempt to be exhaustive.

Interchange fees

In April 2018 Polish entrepreneurs filed a claim for damages against banks for higher interchange fees. The claim concerns damages for the overpayment of the interchange fee in the time period of 2008 to 2014.

The interchange fee is paid by each entrepreneur enabling card payment. The interchange fee is a fixed component of the fee from banks issuing payment cards or agents acting on their behalf. The interchange fee is charged on the gross value of a sales transaction, usually as a specified percentage of the transaction value and paid to issuing banks and card organizations such as Maestro, MasterCard, VISA and American Express. Ultimately, when a customer pays for a good with a card, the merchant receives the gross value less a commission (e.g. PLN 100 gross price of the goods—PLN 2 commission = PLN 98 receipt in the merchant's account). The entrepreneurs claimed that due to an anti-competitive agreement, the fee was higher than it ought to have been *i.e.* 0.3% instead of 0.2% of the gross value of each transaction.

The claimants derive the "right" fee from the entry into force of the amendment to the Act on Payment Services. The claimants suspect that the banks and card organizations agreed on jointly setting the interchange fees. In this respect, the claimants refer to the decision of the President of the OCCP of 29 December 2006, which, as of today is not legally binding (the OCCP decision was challenged by the allegedly infringing parties in the civil court, and the revision procedures are still pending). Moreover, the claimants also refer to the European Commission's decision in the VISA case (AT.39398 Visa MIF) and the CJEU's ruling in the MasterCard case (C-382/12). However, both the President of the OCCP's decision and the Commission's decisions have only evidential value, as the former concerns a different time period and the latter covers a different factual situation.

Truck manufacturers cartel

Another lawsuit based on the Act as a part of a wider, European private enforcement action concerning a truck manufacturers cartel (European Commission's decision of 19 June 2016) is pending before the District Court in Wroclaw (X GC 790/17). However, since the Act fully applies only to infringements that occurred after 27 June 2017, some Polish entrepreneurs joined a private enforcement action which was initiated before German courts.

Cement cartel

In January 2019, a private enforcement action based on the Act was submitted to the Warsaw District Court by entities injured by cement producers.

The cement cartel case is known as one of the biggest cases in the history of Polish competition law enforcement. In 2009 the President of the OCCP imposed the highest

possible fine of PLN 411 million on the seven largest cement producers. The infringing parties had been dividing the market, exchanging confidential information and setting prices for more than eleven years. In 2018, after almost a decade of battling in court, the decision became final. However, the penalties were reduced by one third. This has given impetus to private enforcement actions initiated by aggrieved entrepreneurs, mostly those using cement as a semi-finished product, namely concrete producers.

Chemical products for the mining industry

In June 2020, two more private enforcement actions were submitted to the Katowice District Court (XIV GC 631/19/MN) and Gliwice District Court (X GC 114/20) by two coal mines.

The two lawsuits are based on the same non-final infringement decision of the President of the OCCP alleging price-fixing, market sharing and bid-rigging. Therefore, the Act's provisions are only applicable in part (*i.e.* evidence disclosure). Both claimants must prove their case and do not benefit from any presumption included in the Act.

PORTUGAL

INTERNATIONAL CHAMBER OF COMMERCE

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In Portugal, private antitrust litigation, prior to the enactment of the Private Enforcement Directive, has been based on general rules of civil contractual and tort liability. On 5 June 2018 Law No. 23/2018 was approved, which entered into force on 4 August 2018, implementing EU Directive 2014/104, of 26 November 2014, on Antitrust Damages Actions ("**Law 23/2018**").

1. Jurisdiction

The primary authority in charge of enforcing competition law in Portugal is the Portuguese Competition Authority ("**PCA**"). The authority is only competent for public enforcement and not for private damages actions.

Victims of anti-competitive conducts can seek compensation before civil common courts if the cause of action is grounded non-exclusively on a competition law breach (for instance, abuse of dominance and cumulative breach of insurance sector rules) and before the specialised Competition Court, which has jurisdiction *ratione materiae* over the entire Portuguese territory, if the cause of action is exclusively based on a competition law breach. As such, the specialised Competition Court lacks competence to decide claims based on anti-competitive conducts combined with other grounds.[1]

1 See Article 112(3-4) of Law 62/2013.

In private antitrust enforcement proceedings, claimants can bring actions based on a decision from the PCA, the competition authority of another EU member state or the court of another EU member state finding an infringement of competition law against the defendant(s) (follow-on actions) or, independently of a public enforcement procedure, on the basis of a stand-alone action.

Collective actions for indemnity, under the opt-out model in force in Portugal, can also be started to seek compensation for anti-competitive conducts. The judicial claim is lodged before civil common courts and can also be reasoned on a prior public enforcement procedure or independent of such procedure.

2. Relevant legislation and legal grounds

The relevant legislation is enshrined in (i) Law No. 23/2018, of 5 June 2018, which entered into force on 4 August 2018, implementing EU Directive 2014/104 on Antitrust Damages Actions, (ii) Law No. 19/2012, 8 May 2012, as amended, which approves the national Competition Act, (iii) the Civil Code and the Civil Procedure Code, (iv) Law No. 83/95, 31 August 1995, as amended, on collective actions ("Law 83/95"), and (v) Law No. 62/2013, 26 August 2013, as amended, on the Organisation of the Judicial system ("Law 62/2013").

Pursuant to the framework introduced by Law 23/2018, a competition law infringement found by a final decision adopted by the PCA or judicially confirmed (*res judicata*) has binding evidentiary value in the form of a non-rebuttable presumption regarding the existence, nature, duration and material, personal and territorial scope of the antitrust infringement. Further, the law confers a qualified evidentiary value on the basis of a rebuttable presumption to final decisions or rulings by competition authorities or courts of other EU member states.[2]

3. What types of anti-competitive conduct are damages actions available for?

Damages actions are available for anti-competitive agreements, abuses of dominant position and abuses of economic dependency.[3] Among the classic illegal behaviours that can lead to a damage action, one can include price-fixing and/or allocation of customers among competitors or a refusal to supply or a non-justifiable discriminatory pricing policy set by an undertaking in a dominant position in a regulated or non-regulated sector of the economy. In parallel, the abuse of economic dependence consists of the abusive exploitation by one undertaking of the economic dependence of another undertaking due to the absence of the latter of an equivalent alternative for the supply of goods or the provision of services.

2 See Article 7 of Law 23/2018.

3 See Article 1 and 2(I) of Law 23/2018.

4. What forms of relief may a private claimant seek?

A private claimant under a private antitrust enforcement claim can seek compensation for the damage suffered (*damnum emergens*), as well as for the benefits (*lucrum cessans*) that it lost as a consequence of the unlawful conduct.[4]

Causation between the fault and the damage must be direct, which means that the claimant must prove that the damage suffered and /or loss of profits results exclusively from the anti-competitive behaviour.

In addition, private claimants are also entitled to delay interest (*juros de mora*), which is applied from the adoption date of the judicial decision that awards damages until effective and full payment of the compensation.[5]

If the anti-competitive conduct results from a joint behaviour of two or more undertakings, they are jointly and severally liable for the incurred damage,[6] but the subsequent exceptions can apply to SMEs and leniency applicants. If the damage is caused by an SME, such undertaking is only liable before the respective direct or indirect customers or suppliers if (i) its market share in the market(s) affected by the infringement is below 5% during the infringement period and (ii) the application of joint and severally rules harms irreparably its economic viability and devaluates fully its assets.[7] The aforementioned exception for SMEs is not applicable if the SME is the ringleader or coerced other undertakings to participate in the infringement or has been condemned in another procedure for a competition law breach by a final decision. With regards to a leniency applicant,[8] the company is only liable to (i) the respective direct or indirect customers or suppliers, and (ii) any other victims, if these cannot obtain full reparation on the suffered damages from the other infringers.

5. Burden of proof/Passing-on defence

The passing-on defence is expressly allowed under national rules: the defendant may invoke the fact that the claimant passed on (fully or in part) the overcharge resulting from the competition law infringement. The burden of proving that the overcharge was passed on rests with the defendant.[9] Conversely, indirect purchasers may seek compensation arguing that the overcharge was passed on them.

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no pre-trial discovery procedure in Portugal similar to the one in force in the US legal system.

4 See Article 3(1) and 4(1) of Law 23/2018.

5 See Article 4(2) of Law 23/2018.

6 See Article 5(1) of Law 23/2018.

7 See Article 5(2-3) of Law 23/2018.

8 See Article 5(4) of Law 23/2018.

9 See Article 8 of Law 23/2018.

Still, any party to the proceedings, including the claimant, is entitled to request to the court the disclosure of documents that are considered as necessary to prove the alleged facts that are in the possession of the defendant or of any third party, including public authorities.[10]

In the case of documents from the file of the PCA, the European Commission or a national competition authority within the EU, the court may order the disclosure of the following categories of evidence only after the competition authority has closed its proceedings: (i) information that was prepared by a natural or legal person specifically for the proceedings of the competition authority, (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings and (iii) settlement submissions that have been withdrawn.[11] Still, the court, per applicable rules, cannot request the following sets of documents from a competition authority: (i) leniency statements; and (ii) settlement proposals.[12]

There is also a specific procedure to protect business secrets from requested documents. Under this procedure the court can request the presentation by the parties of documents containing confidential information, albeit adopting adequate measures to protect the respective confidentiality, such as (i) deletion of excerpts from documents; (ii) hold hearings behind closed doors; (iii) restrict the number of persons authorised to have access to the evidence, namely, limit or access the legal representatives and defenders of the parties or individuals subject to the obligation of confidentiality; or (iv) request the preparation by a court-appointed expert of information in an aggregated or otherwise non-confidential manner.[13]

In addition, before bringing an action for damages, the claimant, through a reasoned motion, can request the competent court to summon a party withholding information or means of proof and order it to present the said information or means of proof.[14]

When there is serious evidence of a breach of competition law capable of causing damages, the injured party can ask the court for provisional measures to preserve the means of proof of that breach.[15]

Additionally, when there is a well-founded fear that the deposition of a certain party or the checking of certain facts by means of inspection will become impossible or very difficult, that deposition or inspection can take place before the action is brought.[16]

10 See Article 12, 13 and 14 of Law 23/2018.

11 See Article 14(4) of Law 23/2018.

12 See Article 14(5) of Law 23/2018.

13 See Article 12(7) of Law 23/2018.

14 See Article 13(1) of Law 23/2018. Articles 2 to 9 of Law 23/2018 are applicable, mutatis mutandis, to the request—see Article 13(2) of Law 23/2018. In accordance with the Civil Procedure Code, the summoned party can challenge this court order—see Article 1046(1) of the Civil Procedure Code.

15 See Article 17(1) of Law 23/2018.

16 See Article 17(2) of Law 23/2018.

7. Limitation Periods

Prior to the implementation of Directive 2014/104/EU by Law 23/2018 the relevant limitation period, for private antitrust claims based on tort liability, was three years from the date on which the injured party was aware of its right, even if unaware of the identity of the person liable and the full extent of the damage.[17] Yet, the Court of justice ruled in 2019 that this system of limitation period violated Article 102 TFEU and the principle of effectiveness: "a limitation period of three years, such as that at issue in the main proceedings, which, first, starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and, secondly, may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the right to full compensation practically impossible or excessively difficult".[18]

Pursuant to Law 23/2018, the limitation period is now five years from the date the victim knows or can reasonably be expected to know of, cumulatively, the relevant conduct and the fact that it was anti-competitive, the identity of the wrongdoer; and the harm that it caused to the victim.[19]

In any case, the five-year limitation period does not start to run until the infringement has ceased. Further, said period is suspended when the PCA, other competition authority of other EU member state or the European Commission, starts a formal investigation regarding the infringement to which the indemnity claim is connected. Aforesaid suspension only ceases one year after the case is concluded by the relevant competition authority.[20]

8. Appeal

First instance civil court decisions and specialised Competition Court rulings can be subject to judicial review before the Court of Appeal and, if applicable procedural rules are met, by the Supreme Court of Justice.[21]

9. Class actions and collective representation

In the Portuguese jurisdiction, class actions are available for private antitrust enforcement under the opt-out model.[22]

The judicial claim must be introduced by (i) a natural person; (ii) a public prosecutor; (iii) an association or foundation whose aim is the protection of consumers; or (iv) an association of companies whose members were victims of anti-competitive conducts, even if the respective by-laws do not include in their scope the protection of competition.[23]

17 See Article 498(1) of Law 23/2018.

18 CJEU, Case C-637/17, 28 March 2019, Cogeco, para. 53.

19 See Article 6 of Law 23/2018.

20 Please see preceding footnote.

21 See Article 627 *et seq* of the Civil Procedure Code.

22 See Article 19 of Law 23/2018 and Articles 14 and 15 of Law 83/95.

23 See Article 19(2) of Law 23/2018 and Articles 2(1) and 15 of Law 83/95

If the class action proceeds on the merits, the judicial decision determines the criteria to identify the victims of the anti-competitive conduct and the quantification of the damage suffered by each identifiable victim. If all victims are not individually identifiable, the court can award a global compensation amount. The judicial decision further identifies the entity responsible for the reception, management, and payment of the granted compensation to the victims which were not individually identifiable.[24]

10. Key issues

In a recent request for a preliminary ruling (case C 637/17, Cogeco), triggered by a company active in the Portuguese jurisdiction, the Court of Justice of the European Union, by a judgment of 28 March 2019, confirmed that Directive 2014/104 rules are not applicable ratione temporis to actions for damages that were lodged before the expiry of the deadline for transposing Directive 2014/104 into the Portuguese jurisdiction.

Methodology for the selection of cases

The following database includes the most relevant publicly available cases in the Portuguese case law for both follow-on and stand-alone proceedings and it does not attempt to be exhaustive. The information was retrieved from public databases of Portuguese courts, including www.dgsi.pt.

24 See Article 19 of Law 23/2018.

Country: Portugal	
Case Name and Number: Case 135/12.7TCFUN.L1.S1 AA and BB vs CC	
http://www.dgsi.pt/jstj.nsf/-/1C7619DD818936D680257F5B00541003	
Date of judgment: 16 February 2016	
Economic activity (NACE Code): G46.5—Wholesale of information and communication equipment	
Court: Portuguese Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: AA and BB.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for procedural and substantive reasons.
Defendants: CC.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The case was dismissed due to the lack of competence of Portuguese courts.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. The Portuguese Supreme Court, in 2016, dismissed the distributor's and retailer's case based on the lack of competence of Portuguese courts per agreements dispute jurisdiction clause granting competence to Irish courts.	**Amount of damages initially requested:** Circa EUR 40 million.
Key Legal issues: • Contractual versus extracontractual liability in damages • Validity of dispute resolution clause	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Lost sales and indirect costs linked to the execution and termination of the distributorship contract.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Eduardo Maia Cadete , Partner, Morais Leitão Advogados, maiacadete@mlgts.pt
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

In 2012, AA. and BB, a former distributor and retailer of CC's products, respectively, filed an action in Portugal against CC seeking damages for alleged competition law breaches under Article 102 TFEU and equivalent national provision of the Portuguese Competition Act.

Brief summary of judgment

The first instance court, the Appellate Court and the Supreme Court deemed that the relevant agreements' clauses giving competence to Irish courts were applicable as the dispute cause of action was reasoned on contractual liability pursuant to EC Regulation 44/2001.

Country: Portugal	
Case Name and Number: Case 178/07.2TVPRT.P1.S1 AUTO-AA vs SC COMÉRCIO and SC-INDÚSTRIAS	
Date of judgment: 20 June 2013	
Economic activity (NACE Code): G.45.1—Sale of motor vehicles	
Court: Portuguese Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: AUTO-AA	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: SC COMÉRCIO and SC-INDÚSTRIAS	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes. EUR 50,000 to AUTO-AA plus EUR 40,000 awarded to cover personal injury damages.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. The Portuguese Supreme Court decided to confirm the decision of the appellate court to award damages to the claimant for the abuse of economic dependency within a framework of contractual liability.	**Amount of damages initially requested:** EUR 1,316,584
Key Legal issues: • Contractual liability in damages • Award of damages for abuse of economic dependency	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Damages related to the termination of the contract.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Eduardo Maia Cadete, Partner, Morais Leitão Advogados, maiacadete@mlgts.pt; Miguel Mota Delgado, Junior Lawyer, Morais Leitão Advogados, mmdelgado@mlgts.pt

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

AUTO-AA concluded a concession agreement with SC-COMÉRCIO and SC-INDÚSTRIAS, agreeing to buy and sell Toyota and Lexus motor vehicles. In 2004, SC-COMÉRCIO and SC-INDÚSTRIAS terminated the agreement. AUTO-AA filed a suit claiming damages namely on the basis of an abuse of economic dependency, the abuse consisting in the illegal termination of the agreement.

Brief summary of judgment

In 2013, the Portuguese Supreme Court confirmed the decision of the appellate court to award damages to the claimant for the abuse of economic dependency, within a framework of contractual liability. The Portuguese Supreme Court found that the termination of the agreement breached Article 7 of Law 18/2003 (the now repealed Portuguese Competition Law of 2003). It decided, as well, to increase the amount of the damages awarded by the appellate court.

Country: Portugal	
Case Name and Number: Case 107/2001.L1-7	
Date of judgment: 4 October 2011	
Economic activity (NACE Code): G.45.3—Sale of motor vehicle parts and accessories	
Court: Lisbon Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: ED	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: GD	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claim was dismissed due to lack of proof of economic dependency.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 1,329,525 (at the time, PTE 266,545,938)
Key Legal issues: • Contractual and extracontractual liability in damages • Award of damages for abuse of economic dependency	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Costs related to the termination of the contract.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Eduardo Maia Cadete, Partner, Morais Leitão Advogados, maiacadete@mlgts.pt; Miguel Mota Delgado, Junior Lawyer, Morais Leitão Advogados, mmdelgado@mlgts.pt
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

GD, a producer of tires, and ED, a retailer of tires, entered into a distribution and retail agreement. GD issued to ED a number of invoices related to the purchasing of tires. ED refused to pay some of the amounts owed and, in 2001, GD terminated the contract. Additionally, GD filed a suit claiming the payment of the amounts owed. In its counterclaim, ED claimed that by terminating the contract GD had incurred, namely, in abuse of economic dependency. It did so on the basis of both contractual and extracontractual liability.

Brief summary of judgment

In 2011, the Lisbon Court of Appeal found that, without proof of the absence in the upstream market of an alternative producer of tires, it could not be established a situation of economic dependency and, therefore, of abuse. As such, the claim was dismissed.

Country: Portugal	
Case Name and Number: Case 3130/08, A. vs B, judgment publicly available in physical format at Portuguese Colectânea de Jurisprudência, n.º 227, Tomo III/2010	
Date of judgment: 2010	
Economic activity (NACE Code): J.59.13—Motion picture, video and television programme distribution activities	
Court: Portuguese Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: A	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: B	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claim was dismissed on the basis of a restrictive reading of the scope of protection of the relevant legal provisions which would only protect the consumers and not other competing businesses.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. The Portuguese Supreme Court decided to confirm the decision of the appellate court to deny the award of damages to the claimant.	**Amount of damages initially requested:** EUR 55,000
Key Legal issues: • Extracontractual liability in damages • Scope of protection of antitrust provisions	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Eduardo Maia Cadete, Partner, Morais Leitão Advogados, maiacadete@mlgts.pt; Miguel Mota Delgado, Junior Lawyer, Morais Leitão Advogados, mmdelgado@mlgts.pt

Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

B, a movie distributor, refused to rent to A., a company that runs a movie screening business, three copies of an award-winning picture. A. filed a suit against B, claiming damages on the basis of extracontractual liability.

Brief summary of judgment

In 2010, the Portuguese Supreme Court found that the protection of the interests of the claimant was outside the scope of the relevant norms, including the one contained in Article 1(2) of Law 18/2003 (the now repealed Portuguese Competition Law of 2003). The Portuguese Supreme Court considered that only the consumers would be within the scope of protection of those norms.

Country: Portugal	
Case Name and Number: Cogeco Communications Inc v. Sport TV Portugal	
Date of judgment: Case pending	
Economic activity (NACE Code): J.60.20—Television programming and broadcasting activities	
Court: Lisbon Court of First Instance	**Was pass on raised (yes/no)?** No
Claimants: Cogeco Communications Inc	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for both procedural and substantive reasons.
Defendants: Sport TV Portugal, SA, Controlinvest-SGPS SA, Nos-SGPS SA	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. This preliminary ruling is still pending.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Lisbon Court of First Instance has decided to stay the proceedings and refer the case to the Court of Justice of the European Union for a preliminary ruling (case C-637/17).	**Amount of damages initially requested:** Circa EUR 11.5 million
Key Legal issues: • Compatibility between the text and purpose of the Damages Directive and *res judicata* • Application *rationae temporis* of the Damages Claims Directive • Applicability of the Damages Directive to facts occurred before having entered into force	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Daniela Cardoso, Associate, Telles Advogados, d.cardoso@telles.pt

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

In 2015, Cogeco cable brought an action against Sport Tv, NOS and Controlinveste (These two as Sport Tv´s shareholders) seeking compensation as a result of an infringement of competition law committed by Sport Tv. The Portuguese Competition Authority found out that Sport Tv had abuse of its dominant position and declared such infringement, which was later upheld by the Portuguese Competition Court and by the Lisbon Court of Appeals. In light of the transposition of the Damages Directive to the Portuguese legal order (which had not been yet transposed at the time the facts occurred), Cogeco cable filed an action for damages against Sport Tv and its shareholders claiming damages on the basis of the recent Damages Directive.

Brief summary of judgment

Due to the considerable number of questions raised in the referred lawsuit—ranging from (i) the clashes between national provisions and those laid down in the Damages Directive to (ii) whether can these clashing national provisions be excluded regarding actions for damages lodge before the expiry of the Directive´s transposition period but related to facts that occurred and were declared as such prior to the Directive's publication—the Lisbon Court of First Instance decided to stay proceedings and refer to the Court of Justice of the European Union for a preliminary ruling.

The CJEU in the Cogeco judgment (case C 637/17) ruled that Directive 2014/104/EU was not applicable to the national dispute in the main proceedings. Sill, it concluded that "Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority".

Country: Portugal	
Case Name and Number: Case 1774/11.9TVLSB	
Date of judgment: 22 November 2016	
Economic activity (NACE Code): J.61—Telecommunication	
Court: Lisbon Court of First Instance	**Was pass on raised (yes/no)?** No
Claimants: AA	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: BB	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No. The claim was dismissed.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. The first instance decision deemed the claim and damages not proven. No appeal was brought.	**Amount of damages initially requested:** circa EUR 11 million
Key Legal issues: • Contractual versus extracontractual liability in damages • Margin squeeze • Invalidity of contractual clause in wholesale reference offer (unilaterally changed)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Lost sales.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Gonçalo Machado Borges, Partner, Morais Leitão, gmb@mlgts.pt

Follow-on (EC or NCA?) or stand-alone? Follow-on (NCA) based in case PRC/2003/5 (available at https://extranet.concorrencia.pt/PesquisAdC/PRC_Page.aspx?Ref=PRC_2003_5)	

Brief summary of facts

In 2011, a Portuguese telecommunications operator brought a claim for compensation for damages resulting from a margin squeeze in a wholesale broadband access (bitstream offer) between 2003-2005. Damages were claimed on the basis of contractual liability, due to the nullity of a unilateral increase in wholesale access prices. On a subsidiary basis, tort liability was claimed.

Brief summary of judgment

The judgment considered the damages claimed (loss of profits and wholesale price surcharge) were not sufficiently proved as a result of the evidence produced during the case, including very extensive expert reports. Contractual liability was found to be inapplicable.

The main ground for the decision was the fact that the original abuse of dominance fining decision by the competition authority (which had lapsed in court pending an appeal brought against the fines imposed) was deemed irrelevant (as the PCA case was declared, under the applicable statute of limitation rules, time-barred during the judicial phase) and the claimant was made to demonstrate ex novo the margin squeeze abuse.

SPAIN

INTERNATIONAL CHAMBER OF COMMERCE

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In Spain, private damages actions have historically played a very limited role in the enforcement of competition law. As a result of the enactment of the current Spanish Competition Act 15/2007 of 3 July 2007 (the "**SCA**"), private enforcement of competition law was facilitated, increasing the number of antitrust damages actions brought before Spanish Courts. However, there was still no specific regulation on the liability for such kind of damages.

Private antitrust litigation is expected to grow further as a result of the recent transposition of the Directive 2014/104/EU of 26 November 2014 (the "**Damages Directive**") into Spanish Law through the Royal Decree-Law 9/2017 of 26 May 2017 (the "**RDL 9/2017**"), which has approved certain specific rules, both substantive and procedural, in the field of private antitrust actions, by respectively amending the SCA and the Spanish Act 1/2000 of 7 January 2000 on Civil Procedure (the "**SACP**").

Both follow-on and stand-alone actions (*i.e.* based or not based on a previous resolution issued by a competition authority) are allowed under Spanish law.

1. Jurisdiction

Apart from the European Commission, the main administrative bodies in charge of enforcing competition law in Spain are the National Commission on Markets and Competition ("*Comisión Nacional de los Mercados y la Competencia or CNMC*") and several regional competition authorities. However, they are only competent for public enforcement of competition law.

On the whole, judicial actions for damages resulting from infringements of competition law must be brought before the commercial courts, which are the competent courts regardless of

whether the victim is a public or a private entity. However, a breach of competition law may also be submitted as a defence *vis-à-vis* an action brought by the infringer before civil courts.

In addition, certain anti-competitive conducts are qualified as a crime by the Spanish Criminal Code, and therefore may give rise to criminal liability. In such a case, criminal courts will have jurisdiction and criminal proceedings will prevail. Criminal courts will also deal with the civil liability derived from such criminal offences (*i.e.* damages compensations), unless the injured party reserves its right to claim the damages in further civil proceedings, to be brought once the criminal proceedings have ended.

The rules applicable to administrative and criminal proceedings are not covered in this overview.

2. Relevant legislation and legal grounds

Before the RDL 9/2017 came into force, and without prejudice to the specific antitrust legal provision breached, antitrust damages actions were generally founded on tort liability provisions contained in the Spanish Civil Code (the "SCC"). SCC general provisions on contracts may also be invoked in certain cases. The applicable procedural rules were those generally provided by the SACP for any other civil ordinary proceedings.

In addition to these provisions, private antitrust actions are now dealt with in the new Title VI of the SCA, which regulates certain substantive aspects, and in the new Article 283bis of the SACP, which sets out specific rules on disclosure of evidence in proceedings regarding antitrust damages actions.

The SCA states that undertakings which have infringed competition law are liable for the harm caused by the infringement (new Article 71.1 of the SCA). As a result, any natural or legal person who has suffered harm caused by an infringement of competition law is entitled to claim full compensation for that harm from the infringer (new Article 72.1 of the SCA).

The burden of proof of the harm rests with the claimant (new Article 76.1 of the SCA). In addition, the claimant must bring evidence of the infringement and the causal link between it and the harm.

The RDL 9/2017 has reformed the SCA in order to make it easier to comply with these evidence requirements so that:

- In the event of a Spanish competition authority (the CNMC or a regional authority) or a Spanish court having found an infringement of competition law in a final decision, such an infringement is deemed to be irrefutably established for the purposes of an action for damages (new Article 75.1 of the SCA). The same rule applies to infringements of Articles 101 or 102 of the Treaty on the Functioning of the European Union (the "TFEU") found in EU Commission decisions (Commission decisions have direct effect and are legally binding in national courts, therefore, there is no need for them to be final) and judgments. However, there will only be a rebuttable presumption of existence of those infringements of competition law declared in final decisions issued by competition authorities or courts of other EU Member States (new Article 75.2 of the SCA).

- When, on the basis of the evidence available, it is practically impossible or extremely difficult to precisely quantify the harm suffered by a claimant as a result of an infringement of competition law, Spanish courts will be entitled to estimate an amount (new Article 76.2 of the SCA).

- Spanish courts may request any Spanish competition authority (the CNMC or a regional authority) to report on the criteria that should be considered for the quantification of the harm (new Article 76.4 of the SCA).

- There is a rebuttable presumption that cartels cause harm (new Article 76.3 of the SCA).

Ratione temporis application of the RDL 9/2017

In accordance with the First Transitional Provision of the RDL 9/2017, the substantive provisions implemented through the amendment of the SCA will not apply retroactively. These substantive provisions are those regulating the limitation period to bring an action for damages and its interruption, the application of certain presumptions of damages and rules for determining its amount, the effects of the resolutions handed down by the antitrust authorities once they are final, the liability of the infringers and the special liability regime of the small—or medium-sized enterprises and the immunity recipients.

In Spain, there is currently an ongoing debate on how to interpret the non-retroactivity principle set forth by the RDL 9/2017. There is already case-law from the European Court of Justice confirming that the national laws that have transposed the substantive provision of the Damages Directive cannot be applicable *ratione temporis* to actions brought before the expiry of the transposition deadline or before the transposition of the Damages Directive into the national legal order, without prejudice to the application of the principles of equivalence and effectiveness (judgment of 28 March 2019, *Cogeco*, case C-637/17). However, it is still not clear whether the substantive provisions of the RDL 9/2017 may apply to those cases referring to infringements of competition law that ceased before its entry into force (*i.e.* 27 May 2017). Particular questions arise with regard to limitation periods, especially when, despite the conduct ceasing before the entry into force of the new regime, the competition authority adopts a decision declaring the existence of an infringement after the entry into force of same.

With respect to the procedural provisions implemented through the amendment of the SACP, which regulate access to the sources of evidence, the First Transitional Provision of the RDL 9/2017 states that they will apply to proceedings initiated after its entry into force (*i.e.* 27 May 2017), regardless of whether they refer to an infringement of competition law that ceased before said date.

3. What types of anti-competitive conduct are damages actions available for?

Although damages actions are available for conducts falling within the scope of the Spanish Act 3/1991 of 10 January 1991 on Unfair Competition, the new provisions included in the SCA by the RDL 9/2017 are only applicable to actions for damages resulting from the breach of Articles 101 or 102 of the TFEU or their national equivalent provisions, *i.e.* Articles 1 or 2 of the SCA (new Article 71.2.a of the SCA).

4. What forms of relief may a private claimant seek?

Without prejudice to other remedies when an antitrust action has to do with a contract (in which case SCC general provisions on contracts, and the remedies set therein, will also apply), pursuant to the new Article 72.1 of the SCA, claimants are entitled to obtain full compensation for the harm caused by any breach of competition law.

Full compensation means that the person who has suffered the harm must be placed in the position in which it would have been had the infringement not been committed. The compensation shall therefore cover actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), plus interest (new Article 72.2 of the SCA).

Overcompensation by means of punitive damages, in whatever form, is not allowed under Spanish law (new Article 72.3 of the SCA).

Undertakings which have jointly infringed competition law shall be jointly and severally liable for the harm caused. The injured party has the right to claim compensation in full for the harm from any of the infringers (new Article 73.1 of the SCA).

Infringing undertakings which had compensated the injured party may seek a contribution from the rest of the infringers, the amount of which shall be determined in accordance with their relative responsibility for the harm caused by the infringement (new Article 73.5 of the SCA). Such recovery actions must be brought within the general time limit of five years, pursuant to Article 1964.2 of the SCC.

There are two exceptions to the aforementioned general principle of co-infringers' joint and several liability set out by new Article 73.1 of the SCA:

- Where the infringer is a small—or medium-sized enterprise ("SME"), as defined in European Commission Recommendation 2003/361/EC, it will be liable only to its own direct and indirect purchasers, provided that certain conditions expressed by the Damages Directive are fulfilled (new Articles 73.2 and 73.3 of the SCA).

- Where the infringer has been granted immunity by a competition authority, it will be jointly and severally liable only to its own direct and indirect purchasers or providers. Immunity recipients shall also be liable to other injured parties if full compensation for the harm caused by the infringement of competition law cannot be obtained from the other infringers (new Articles 73.4 of the SCA).

Finally, one of the main innovations introduced by the RDL 9/2017 is parent companies' joint and several liability for the harm caused by the infringements of competition law committed by their subsidiaries (new Article 71.2.b of the SCA). Although the parent companies' liability rule was not directly required by the Damages Directive, the Court of Justice of the EU ruled that the concepts of undertaking and economic unit in EU competition law involve such liability in damage claims.[1] Yet, the parent company is not liable when it does not determine the subsidiary's economic behaviour.

1 CJEU, Case C-724/17, 14 March 2019, Skanska, para. 28-32.

5. Burden of proof/Passing-on defence

Right to full compensation for the harm caused by a breach of competition law does not cover the overcharge that the claimant passed on to its customers (new Article 78.1 of the SCA).

The defendant may argue that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof shall be on the defendant (new Article 78.3 of the SCA).

6. Pre-trial discovery and disclosure, treatment of confidential information

New Article 283bis of the SACP provides specific rules on disclosure of evidence in proceedings relating to antitrust damages actions, in line with the Damages Directive.

Accordingly, both the claimant and the defendant may reasonably request each other or a third party (typically, a competition authority) to disclose relevant evidence which lies in their control. The court shall limit the disclosure of evidence to that which can be considered proportionate.

Request for the disclosure of evidence may be submitted prior to filing the claim (in that case, the claim must be brought within twenty days from the date on which this disclosure had taken place), at the time of filing it or over the course of the judicial proceedings.

The disclosure of evidence included in the file of a competition authority is specifically regulated by the SACP, in a more restrictive manner than the disclosure of other evidence:

- Spanish courts cannot order the disclosure of the following categories of evidence before the closure of the relevant competition proceedings: (i) information that a natural or legal person has specifically prepared for such proceedings, (ii) information that the relevant competition authority has drawn up and sent to the parties in the course of the proceedings, and (iii) *settlement submissions* that have been withdrawn.

- Spanish courts cannot order the disclosure of *leniency statements* and *settlement submissions*.

- Spanish courts cannot order the disclosure from a competition authority of evidence included in its file unless no other party is reasonably able to provide that evidence.

With regard to evidence containing confidential information, Spanish courts shall be empowered to order its disclosure where they consider it relevant, but must take effective measures to protect such information (e.g. redacting sensitive passages in documents, conducting closed hearings or restricting access to them, limiting the number of persons allowed to examine the evidence, instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form, redacting a non-confidential version of court resolutions containing confidential data and limiting access to certain sources of evidence to the parties' legal representatives and advocates and to experts subject to confidentiality obligations). Legal professional privilege shall be protected by the courts when ordering the disclosure of evidence.

7. Limitation Periods

The RDL 9/2017 has implemented a relevant change in the limitation period for bringing antitrust damages actions. Prior to its entry into force, such actions had to be brought within the general time limit of one year provided for damages resulting from tort liability (Article 1968.2 of the SCC). The *dies a quo* for this one-year limitation period has been interpreted by the Spanish Supreme Court as the day on which the party suffering the damage knew about it and was able to bring the corresponding damages action. However, new Article 74.1 of the SCA lays down a time limit of five years (the minimum required by the Damages Directive).

The five-year limitation period shall begin to run on the date when, once the infringement has ceased, the claimant has or can reasonably be expected to have knowledge of all the following circumstances: (i) the behaviour and the fact that it infringes competition law, (ii) the harm caused by the infringement, and (iii) the identity of the infringer (new Article 74.2 of the SCA).

The limitation period shall be interrupted if a competition authority initiates an investigation or sanctioning proceedings in respect of an infringement related to the action for damages. The interruption shall end one year after the resolution issued by the relevant competition authority has become final or the proceedings are otherwise terminated (new Article 74.3 of the SCA).

Likewise, the limitation period shall be interrupted during any out-of-court settlement process concerning the claim for damages, for a maximum term of two years. The interruption shall apply only to those parties involved or represented in such a process (new Articles 74.4 and 81 of the SCA).

8. Appeal

Judgments issued by commercial courts may be challenged before the corresponding Appeal Court.

Judgments issued by courts of appeals may in turn be appealed before the Spanish Supreme Court, provided that certain requirements set out by the SACP are met.

9. Class actions and collective representation

US-style class actions are not available in Spain, but the SACP provides for a sort of collective legal standing of consumers' and users' associations that would also be available for antitrust damages actions.

There are two different types of collective actions, depending on whether they are aimed at defending collective interests (*i.e.* those of victims that are perfectly determined or easily determinable) or diffuse interests (*i.e.* those of victims that are undetermined or difficult to determine). Consumers' and users' associations are entitled to bring any of these two actions, as well as the public prosecutor. Actions in defence of collective interests can also be brought by entities whose purpose is the defence or protection of the affected consumers and users or by the own groups of them (Article 11 of the SACP).

The admission for processing of the complaint will be published in the media so that any affected party can join the proceedings (Article 15 of the SACP). In practice, if the complaint is upheld, the judgment will determine the consumers that will benefit from the compensation. If the individual determination of the affected consumers is not possible, the judgment will establish the basis for the calculation of the compensation to which any injured party is entitled.

10. Key issues

The non-retroactivity of the substantive provisions introduced by the RDL 9/2017

In proceedings referring to antitrust infringements committed before the transposition of the Damages Directive into Spanish law, Spanish Courts seem to agree that it is not possible to interpret the former regime applicable to damages actions in accordance with the Damages Directive on the basis of the principle of interpretation in conformity. This is the reasoning used, for instance, by the 15th Section of the Barcelona Court of Appeals in its judgment of 13 January 2020 handed down in the so-called "envelopes cartel", sanctioned by the CNMC (then referred to as "*Comisión Nacional de la Competencia CNC*") in a decision dated 25 March 2013, to conclude that "the favourable treatment of the leniency provided for in Article 11 of the Directive is not appropriate and there is no presumption of damage on account of the principle of conforming interpretation".

However, in the damages actions brought in relation to the "trucks cartel", sanctioned by the European Commission by a decision dated 19 July 2016 (but published on 6 April 2017), despite referring to an infringement that had ceased also before the entry into force of the Damages Directive, some courts have interpreted the former regime in the light of the Damages Directive on the basis of the principle of interpretation in conformity, on the understanding that that decision was handed down when the Damages Directive was already in force and was published after its transposition period had elapsed. In practice, this implies embracing the presumption that cartels cause damages and being flexible in the determination of the damages to facilitate their calculation. However, other Courts, rather than invoking the interpretation in conformity (the Damages Directive was not applicable *ratione temporis*), have taken into account the Court of Justice of the EU case-law on equivalence and effectiveness when applying the former regime in these cases, thus arriving to a similar result.

Subsidiaries' liability for their parent companies' antitrust infringements found in European Commission decisions

In Spain, a significant number of actions for damages relating to the European cartel of truck manufacturers have been brought not against the companies sanctioned by the EU Commission in its decision of 19 July 2016, but against their Spanish subsidiaries, assuming that the commission of the infringement by the latter was irrefutably established as a result of such a decision, without need of further evidence.

In this regard, Spanish courts have taken two different positions. Some of them have dismissed the truck purchasers' claims against the subsidiaries by arguing that the EU Commission decision only evidences that the companies mentioned therein infringed

competition law, but not their subsidiaries, which may only be deemed liable for the infringement if the claimants bring evidence that they effectively took part in it.

Other courts, however, have considered that the principle of economic unit established by the ECJ case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exerts a decisive influence on the former (there is a rebuttable presumption of that influence in the case of wholly-owned subsidiaries), must also apply in reverse, *i.e.* to extend the parents' liability to their subsidiaries. Accordingly, these courts have deemed the subsidiaries' infringement of competition law to be evidenced on the sole basis of the EU Commission decision, although it did only refer to their parent companies.

Such are the doubts about this issue that the 15th Section of the Barcelona Court of Appeals, in its judgment of 24 October 2019, referred this question to the Court of Justice of the EU for a preliminary ruling: "Does the ECJ doctrine on the economic unit justify the extension of the parent company's liability to the subsidiary or only applies to the extension of the subsidiaries' liability to the parent company?"

Calculation of damages

Courts dealing with antitrust damages actions encounter a major difficulty when quantifying the harm suffered. In practice, Spanish Courts will usually follow the guidance provided in the Communication from the European 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) and will compare the actual position of the claimants with the position in which they would have had if the infringement had not occurred. In order to do so, they will assess the expert opinions filed by the parties and will infer their own criteria on how to calculate the damages.

Methodology for the selection of cases

The selection focuses on the court decisions issued after the entry into force of the RDL 9/2017, which transposed the Damages Directive into Spanish law. Prior and more paradigmatic cases, such as those related to the damages caused by the cartel of sugar producers, have also been included. These cases raise issues of particular legal interest, most of them connected to the European cartel of truck manufacturers.

Country: Spain	
Case Name and Number: Case 344/2012	
Date of judgment: 8 June 2012	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Supreme Court	**Was pass on raised (yes/no)?** Yes
Claimants: Galletas Gullón, S.A.; Mazapanes Donaire, S.L.; Nestlé España, S.A.; Zahor, S.A.; Galletas Coral, S.A.; Productos Alimenticios La Bella Easo, S.A., Lacasa, S.A.U.; Chocolates del Norte, S.A. and Bombonera Vallisoletana, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied. The Damages Directive was not in force yet.
Defendants: Acor Sociedad Cooperativa General Agropecuaria	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1,101,053
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 1,101,053
Key Legal issues: • Cartel of sugar producers • Statute of limitations • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Price paid by the claimants minus price that they would have paid if determined by the market.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): 426/98	

Brief summary of facts

Several sugar producers were fined by the Spanish competition authority for price fixing and geographical distribution of the market. Its decision was then confirmed by the Supreme Court. Some customers of one of the cartelists (Acor) claimed for damages resulting from the infringement (*i.e.* overprice paid for the sugar). The defendant alleged that the action was time-barred, that the cartel did not cause any damages to the claimants and that any hypothetical overcharge paid by them was passed-on to their customers. The claim for damages was dismissed by the First Instance Court but then upheld by the Appeal Court. The defendant challenged the judgment of the Appeal Court before the Supreme Court.

Brief summary of judgment

The claim was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code. The *dies a quo* of this one-year period is the date of notification of the Supreme Court judgment that confirmed the sanctioning decision issued by the competition authority. The Appeal Court considered that the damages had been proved (in light of the expert report submitted by the claimants) but that the alleged passing-on had not (since the claimants did not bring any evidence on it) and the Supreme Court is not entitled to re-examine these findings. Acor must pay the difference between the sugar price charged to the claimants and the price that would have been charged to them if there had not been a cartel, since that amount is the damage caused to the claimants.

Country: Spain	
Case Name and Number: Case 651/2013	
Date of judgment: 7 November 2013	
Economic activity (NACE Code): C.10.81—Manufacture of sugar	
Court: Supreme Court	**Was pass on raised (yes/no)?** Yes
Claimants: Nestle España, S.A.; Productos del Café, S.A.; Helados y Postres, S.A.; Chocolates Hosta Dulcinea, S.A.; Zahor, S.A.; Mazapanes Donaire, S.L.; Lu Biscutis, S.A.; Chocolates Torras, S.A.; Arluy, S.L.; Chocovic, S.A.; La Casa, S.A.U.; Productos Mauri, S.A.; Delaviuda Alimentación, S.A. and Wrigley Co., S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied. The Damages Directive was not in force yet.
Defendants: Ebro Foods	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 4,105,209
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 4,105,209
Key Legal issues: • Cartel of sugar producers • Statute of limitations • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Price paid by the claimants minus price that they would have paid if determined by the market.
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso. Laguard Advocats, juanpablo.correa@laguardlegal.com; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law

Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): 426/98	

Brief summary of facts

Several sugar producers were fined by the Spanish competition authority for price fixing and geographical distribution of the market. The claimants claimed for damages (extra costs incurred) resulting from the infringement.

Brief summary of judgment

The Court holds that in the case of claiming compensation for damages caused by the cartel's actions in arranging the price rise, it is not enough to prove that the direct buyer has also increased the price of its products. It is necessary to prove that with that raise in the price charged to the customers it has been possible to pass on the damage suffered by the price raise resulting from the cartel's actions. If the price increased has not succeeded in passing on all that damage because there has been a decrease in sales, the passing-on defence cannot be hold or cannot be hold in its totality.

What is required in these cases is an expert's report that develops a reasonable and technical hypothesis on verifiable and non-erroneous data. The Court considers that the expert's report includes these elements and, therefore, obliges Ebro to pay the difference between the sugar price charged to the claimants and the price that would have been charged to them if there had not been a cartel, since that amount is the damage caused to the claimants. Ebro has not provided proper evidence to prove the passing-on of the damage.

Country: Spain	
Case Name and Number: Case 475/2015	
Date of judgment: 3 July 2017	
Economic activity (NACE Code): K.65.1—Insurance	
Court: Madrid Court of Appeals	**Was pass on raised (yes/no)?** No (but the Court makes a reference to the fact that the defendant had not raised this argument)
Claimants: Musaat, Mutua de Seguros a Prima Fija	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Asefa, S.A., Compañía Española de Seguros y Reaseguros, Scor Global P&C, S.E., y Caja de Seguros Reunisos, Compañía de Seguros y Reaseguros, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes (EUR 2,928,848)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available	**Amount of damages initially requested:** Damages (EUR 3,732,123) and loss of profit (EUR 19,542,241)
Key Legal issues: • Spanish property insurance cartel • Legal value of previous courts • Declarations of infringement • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert reports. The damage consisted of the 15% of insurance premiums assigned to National, after deduction of the compensations paid by National to Musaat for the whole period covered.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com

Follow-on (EC or NCA?) or stand-alone?
Follow-on NCA (Spanish competition authority): S/0037/08

Brief summary of facts

Several companies active in the property insurance market were sentenced by the Spanish competition authority for their participation in a cartel. Befre the decision became final, Musaat claimed for damages against some of these companies (Caser, Asefa and Scor).

Brief summary of judgment

The Appeal Court partially confirms the judgment handed down by Madrid Commercial Court nº 12 on 9 February 2014 (case 24/12).

The Appeal Court confirmed the first instance finding that the calculation of the limitation period begins from when the claimant is fully capable of bringing action against the defendant. This is only possible when the claimant is aware of the result of the investigation. In this respect, the Appeal Court states that the *dies a quo* should be the date on which the decision of the Spanish competition authority was notified.

Regarding the assessment of whether the acts conducted by the defendants constituted an infringement of the competition laws, the Appeal Court states that it is bound by the findings reached in this respect by the judgments handed down by the Supreme Court in the parallel administrative-contentious proceedings, which were final and which declared that the conduct of the defendants constituted a breach of the competition laws. Thus, the Appeal Court confirms the First Instance Court finding that the defendant's conduct constituted a breach of the competition laws and that it caused damages to the claimant.

However, after assessing the different expert reports filed by the parties in these proceedings, the Appeal Court revoked the compensation for damages set by the First Instance Court (which amounted to EUR 3,550,615) and set a different compensation. In this respect, the Appeal Court agreed that the defendants should jointly and severally pay MUSAAT the amount of EUR 2,928,848, which had to be partially updated by applying, to the part of the damage corresponding to claims in the period 2007-2010, the average interest rates for Treasury bonds at five and ten years (*i.e.* percentages of 4.16 % for 2007, 4.09 % for 2008, 2.97 % for 2009 and 3.17 % for 2010) according to the system established in the expert report filed by the claimant MUSAAT, and with the maximum limit of EUR 3,550,615 (the amount set by the first instance judgment).

Country: Spain	
Case Name and Number: Case 528/2013	
Date of judgment: 4 September 2013	
Economic activity (NACE Code): D.35.1—Electric power generation, transmission and distribution	
Court: Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: Céntrica Energía S.L.U.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied. The Damages Directive was not in force yet.
Defendants: Iberdrola Distribución Eléctrica, S.A.U.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** EUR 11,943,392
Key Legal issues: • Abuse of dominant position in the electricity distribution market • Statute of limitations	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): 644/08	

Brief summary of facts

Céntrica had requested from Iberdrola unconditional and massive access to the database of supply points of its electricity distribution network, to which Iberdrola was legally obliged in order to allow competition in the electricity distribution market. Iberdrola's refusal led to the opening of a file with the Spanish competition authority, which resolved that Iberdrola had a dominant position in the relevant market and that its refusal to provide access to such information was abusive (Iberdrola was imposed a fine of EUR 15 million). Iberdrola did not give Céntrica access to the database of supply points until 2 June 2008. Céntrica sent Iberdrola a letter interrupting the time limit of one year provided for damages resulting from tort liability (article 1968.2 of the Spanish Civil Code) on 28 May 2009 and then filed a claim for damages against Iberdrola. Iberdrola argued that the action was already time-barred.

Brief summary of judgment

The limitation period for bringing an antitrust damages action begins when the injured party acquires knowledge of the harm caused by the infringement of competition law. The Supreme Court made express reference to its case-law about personal injuries resulting from tort liability –according to which the one-year time limit does not start until the total and definitive extent of the damages is known– and considered it applicable to antitrust damages. The Supreme Court considered that Céntrica could not know the extent of the damages suffered until it was granted access to Iberdrola's database. Therefore, the action was not time-barred. The competent court (Bilbao Court of Appeals), which had previously resolved that the action was time-barred, was requested to issue a new judgment about Céntrica's claim for damages.

Country: Spain

Case Name and Number: Case 241/2015

Date of judgment: 7 May 2018

Economic activity (NACE Code): C.17.23 Manufacture of paper stationery

Court: Commercial Court nº 3 of Madrid	**Was pass on raised (yes/no)?** No
Claimants: Cámara Oficial de Comercio e Industria de Madrid	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied. The Damages Directive wasn't in force yet.
Defendants: ANTALIS INTERNATIONAL, SAS; ENVEL EUROPA, SA; PRINTERIOS CARTERA INDUSTRIAL, SL; TOMPLA INDUSTRIA INTERNACIONAL DEL SOBRE, SL; HISPAPEL, SA; MAESPA MANIPULADOS, SL; SOCIEDAD ANÓNIMA DE TALLERES DE MANIPULACIÓN DE PAPEL; ADVEO ESPAÑA, SA and ADVEO GROUP INTERNATIONAL	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of proof).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 64/2020, 3 February 2020, of Section 28 of Madrid Court of Appeal partially revokes the first instance judgment: • Partial acceptance of the complaint • Defendants jointly liable to pay EUR 30,100 Euros plus legal interest incremented in two points • Envel Europa, SA jointly liability is limited to the compensation determined on the basis of the parameters set in the judgment for the period from 1 February 2006 to 31 October 2010, capitalized at 9 March 2015 in accordance the IPC	**Amount of damages initially requested:** EUR 140,309

Key Legal issues: • Cartel of producers and distributors of envelopes • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Price paid by the claimant minus price that it would have paid if determined by the market.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso. Laguard Advocats, juanpablo.correa@laguardlegal.com; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant claimed for damages (payment of surcharges) resulting from the infringement.

Brief summary of judgment

The decision of the Spanish competition authority is enough to prove the existence of the cartel agreement, but there is no evidence that the claimant suffered any damages as a result.

Country: Spain	
Case Name and Number: Case 15/15	
Date of judgment: 6 June 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 7 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Bankoa, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No, although the general provisions on compensation for torts are interpreted in accordance with the Damages Directive.
Defendants: Envel Europa, S.A., Printeos Cartera Industrial, S.L., Tompla Industria Internacional del Sobre, S.L., Printeos, S.A., Hispapel, S.A., S.A. de Talleres de Manipulación de Ppael, Adveo España, S.A., Adveo Group International, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 154,270
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 66/2020, dated 13 January 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendants ordered to pay the amount to be determined in accordance with the parameters set in the first instance judgment, with the exception of the annual variable surplus, which is set at 20% for the period from 1998 to 2010	**Amount of damages initially requested:** EUR 215,468 (although the claimant reduced the among during the proceedings to EUR 154,270).
• Envel Europa, S.A.'s joint liability is limited to the period from February 2006 to September 2010	
Key Legal issues: • Cartel of producers and distributors of envelopes • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.

Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. The expert tried to determine the price in a "non-cartelized" market on the basis of comparable real scenarios taking into account data relating to the period after the Spanish competition authority investigation and the companies that did not participate in the infringement during the period in which it took place.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant claims the damages caused as a consequence of the competition infringement sanctioned by the CNMC.

Brief summary of judgment

Although the new regime does not apply here, the Court understands that one of the defendants, Adveo, which benefits from the leniency programme, will only be liable before the claimant on a subsidiary basis. Moreover, the Court declared all the defendants jointly liable, regardless of the time they began participating in the cartel.

The Court considered that the infringement of competition law by the defendants caused damages to the claimant, as it had to pay an overprice. In this respect, the Court starts from the expert report filed by the claimant (as it had the burden of proving the damage) and analyses it in light of the criticism raised in the expert reports filed by the defendants. And after this assessment, the Court concludes that the compensation could be determined following the expert report filed by the claimant, with the corrections that the expert made to it according to the allegations made by the defendants' experts.

The first instance judgment has been partially reversed by the Barcelona Court of Appeal.

The Appeal Court upheld Envel Europa, SA's petition that it not be deemed liable for the damages suffered by the claimant during the period prior to the moment when Envel became a party to the cartel. Thus, its joint liability was limited to the period from February 2006 to September 2010.

As for the damages, the Appeal Court understands that although these could be presumed on an abstract basis, this is a mere presumption that benefits the claimant but that it admits evidence to the contrary. Thus, evidence can be submitted to contest the existence of a causal link between the unlawful conduct of which the offender is accused and the damage allegedly suffered by the claimant. In this respect, the Appeal Court observes that the CNC found in its decision that there was an appreciable overpricing, which would mean that there was effective damage attributable to the companies that participated in the cartel. As for the determination of the damages, the Appeal Court starts from the expert report filed by the claimant (at the First Instance Court), but it applies corrective parameters in light of the reports filed by the defendants, concluding that the compensation should be set at 20% for the period between 1998 and 2010.

Country: Spain	
Case Name and Number: Case 189/2015	
Date of judgment: 8 June 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 11 of Madrid	**Was pass on raised (yes/no)?** No
Claimants: Obras Misionales Pontificias	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, for substantive provisions.
Defendants: Envel Europa, SA, Tompla Industria Internacional del Sobre SL, Tompla Sobre Expres, SL, Printeos, SA, Hispapel, SA, Maespa Manipulados, SL, Sociedad Anónima de Talleres de Manipulación de Ppael (S.A.M.), Adveo España, S.A. y Adveo Group Internacional, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of proof).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 63/2020, 3 February 2020, of Section 28 of Madrid Court of Appeal partially revokes the first instance judgment: • Partial acceptance of the complaint • Declaration that the defendants participated in a cartel • Defendants jointly liable to pay EUR130,200 • Envel Europa, SA jointly liability is limited to the compensation determined on the basis of the parameters set in the Compass Lexecon report for the period from February 2006 to October 2010	**Amount of damages initially requested:** EUR 215,468 (although the claimant reduced the among during the proceedings to EUR 154,270).

Key Legal issues: • Cartel of producers and distributors of envelopes • Proof and amount of damages • Statute of limitations	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com , Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant has been a client of the cartel from 1999 to 2010. It claims that the overprice paid was a consequence of the infringement.

Brief summary of judgment

Limitation period—the *dies a quo* is not the publication of the press release by the CNMC initiating proceedings as it did not offer all the factual and legal elements necessary to bring proceedings. The *dies a quo* is the day the final decision and the result of the investigation is published.

It is possible to presume that cartels produce damages, but it is not possible to presume said damage without bringing any kind or evidence. This applies particularly when the cartel consists in client-sharing without price-fixing and when prices have been privately and bilaterally negotiated with each client. In view of lacking evidence on that point, the Court dismissed the claim.

This finding was later reversed by Section 18 of the Madrid Court of Appeal in its Judgment 63/2020, dated 3 February 2020. According to the Appeal Court, the damages complaint could not be dismissed on the ground that the expert report filed by the claimant was not optimal for determining the overcharge suffered by the claimant, without taking into account the other reports filed in the proceedings by the defendants, which may determine this overcharge more precisely. The Appeal Court concluded that the report filed by one of the defendants was the one which determined the damages in the most accurate way, as it used a method that directly compared prices by applying a regression analysis to exclude

other factors affecting prices. Moreover, this report used a sufficiently representative sample of the sales in relation to the products concerned by the cartel and it also referred to one of the "hard core" participants in the cartel, which benefitted the claimant in the calculation of the compensation.

Country: Spain	
Case Name and Number: Case 30/2015	
Date of judgment: 6 June 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 3 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Cortefiel, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied.
Defendants: Antalis; Envel; Tompla and Adveo.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 477,435
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 46/2020, dated 10 January 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendants ordered to pay the amount to be determined in accordance with the parameters set in the first instance judgment, with the exception of the annual variable surplus, which is set at 20% for the period between 1994 and 2008 • Envel Europa, SA's joint liability is limited to the period from February 2006 to September 2008	**Amount of damages initially requested:** EUR 657,897
Key Legal issues: • Cartel of producers and distributors of envelopes • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.

Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Calculation of the volume of purchases made by the claimant to the defendants and determination of the surcharge in each of these purchases.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso, Laguard Advocats, juanpablo.correa@laguardlegal.com; Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com; Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant claimed for damages (payment of surcharges) resulting from the infringement.

Brief summary of judgment

The Court states that if those affected by a conduct against the Competition Law, exercise the appropriate actions to enforce their right to be compensated for the damages suffered as a result of such unlawful conducts, the burden of proof rests on the part that is claiming them. Expert reports were provided by all parties in order to establish a scenario where the injured party could see the damage suffered being compensated.

For the determination of the damages, Court only admitted the Expert opinion provided by the claimant because it contained "*a reasonable and technical hypothesis on verifiable and not erroneous data*". The report took into account the number of purchases made by the claimant from the cartel members during the period 1994 to 2008 and the setting of the overprice applied to those purchases. Therefore, the Court considered that the infringement of competition law by the defendants caused damages to the claimant.

The first instance judgment has been partially reversed by the Barcelona Court of Appeal.

The Appeal Court upheld Envel Europa, SA's petition that it not be deemed liable for the damages suffered by the claimant during the period prior to the moment when Envel

became a party to the cartel. Thus, its joint liability was limited to the period from February 2006 to 2008.

As for the damages, the Appeal Court understands that although these could be presumed on an abstract basis, this is a mere presumption that benefits the claimant but that it admits evidence to the contrary. Thus, evidence can be submitted to contest the existence of a causal link between the unlawful conduct of which the offender is accused and the damage allegedly suffered by the claimant. In this respect, the Appeal Court observes that the CNC found in its decision that there was an appreciable overpricing, which would mean that there was effective damage attributable to the companies that participated in the cartel. As for the determination of the damages, the Appeal Court starts from the expert report filed by the claimant (at the First Instance Court), but it applies corrective parameters in light of the reports filed by the defendants and it concludes that the compensation should be set at 20% for the period between 1994 and 2008.

Country: Spain	
Case Name and Number: Case 31/15	
Date of judgment: 5 September 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 3 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Misiones Salesianas	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No, although the general provisions on compensation for torts are interpreted in accordance with the Damages Directive.
Defendants: Antalis Internacional, SAS, Envel Europa, SA, Tompla Industria Internacional del Sobre SL, Tompla Sobre Expres, SL, Printeos, SA, Hispapel, SA, Maespa Manipulados, SL, Sociedad Anónima de Talleres de Manipulación de Ppael (S.A.M.), Adveo España, S.A. y Adveo Group Internacional, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 2,043,560 (EUR 847,029 for proven purchases and EUR 1,196,531 for estimated purchases).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 45/2020, dated 10 January 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendants ordered to pay the amount to be determined in accordance with the parameters set in the first instance judgment, with the exception of the annual variable surplus, which is set at 20% for the period between 1990 and 2010 • Envel Europa, SA's joint liability is limited to the period from February 2006 to September 2010	**Amount of damages initially requested:** EUR 1,184,019 for proven purchases EUR 1,486,571 for estimated purchases

Key Legal issues: • Cartel of producers and distributors of envelopes • Legal standing • Statute of limitations • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Calculation of the volume of purchases made by the claimant to the defendants and determination of the surcharge in each of these purchases.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant has been Envel and Group Tompla's client between 1987 and 2009. It claims that the overprice paid was a consequence of the infringement.

Brief summary of judgment

The Courts deals, in the first place, with several procedural objections raised by the defendants. In this respect, it states that the action brought by the claimant was based on the general regime for tort liability (Article 1902 of the SCC) and was filed within the time limit of one year provided for these actions (Article 1968.2 of the SCC). In this respect, the Court considers that the *dies a quo* was the date on which the CNC decision was published. The Court also concludes that the principle of improper solidarity should apply in this case, as it is not possible to individualize the liability of each of the participants in the cartel.

As for the determination of the damages, the Court analyses all the reports filed by the parties and it concludes that more weight should be given to the report filed by the claimant, which would contain "*a reasonable and technical hypothesis on verifiable and not erroneous data*". The report took into account the number of purchases made by the claimant from the cartel members during the period 1987 to 2009 and the setting of the overprice applied to those purchases. And although the calculations made in this report had

to be corrected, the Court considered that the methodology followed in its analysis was the correct one.

The first instance judgment has been partially reversed by the Barcelona Court of Appeal.

The Appeal Court upheld Envel Europa, SA's petition that it not be deemed liable for the damages suffered by the claimant during the period prior to the moment when Envel became a party to the cartel. Thus, its joint liability was limited to the period from February 2006 to September 2010.

As for the damages, the Appeal Court understands that although these could be presumed on an abstract basis, this is a mere presumption that benefits the claimant but that it admits evidence to the contrary. Thus, evidence can be submitted to contest the existence of a causal link between the unlawful conduct of which the offender is accused and the damage allegedly suffered by the claimant. In this respect, the Appeal Court observes that the CNC found in its decision that there was an appreciable overpricing, which would mean that there was effective damage attributable to the companies that participated in the cartel. As for the determination of the damages, the Appeal Court starts from the expert report filed by the claimant (at the First Instance Court), but it applies corrective parameters in light of the reports filed by the defendants and it concludes that the compensation should be set at 20% for the period between 1990 and 2010.

Country: Spain	
Case Name and Number: Case 32/15	
Date of judgment: 5 September 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 3 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Compañía Internacional Para la Financiación de la Distribución SAU (CIFDSA)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No, although the general provisions on compensation for torts are interpreted in accordance with the Damages Directive.
Defendants: Antalis Internacional, SAS, Envel Europa, SA, Tompla Industria Internacional del Sobre SL, Tompla Sobre Expres, SL, Printeos, SA, Hispapel, SA, Maespa Manipulados, SL, Sociedad Anónima de Talleres de Manipulación de Ppael (S.A.M.), Adveo España, S.A. y Adveo Group Internacional, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 1,273,533
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 64/2020, dated 13 January 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendants ordered to pay the amount to be determined in accordance with the parameters set in the first instance judgment, with the exception of the annual variable surplus, which is set at 20% for the period between 2002 and 2010 • Envel Europa, SA's joint liability is limited to the period from February 2006 to September 2010	**Amount of damages initially requested:** EUR 1,781,280

Key Legal issues: • Cartel of producers and distributors of envelopes • Legal standing • Statute of limitations • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Calculation of the volume of purchases made by the claimant to the defendants and determination of the surcharge in each of these purchases.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant has been Envel and Tompla's client between 2002 and 2010. It claims that the overprice paid was a consequence of the infringement.

Brief summary of judgment

The Courts deals, in the first place, with several procedural objections raised by the defendants. In this respect, it states that the action brought by the claimant was based on the general regime for tort liability (Article 1902 of the SCC) and was filed within the time limit of one year provided for these actions (Article 1968.2 of the SCC). In this respect, the Court considers that the *dies a quo* was the date on which the CNC decision was published. The Court also concludes that the principle of improper solidarity should apply in this case, as it is not possible to individualize the liability of each of the participants in the cartel.

As for the determination of the damages, the Court analyses all the reports filed by the parties and it concludes that more weight should be given to the report filed by the claimant, which would contain "*a reasonable and technical hypothesis on verifiable and not erroneous data*". The report took into account the number of purchases made by the claimant from the cartel members during the period 2002 to 2010 and the setting of the overprice applied to those purchases. And although the calculations made in this report had

to be corrected, the Court considered that the methodology followed in its analysis was the correct one.

The first instance judgment has been partially reversed by the Barcelona Court of Appeal.

The Appeal Court upheld Envel Europa, SA's petition that it not be deemed liable for the damages suffered by the claimant during the period prior to the moment when Envel became a party to the cartel. Thus, its joint liability was limited to the period from February 2006 to September 2010.

As for the damages, the Appeal Court understands that, although these could be presumed on an abstract basis, this is a mere presumption that benefits the claimant but that it admits evidence to the contrary. Thus, evidence can be submitted to contest the existence of a causal link between the unlawful conduct of which the offender is accused and the damage allegedly suffered by the claimant. In this respect, the Appeal Court observes that the CNC found in its decision that there was an appreciable overpricing, which would mean that there was effective damage attributable to the companies that participated in the cartel. As for the determination of the damages, the Appeal Court starts from the expert report filed by the claimant (at the First Instance Court), but it applies corrective parameters in light of the reports filed by the defendants and it concludes that the compensation should be set at 20% for the period between 2002 and 2010.

Country: Spain	
Case Name and Number: Case 320/15	
Date of judgment: 10 September 2018	
Economic activity (NACE Code): C.17.23 Manufacture of paper stationery	
Court: Commercial Court nº 3 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Mutua Madrileña Automovilista, Sociedad de Seguros A Prima Fija	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No, although the general provisions on compensation for torts are interpreted in accordance with the Damages Directive.
Defendants: Tompla Industria Internacional del Sobre, S.L. Tompla Sobre Expres, S.L. Printeos S.A. Maespa Manipulados, S.L. Adveo España, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 168,078
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 58/2020, dated 13 January 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendants ordered to pay the amount to be determined in accordance with the parameters set in the first instance judgment, with the exception of the annual variable surplus, which is set at 20% for the period between 2005 and 2010	**Amount of damages initially requested:** EUR 223,198
Key Legal issues: • Cartel of producers and distributors of envelopes • Legal standing • Statute of limitations • Proof and amount of damages	**Is the dispute likely to be settled privately?** No information publicly available.

Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Calculation of the volume of purchases made by the claimant to the defendants and determination of the surcharge in each of these purchases.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (Spanish competition authority): S/0316/10	

Brief summary of facts

Several producers and distributors of envelopes were fined by the Spanish competition authority for price fixing and customer allocation. The claimant has been Adveo and Tompla's client for five years. It claims the overprice paid as a consequence of the infringement.

Brief summary of judgment

The Courts deals, in the first place, with several procedural objections raised by the defendants. In this respect, it states that the action brought by the claimant was based on the general regime for tort liability (Article 1902 of the SCC) and was filed within the time limit of one year provided for these actions (Article 1968.2 of the SCC). In this respect, the Court considers that the *dies a quo* was the date on which the CNC decision was published. The Court also concludes that the principle of improper solidarity should apply in this case, as it is not possible to individualize the liability of each of the participants in the cartel.

As for the determination of the damages, the Court analyses all the reports filed by the parties and it concludes that more weight should be given to the report filed by the claimant, which would contain "*a reasonable and technical hypothesis on verifiable and not erroneous data*". The report took into account the number of purchases made by the claimant from the cartel members during the period 2005 to 2010 and the setting of the overprice applied to those purchases. And although the calculations made in this report had to be corrected, the Court considered that the methodology followed in its analysis was the correct one.

The first instance judgment has been partially reversed by the Barcelona Court of Appeal.

The Appeal Court understands that, although these could be presumed on an abstract basis, this is a mere presumption that benefits the claimant but that it admits evidence to the contrary. Thus, evidence can be submitted to contest the existence of a causal link

between the unlawful conduct of which the offender is accused and the damage allegedly suffered by the claimant. In this respect, the Appeal Court observes that the CNC found in its decision that there was an appreciable overpricing, which would mean that there was effective damage attributable to the companies that participated in the cartel. As for the determination of the damages, the Appeal Court starts from the expert report filed by the claimant (at the First Instance Court), but it applies corrective parameters in light of the reports filed by the defendants and it concludes that the compensation should be set at 20% for the period between 2005 and 2010.

Country: Spain	
Case Name and Number: Case 274/2018	
Date of judgment: 27 September 2018	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Murcia	**Was pass on raised (yes/no)?** No
Claimants: Explotaciones Agrícolas Basol, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. For procedural and substantive provisions.
Defendants: Volvo Group España, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of proof).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 14,795
Key Legal issues: • European cartel of truck manufacturers (sanctioned by the EC for price fixing and passing-on of costs for the introduction of new emission technologies) • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso. Laguard Advocats, juanpablo.correa@laguardlegal.com; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The claimant argued that, because of the cartel of truck manufacturers, sanctioned by the European Commission in 2016, the price paid to the defendant for a truck was higher than it should have been.

Brief summary of judgment

Even if the defendant has infringed competition law, the claimant must bring evidence of the damage suffered as a result, which it did not in this case.

Country: Spain	
Case Name and Number: Case 644/2017	
Date of judgment: 7 December 2018	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** Yes
Claimants: Safetykleen España, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. For procedural provisions.
Defendants: Volvo Group España, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** N/A
Key Legal issues: • European cartel of truck manufacturers • Disclosure of evidence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had acquired a Volvo truck requested access to some evidence in possession of Volvo Group España SA, pursuant to Article 283bis of the Spanish Act on Civil Procedure, for the subsequent filing of a claim for damages resulting from the cartel of truck manufacturers sanctioned by the European Commission. Volvo Group España SA alleged

its lack of standing, since it was not an addressee, but the subsidiary of an addressee, of the European Commission decision relating to the trucks cartel.

Brief summary of judgment

The court considered that disclosure of evidence may be requested from subsidiaries of a company sanctioned for a cartel, in line with the case-law of the European Court of Justice, which rejects a strict concept of legal personality in favour of the broader concept of economic unity. However, it dismissed the request on the grounds that some of the documents required from Volvo Group España SA were useless to substantiate the claim, others could contain a quantification of damages (therefore, disclosure of them could affect the right of defence) and others were already in possession of the future claimant.

Country: Spain	
Case Name and Number: Case 198/2018	
Date of judgment: 13 December 2018	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Zaragoza	**Was pass on raised (yes/no)?** Yes
Claimants: Two natural persons	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied.
Defendants: Daimler AG and AB Volvo	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of proof).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 485,111
Key Legal issues: • European cartel of truck manufacturers • Passing-on defence • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

Two individuals that had bought several trucks brought an action against Daimler AG and AB Volvo, which had been sanctioned by the European Commission for their participation in the cartel of truck manufacturers, seeking compensation for the damages resulting from the overcharge paid for the trucks due to that cartel. The defendants alleged that the infringement of competition law found by the European Commission did not give rise to an increase of prices.

Brief summary of judgment

The claimants submitted an expert report according to which the trucks were sold with a 20,87% overprice. The expert report reached this conclusion on the basis of an academic article of 2013 ("Cartel overcharges and the deterrent effect of EU competition law") but did not make an analysis of the specific effects of the trucks cartel. Therefore, the court considered that the expert report was insufficient to prove the alleged damages and dismissed the claim.

Country: Spain	
Case Name and Number: Case 309/2018	
Date of judgment: 17 December 2018	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** Yes
Claimants: Llácer y Navarro, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. For substantive provisions.
Defendants: AB Volvo and Renault Trucks SAS.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** N/A
Key Legal issues: • European cartel of truck manufacturers • Disclosure of evidence • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had bought 108 Renault trucks brought an action against AB Volvo and Renault Trucks SAS, which had been sanctioned by the European Commission for their participation in the cartel of truck manufacturers, seeking compensation for the damages

resulting from the overcharge paid for the trucks due to that cartel. The defendants alleged that any hypothetical overcharge paid by the claimant was passed-on to its customers and requested the court to order the claimant to provide a large number of documents in order to substantiate the passing-on defence.

Brief summary of judgment

The request was partially upheld. The court considered that, as the defendants have the burden of proving that the overcharge resulting from the infringement was passed on, they must have the right of access to those documents in the claimant's possession that relate to the commercial conditions of the truck sales by the claimant to third parties, but not to further documents relating to other matters.

Country: Spain	
Case Name and Number: Case 899/2017	
Date of judgment: 23 January 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 7 of Barcelona	**Was pass on raised (yes/no)?** No
Claimants: Sumal SL	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. General civil law provisions are applied when interpreting the provisions in force.
Defendants: Mercedes-Benz Trucks España, S.L.U.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages awarded (lack of passive *locus standi*).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. (See below Barcelona Court of Appeals 775/2019)	**Amount of damages initially requested:** 20% of the acquisition price
Key Legal issues: • European cartel of truck manufacturers • Legal standing • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a European trucks cartel in 2016. The claimant, an indirect customer, argued that, because of the cartel of truck manufacturers, the price paid to the distributor company Stern Motor SL for two trucks of the Daimler Group was higher than it should have been. It calculates that this surplus was 20% of the acquisition price.

Brief summary of judgment

The action was filed within the one-year deadline stated in Article 1968.2 of the Civil Code (of application before the entry into force of the new regime) as the *dies a quo* of this one-year period is the publication of the Commission Decision.

The defendant does not have passive locus standi as it has not been sanctioned by the European Commission in the Decision. It is not possible to extend, *per se*, the liability of its mother company (which was sanctioned by the Commission) to its Spanish affiliate. The complaint is, thus, dismissed. However, this finding remains disputed in the appeal procedure.

Country: Spain	
Case Name and Number: Case 287/2018	
Date of judgment: 20 February 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Barcelona	**Was pass on raised (yes/no)?** Yes
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied.
Defendants: Man Vehículos Industriales, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 4,057
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 14,314
Key Legal issues: • European cartel of truck manufacturers • Passing-on defence • Proof of damages • Legal standing • Statute of limitations	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report, which applies the criteria of Oxera study.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso, Laguard Advocats, juanpablo.correa@laguardlegal.com; Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a European trucks cartel in 2016. According to the relevant decision of the European Commission, the defendant infringed Articles 101 TFEU and 53 EEA in the market for medium and heavy trucks. The claimant was a customer who claimed for the damages caused to him by such an infringement of competition law.

Brief summary of judgment

The case is based on the presumption that the defendant's conduct caused damages to the claimant in the form of overpricing and repercussion of overcosts in the implementation of technologies. Based on the expert reports provided by both parties to the process, Court holds that the defendant has not proven with its report the absence of damages caused by the cartel in which it was involved. Moreover, the only evidentiary element relevant that the claimant brought to the process was the invoice of the purchase of the truck. Therefore, Court considered that the coordination between the truck manufacturers had an impact on the price of trucks and that damages had been caused to the claimant as a result.

Country: Spain	
Case Name and Number: Case 262/2018	
Date of judgment: 26 February 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Supreme Court (Order)	**Was pass on raised (yes/no)?** N/A
Claimants: N/A	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes, effectiveness principle
Defendants: N/A	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** N/A
Key Legal issues: • European cartel of truck manufacturers, sanctioned by the EC for price fixing and passing-on of costs for the introduction of new emission technologies	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A procedural issue arising during damages claims procedure following the European Commission's decision to sanction trucks manufacturers for breach of Article 101 (1) TFEU. Indeed, a territorial conflict between three Commercial Courts was to be decided: Valladolid (defendant's residence); Valencia (claimant's residence and place where the transaction took place) and Madrid (address of the bill).

Brief summary of judgment

The Supreme Court noted that the Damages Directive did not include specific rules regarding territorial competence. However, it included a reference to the effectiveness of EU Competition law, which needs to guide the interpretation of the Supreme Court. The Supreme Court uses by analogy the rules applicable in the framework of unfair competition and opts for the territory where the transaction took place (Valencia).

Country: Spain	
Case Name and Number: Case 309/2018	
Date of judgment: 13 March 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** Yes
Claimants: Llácer y Navarro, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. The court applied the general civil law provisions on tort liability (because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law), but construed such civil law provisions in accordance with the Directive (the principle of interpretation in conformity was deemed applicable because the Directive was already in force and the transposition period had expired when the EC decision relating to the trucks cartel was published).
Defendants: AB Volvo and Renault Trucks SAS.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** 5% of the purchase price of the trucks plus interest.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 1,298,115
Key Legal issues: • European cartel of truck manufacturers • Passing-on defence • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Court estimation of damages (5% of the price of the trucks), taking into account the Oxera study and the EC guidelines.

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

This judgment follows the disclosure order of 17 December 2018 relating to passing-on defence (see above).

A company that had bought 108 Renault trucks brought an action against AB Volvo and Renault Trucks SAS, which had been sanctioned by the European Commission for their participation in the cartel of truck manufacturers, seeking compensation for the damages resulting from the overcharge paid for the trucks due to that cartel. The defendants alleged that there was no evidence of any damages caused to the claimant, that the method of calculation of damages used in the expert report submitted by the claimant was inappropriate and that any hypothetical overcharge paid by the claimant was passed-on to its customers.

Brief summary of judgment

The claim was partially upheld. The causation of damages to the claimant was presumed on the basis that the infringement found by the European Commission was a cartel. The damages awarded to the claimant were lower than those determined in the expert report submitted by the claimant. The defendants did not bring proper evidence of the alleged passing-on.

Country: Spain	
Case Name and Number: Case 52/2019	
Date of judgment: 15 March 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 2 of Zaragoza	**Was pass on raised (yes/no)?** No
Claimants: Hermanos Bailon, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied.
Defendants: CNH Industrial N.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 93,916
Key Legal issues: • European cartel of truck manufacturers • Statute of limitations	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had bought seven Iveco trucks brought an action against CNH Industrial NV, which had been sanctioned by the European Commission for its participation in the

cartel of truck manufacturers, seeking compensation for the damages resulting from the overcharge paid for the trucks due to that cartel. The defendant alleged that the action was time-barred.

Brief summary of judgment

The court dismissed the claim. The action should have been brought within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code (the RDL 9/2017 that transposed the Damages Directive into Spanish law was not considered applicable as regards limitation periods). The *dies a quo* of the one-year period is the date of publication of the press release about the European Commission decision relating to the trucks cartel (*i.e.* 19 July 2016). Therefore, the action was time-barred when the claim was filed on 5 April 2018.

Country: Spain	
Case Name and Number: Case 338/2018	
Date of judgment: 7 May 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** Yes
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. The court applied the general civil law provisions on tort liability (because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law), but construed such civil law provisions in accordance with the Directive (the principle of interpretation in conformity was deemed applicable because the Directive was already in force and the transposition period had expired when the EC decision relating to the trucks cartel was published).
Defendants: Distribuidora de Vehículos Divesa, S.L. and Mercedes-Benz Trucks España, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** 5% of the purchase price of the truck (*i.e.* EUR 4,500) plus interest.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 25,931
Key Legal issues: • European cartel of truck manufacturers	**Is the dispute likely to be settled privately?** No information publicly available.
• Proof of damages • Legal standing • Statute of limitations • Passing-on defence	

Direct or indirect claims? Direct	**Method of calculation of damages:** Court estimation of damages (5% of the price of the truck), taking into account the Oxera study and the EC guidelines.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A natural person that had bought a Mercedes truck brought an action against Mercedes Benz Trucks España SL (the Spanish subsidiary of Daimler AG, which was sanctioned by the European Commission for its participation in the cartel of truck manufacturers) and against the distributor Distribuidora de Vehículos Divesa SL, claiming for the damages resulting from the overcharge paid for the truck due to that cartel. The defendants alleged their lack of standing, since they were not addressees of the European Commission decision relating to the trucks cartel. Mercedes Benz Trucks España SL also alleged that there was no evidence of any damages caused to the claimant, that any hypothetical overcharge paid by the claimant was passed-on to its customers and that the action was time-barred.

Brief summary of judgment

The claim was partially upheld. The action was not time-barred, since it was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code (the RDL 9/2017 that transposed the Damages Directive into Spanish law was not considered applicable as regards limitation periods). The *dies a quo* of the one-year period is the date of publication of the European Commission decision relating to the trucks cartel. Mercedes-Benz Trucks España SL and its parent company Daimler AG are part of the same "economic unit" (because the former carries out the commercial activity of the Daimler group in Spain), but Divesa Distribuidora de Vehículos Divesa SL is not. Therefore, only Mercedes-Benz Trucks España SL has legal standing. The causation of damages to the claimant was presumed on the basis that the infringement found by the European Commission was a cartel. The damages awarded to the claimant were lower than those determined in the expert report submitted by the claimant. Mercedes-Benz Trucks España SL did not bring proper evidence of the alleged passing-on.

Country: Spain	
Case Name and Number: Case 338/2019	
Date of judgment: 14 June 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** No
Claimants: Two natural persons	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. For procedural provisions.
Defendants: Daimler AG	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** N/A
Key Legal issues: • European cartel of manufacturers • Disclosure of evidence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

Two individuals who had acquired trucks from Daimler AG, which had been sanctioned by the European Commission for its participation in the cartel of truck manufacturers, requested access to some evidence in Daimler AG's possession for the subsequent filing of

a claim for damages resulting from the cartel, pursuant to Article 283bis of the Spanish Act on Civil Procedure.

Brief summary of judgment

The request was partially upheld. The court considered that the future claimants had a legitimate interest in obtaining information from Daimler AG about the possible overprice charged to them (not about other matters), insofar as such information is necessary for the filing of the follow-on claim and for the preparation of an expert report quantifying the damages suffered.

Country: Spain	
Case Name and Number: Case 180/2019	
Date of judgment: 20 June 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Murcia Court of Appeals	**Was pass on raised (yes/no)?** No
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Man Services España, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 57,318
Key Legal issues: • European cartel of truck manufacturers • Legal standing of defendant not identified by EC decision	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a European trucks cartel in 2016. The Commercial Court n°1 of Murcia concluded that the defendant lacked legal standing because it had not

been identified in the Commission Decision and it had not been proven that the defendant participated in the determination of prices of the trucks affected by the cartel.

Brief summary of judgment

Murcia Court of Appeals confirms that the defendant lacked legal standing. It was not mentioned in the Commission Decision—as other subsidiaries were—and there was no other evidence to confirm that the defendant infringed competition law. A wide interpretation of the notion of undertaking does not allow to achieve a different conclusion because the claimant did not determine the prices, *i.e.* it just financed the transaction. The fact that the defendant is a subsidiary of the infringer is not sufficient by itself to confer legal standing.

Country: Spain	
Case Name and Number: Case 265/2019	
Date of judgment: 2 July 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Madrid	**Was pass on raised (yes/no)?** Yes
Claimants: Generadores Insonorizados Paulino Alonso e Hijos, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. The court applied the general civil law provisions on tort liability (because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law), but construed such civil law provisions in accordance with the Directive on the basis of the principle of interpretation in conformity.
Defendants: Mercedes-Benz Trucks España, S.L.U.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 8,116
Key Legal issues: • European cartel of truck manufacturers • Statute of limitations • Legal standing	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT. 39824 Trucks

Brief summary of facts

A company that had bought a Mercedes truck brought an action against Mercedes-Benz Trucks España SL, which is the Spanish subsidiary of a company sanctioned by the European Commission for its participation in the cartel of truck manufacturers, claiming for the damages resulting from the overcharge paid for the truck due to that cartel. Mercedes-Benz Trucks España SL alleged its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel. It also alleged that there was no evidence of any damages caused to the claimant, that any hypothetical overcharge paid by the claimant was passed-on to its customers and that the action was time-barred.

Brief summary of judgment

The action was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code. The *dies a quo* of this one-year period is the publication date of the Commission Decision.

The defendant (Mercedes-Benz Trucks España SL) was not an addressee of the European Commission decision, but the Spanish subsidiary of one of the companies fined by the Commission (Daimer AG). There is no evidence that Mercedes-Benz Trucks España SL took part in the antitrust infringement. In fact, the European Commission referred in its decision to several subsidiaries, together with their respective parent companies, when it found that they also took part in the in the cartel, but did not mention Mercedes-Benz Trucks España SL. Thus, the court dismissed the claim due to the defendant's lack of standing.

Country: Spain	
Case Name and Number: Case 225/2019	
Date of judgment: 3 July 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 12 of Madrid	**Was pass on raised (yes/no)?** No
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. For procedural provisions.
Defendants: Iveco España, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 16,448
Key Legal issues: • European cartel of truck manufacturers • Legal standing • Burden of proof	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A natural person that had bought an Iveco truck brought an action against Iveco España SL, which is the Spanish subsidiary of a company sanctioned by the European Commission

for its participation in the cartel of truck manufacturers, claiming for the damages resulting from the overcharge paid for the truck due to that cartel. Iveco España SL alleged its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel.

Brief summary of judgment

If the damages action had been brought against an addressee of the European Commission decision, the infringement of competition law would have been presumed. However, in this case, the defendant (Iveco España, S.L) was not an addressee of the European Commission decision. Therefore, the burden of proof of its liability for the antitrust infringement rests with the claimant, which did not bring any evidence that Iveco España SL took part in the cartel. On this basis, the court dismissed the claim due to the defendant's lack of standing.

Country: Spain	
Case Name and Number: Case 117/2019	
Date of judgment: 26 July 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Pontevedra	**Was pass on raised (yes/no)?** Yes
Claimants: Transportes Luis Tarela, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Daimler AG	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** N/A
Key Legal issues: • European cartel of truck manufacturers • Disclosure of evidence • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a European trucks cartel in 2016. The claimant brought an action against Daimler for damages resulting from the cartel (the surcharge paid in the acquisition of some vehicles).

Together with its reply, Daimler submitted a written request for access to sources of evidence in the claimant's possession pursuant to Article 283bis of the Spanish Act on Civil Procedure in order to plead the passing-on defence.

Brief summary of judgment

Article 283bis of the Spanish Act on Civil Procedure states that the rules provided therein on disclosure of evidence only apply to evidence that may be relevant (not useless). In this case, Daimler argues that the cartel to which it belonged did not give rise to any additional costs (*i.e.* to any damage). However, anyone who alleges passing-on must acknowledge that its conduct led to an increase of the costs downstream. If the defendant claims that there was never an increase of the costs or prices resulting from the cartel, it cannot invoke passing-on as a defence. Therefore, evidence aimed at proving the passing-on cannot be useful or relevant.

Consequently, the Court refused to grant the disclosure order.

Country: Spain	
Case Name and Number: Case 151/2019	
Date of judgment: 30 August 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Pontevedra	**Was pass on raised (yes/no)?** No
Claimants: Transportes Cabalar Líquidos Alimentarios, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. The court applied the general civil law provisions on tort liability and did not even construe them in accordance with the Directive (the principle of interpretation in conformity was not deemed applicable because the infringement of competition law took part before the entry in force of the Directive).
Defendants: Iveco, S.p.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 51,265
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 30,735
Key Legal issues: • European cartel of truck manufacturers • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Court estimation of damages (9% of the price of the trucks), taking into account the expert report and the EC guidelines.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT. 39824 Trucks

Brief summary of facts

A company that had bought five Iveco trucks brought an action against Iveco S.p.A., which had been sanctioned by the European Commission for its participation in the cartel of truck manufacturers. It claimed for the damages resulting from the overcharge paid for the trucks due to that cartel.

Iveco S.p.A. did not answer in time and was tried *in absentia*.

Brief summary of judgment

The claim was partially upheld. The infringement of competition law was deemed evidenced on the sole basis that Iveco S.p.A. was one of the addressees of the European Commission decision relating to the trucks cartel. The causation of damages to the claimant was presumed on the basis of the Supreme Court doctrine "*ex re ipsa*", according to which those damages that usually result from infringements of the nature of the one committed by the defendant must be presumed. The damages awarded to the claimant were lower than those determined in the expert report submitted by the claimant.

Country: Spain	
Case Name and Number: Case 118/2019	
Date of judgment: 10 September 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Pontevedra	**Was pass on raised (yes/no)?** No
Claimants: Áridos do Mendo, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. The court applied the general civil law provisions on tort liability and did not even construe them in accordance with the Directive (the principle of interpretation in conformity was not deemed applicable because the infringement of competition law took part before the entry in force of the Directive).
Defendants: Daimler AG	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 22,889
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 13,722
Key Legal issues: • European cartel of truck manufacturers • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Court estimation of damages (9% of the price of the trucks), taking into account the expert report and the EC guidelines.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT. 39824 Trucks

Brief summary of facts

A company that had bought two Daimler trucks brought an action against Daimler AG, which had been sanctioned by the EC for its participation in the cartel of truck manufacturers. It claimed for the damages resulting from the overcharge paid for the trucks due to that cartel.

Daimler did not answer in time and was tried *in absentia*.

Brief summary of judgment

The claim was partially upheld. The infringement of competition law was deemed evidenced on the sole basis that Daimler AG was one of the addressees of the European Commission decision relating to the trucks cartel. The causation of damages to the claimant was presumed on the basis of the Supreme Court doctrine "*ex re ipsa*", according to which those damages that usually result from infringements of the nature of the one committed by the defendant must be presumed. The damages awarded to the claimant were lower than those determined in the expert report submitted by the claimant.

Country: Spain	
Case Name and Number: Case 501/2018	
Date of judgment: 12 September 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 7 of Barcelona	**Was pass on raised (yes/no)?** No (the defendant only pointed this out as a mere hypothesis, with no evidence at all).
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. General civil law provision on tort liability was applied, although interpreted in a way aligned with the Damages Directive.
Defendants: CNH Industrial, N.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 9,164
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed. Judgment 603/2020, dated 17 April 2020, of Section 15 of the Barcelona Court of Appeal partially revokes the first instance judgment: • Defendant ordered to pay EUR 4,582 plus the legal interest accrued since the acquisition of the truck, plus the legal interest on the resulting amount since the date of filing of the complaint.	**Amount of damages initially requested:** 20% of the acquisition price.
Key Legal issues: • European cartel of truck manufacturers	**Is the dispute likely to be settled privately?** No information publicly available.
• Legal standing • Statute of limitations • Proof of damages	

Direct or indirect claims? Direct	**Method of calculation of damages:** 10%, taking into account that the Commission has accepted that in 93% of the cartels the overprice is set, at least, in a range between 0%—10% (Oxera, p. 91, fig. 4.1).
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Rais Amils and Belén Irissarry, Clifford Chance, Rais.Amils@CliffordChance.com, Belen.Irissarry@CliffordChance.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The claimant argued that, because of the cartel of truck manufacturers, the price paid to the defendant for a truck was higher than it should have been. He calculated that this surplus was 20% of the acquisition price.

Brief summary of judgment

The action was filed within the one-year deadline stated in Article 1968.2 of the Civil Code (of application before the entry into force of the new regime) as the *dies a quo* of this one-year period is the publication of the Commission Decision. The defendant had passive *locus standi* despite the fact that the claimant bought the truck from the distributor COMERCIAL RABERT SL and not from the defendant itself nor from its Spanish subsidiary IVECO ESPAÑA. In accordance with both, the old regime of the Civil Code and the new regime, the infringers are jointly liable for the damage caused. Thus, the defendant, who was sanctioned by the Commission in its Decision, has passive *locus standi*. The defendant infringed competition law and caused damages to the claimant consisting in an overprice. The defendant has not proven the contrary. The judge estimates this overprice to be 10%.

This judgment was partially revoked by the Barcelona Appeal Court, which modified the amount of the compensation to be paid to the claimant.

The Appeal Court agrees with the First Instance Court that it is necessary to opt for the judicial assessment of the damage, taking into account the fact that the expert report filed by the claimant is insufficient and that the defendant did not file an alternative quantification, although it had the real data. However, given the particular facts of the matter, the Appeal Court estimates the overprice to be 5% of the sales price of the truck.

Country: Spain	
Case Name and Number: Case 1/2018	
Date of judgment: 27 September 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 14 of Madrid	**Was pass on raised (yes/no)?** Yes
Claimants: Electricidad y Electrónica Martín A.G., S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Iveco España, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of standing).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 18,149
Key Legal issues: • European cartel of truck manufacturers • Legal standing • Burden of proof	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had bought an Iveco truck brought an action against Iveco España SL, which is the Spanish subsidiary of a company sanctioned by the European Commission for its participation in the cartel of truck manufacturers, claiming for the damages resulting

from the overcharge paid for the truck due to that cartel. Iveco España SL alleged its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel and the claimant had not brought any evidence that Iveco España SL effectively took part in it.

Brief summary of judgment

The burden of proof that Iveco España SL infringed competition law rests with the claimant, which did not bring any evidence on that. The European Commission decision relating to the trucks cartel is useless for such purpose, because Iveco España SL is not an addressee of such a decision. The principle of economic unit established by the European Court of Justice case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exerts a decisive influence on the former (there is a rebuttable presumption of that influence in the case of wholly-owned subsidiaries), cannot apply in reverse, *i.e.* to extend the parents' liability to their subsidiaries. On this basis, the court dismissed the claim due to the defendant`s lack of standing.

Country: Spain	
Case Name and Number: Case 211/2019	
Date of judgment: 2 October 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 14 of Madrid	**Was pass on raised (yes/no)?** No
Claimants: Central Eléctrica Sestelo y Compañía, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: MAN Truck & Bus Iberia, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of standing).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 24,274
Key Legal issues: • European cartel of truck manufacturers • Legal standing • Burden of proof	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had bought a MAN truck brought an action against MAN Truck & Bus Iberia SA, which is the Spanish subsidiary of a company sanctioned by the European Commission for its participation in the cartel of truck manufacturers, claiming for the damages resulting

from the overcharge paid for the truck due to that cartel. MAN Truck & Bus Iberia SA alleged its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel.

Brief summary of judgment

The burden of proof that MAN Truck & Bus Iberia SA infringed competition law rests with the claimant, which did not bring any evidence on that. The European Commission decision relating to the trucks cartel is useless for such purpose, because MAN Truck & Bus Iberia SA is not an addressee of such a decision. The principle of economic unit established by the European Court of Justice case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exercises a decisive influence on the former (there is a rebuttable presumption of that influence in the case of wholly-owned subsidiaries), cannot apply in reverse, *i.e.* to extend the parents' liability to their subsidiaries. On this basis, the court dismissed the claim due to the defendant's lack of standing.

Country: Spain	
Case Name and Number: Case 775/2019	
Date of judgment: 24 October 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Barcelona Court of Appeals	**Was pass on raised (yes/no)?** No
Claimants: Sumal, S.L.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Mercedes Benz Trucks España, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages have been awarded yet.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 22,204
Key Legal issues: • European cartel of truck manufacturers • Legal standing • Preliminary ruling	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company that had bought two Mercedes trucks brought an action against Mercedes Benz Trucks España SL, which is the Spanish subsidiary of a company sanctioned by the

European Commission for its participation in the cartel of truck manufacturers, claiming for the damages resulting from the overcharge paid for the trucks due to that cartel. Mercedes Benz Trucks España SL alleged its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel. The first instance commercial court dismissed the claim due to the defendant`s lack of standing and the claimant challenged the judgment before the Barcelona Court of Appeals.

Brief summary of judgment

The court expressed its doubts as to whether the principle of economic unit established by the European Court of Justice case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exercises a decisive influence on the former, could apply in reverse, *i.e.* to extend the parents' liability to their subsidiaries. The court decided to suspend the proceedings and referred the following questions, among others, to the European Court of Justice for a preliminary ruling: May the parent company's liability extend to the subsidiaries under the Court of Justice doctrine on the economic unit? If so, what requirements must be met?

Country: Spain	
Case Name and Number: Case 1169/2019	
Date of judgment: 5 December 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Valencia Court of Appeals	**Was pass on raised (yes/no)?** No
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: MAN Truck & Bus Iberia, S.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No damages were awarded (lack of standing).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 13,914
Key Legal issues: • European cartel of truck manufacturers • Legal standing	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A natural person that had bought a MAN truck brought an action against MAN Truck & Bus Iberia SA, which is the Spanish subsidiary of a company sanctioned by the European Commission for its participation in the cartel of truck manufacturers, claiming for the

damages resulting from the overcharge paid for the truck due to that cartel. The first instance commercial court partially upheld the claim (it estimated that the damages amounted to a 5% of the price of the truck).

MAN Truck & Bus Iberia SA challenged the judgment before the Valencia Court of Appeals, among other reasons, because of its lack of standing, since it was not an addressee of the European Commission decision relating to the trucks cartel.

Brief summary of judgment

The principle of economic unit established by the European Court of Justice case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exercises a decisive influence on the former (there is a rebuttable presumption of that influence in the case of wholly-owned subsidiaries), cannot apply in reverse, *i.e.* to extend the parents' liability to their subsidiaries. On this basis, the court upheld the appeal and dismissed the damages claim because of the defendant's lack of standing.

Country: Spain	
Case Name and Number: Case 1680/2019	
Date of judgment: 16 December 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Valencia Court of Appeals	**Was pass on raised (yes/no)?** Yes
Claimants: A natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied, although interpreted in a way aligned with the Damages Directive.
Defendants: Fiat Chrysler Automobiles NV and CNH Industrial NV	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 3,985
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 3,985
Key Legal issues: • European cartel of truck manufacturers • Proof of damages • Legal standing	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert reports
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso. Laguard Advocats, juanpablo.correa@laguardlegal.com; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a cartel of trucks manufacturers in 2016. A natural person bought a flawed truck and sought compensation from the defendant companies. The first instance commercial court partially upheld the claim (it estimated that the damages amounted to a 5% of the price of the truck). However, the claimant decided to bring action before the Valencia Court of Appeals requesting a weighting of the damage by setting a percentage higher that 5% of the purchase of the flawed truck. The defendant invoked that the action was time-barred and that there was no evidence of damages caused to the claimant truck.

Brief summary of judgment

The claim was partially upheld. The action was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code. The *dies a quo* of this one-year period is the publication date of the Commission Decision. The Court argues that in order to quantify damages, it must be taken into account the "*ex re ipsa*" doctrine, according to which there is a presumption of existence of damages caused by certain infringements. In this case, in the light of the evidence, the Court considered that the amount set at 5% was proportionate.

Country: Spain	
Case Name and Number: Case 1679/2019	
Date of judgment: 16 December 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Valencia Court of Appeals	**Was pass on raised (yes/no)?** Yes
Claimants: Fiat Chrysler Automobiles NV	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied, although interpreted in a way aligned with the Damages Directive.
Defendants: MANIPULADOS GUERRERO SANCHO, S.L.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 3,905
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 3,905
Key Legal issues: • European cartel of truck manufacturers • Proof of damages • Legal standing	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert reports
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Juan Pablo Correa Delcasso. Laguard Advocats, juanpablo.correa@laguardlegal.com; Claudia Cañas, Lawyer, DWF-RCD Abogados, Claudia.canas@dwf-rcd.law
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The European Commission sanctioned a cartel of trucks manufacturers in 2016. The Commercial Court n.9 of Valencia recognised Manipulados Guerrero Sancho SL as an entity who suffered direct damage and brought action against FIAT to seek compensation. The defendant invoked that the action was time-barred, that there was no evidence of any damages caused to the defendant.

Brief summary of judgment

The claim was partially upheld. The action was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code. The *dies a quo* of this one-year period is the publication date of the Commission Decision. The Court argues that in order to quantify damages, it must be taken into account the "*ex re ipsa*" doctrine, according to which there is a presumption of existence of damages caused by certain infringements. In this case, in the light of the evidence, the Court considers that the amount set at 5% is proportionate.

Country: Spain	
Case Name and Number: Case 317/2019	
Date of judgment: 30 December 2019	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 3 of Valencia	**Was pass on raised (yes/no)?** Yes
Claimants: Suministros Energéticos de Levante, S.A.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Yes. The court applied the general civil law provisions on tort liability (because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law), but construed such civil law provisions in accordance with the Directive (the principle of interpretation in conformity was deemed applicable because the Directive was already in force when the EC decision relating to the trucks cartel was published).
Defendants: MAN Truck & Bus AG	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 34,528
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 34,528
Key Legal issues: • European cartel of truck manufacturers • Statute of limitations • Proof of damages • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.

Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Comparison with data from another product market with similar characteristics (light trucks) and comparison over time on the same market.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

The claimant had bought four MAN trucks and sought compensation from MAN Truck & Bus AG, which had been sanctioned by the European Commission for its participation in the cartel of truck manufacturers, for the damages resulting from the overcharge paid for the trucks due to that cartel. The defendant alleged that the action was time-barred, that there was no evidence of any damages caused to the claimant and that any hypothetical overcharge paid by the claimant was passed-on to its customers.

Brief summary of judgment

The claim was upheld. The action was not time-barred, since it was filed within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code (the RDL 9/2017 that transposed the Damages Directive into Spanish law was not considered applicable). The *dies a quo* of the one-year period is the date of publication of the European Commission decision relating to the trucks cartel. The causation of damages to the claimant was presumed on the basis of the doctrine "*ex re ipsa*", according to which there is a presumption of existence of those damages that naturally or inevitably result from a certain infringement, and the findings of the European Commission decision itself. The full damages requested were considered evidenced in light of the expert report submitted by the claimant. The methodology of the report submitted by the defendant was criticised. MAN Truck & Bus AG did not bring any evidence of the alleged passing-on, although the burden of proof rests on the defendant.

Country: Spain	
Case Name and Number: Case 342/2019	
Date of judgment: 6 February 2020	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Court of First Instance No. 1 of Cáceres	**Was pass on raised (yes/no)?** Yes
Claimants: Transportes Gil Marín, S.L. and a natural person	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied, because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law.
Defendants: DAF Trucks, N.V.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 86,111
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 86,111
Key Legal issues: • European cartel of truck manufacturers • Statute of limitations • Proof of damages	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Comparison with data from another product market with similar characteristics (light trucks).
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

A company and a natural person that had jointly bought four DAF trucks brought an action against DAF Trucks NV, which had been sanctioned by the European Commission for its participation in the cartel of truck manufacturers, claiming for the damages resulting from the overcharge paid for the trucks due to that cartel.

Brief summary of judgment

The claim was upheld. The action was not time-barred, since it was wiled within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code (the RDL 9/2017 that transposed the Damages Directive into Spanish law was not considered applicable). The *dies a quo* of the one-year period is the date of publication of the European Commission decision relating to the trucks cartel. The infringement of competition law was deemed evidenced on the sole basis that DAF Trucks NV was one of the addressees of the European Commission decision. The causation of damages to the claimants was presumed on the basis of the European Commission Guidelines, according to which cartels cause damages as a general rule, and the findings of the European Commission decision itself. The full damages requested were considered evidenced in light of the expert report submitted by the claimant.

Country: Spain	
Case Name and Number: Case 127/2019	
Date of judgment: 3 March 2020	
Economic activity (NACE Code): C.29.10 Manufacture of motor vehicles	
Court: Commercial Court nº 1 of Valladolid	**Was pass on raised (yes/no)?** Yes
Claimants: Kept confidential in the judgment.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No. General civil law provisions on tort liability were applied, because of the non-retroactivity of the substantive provisions of the RDL 9/2017 that transposed the Damages Directive into Spanish law.
Defendants: Iveco, S.p.A.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** EUR 211,390
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No information publicly available.	**Amount of damages initially requested:** EUR 211,390
Key Legal issues: • European cartel of truck manufacturers • Statute of limitations • Proof of damages • Passing-on defence	**Is the dispute likely to be settled privately?** No information publicly available.
Direct or indirect claims? Direct	**Method of calculation of damages:** Expert report. Comparison with data from other product markets with similar characteristics (light trucks and vans) and comparison over time on the same market.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Jesús Almoguera, J. Almoguera Abogados, jesus.almoguera@almoguera.net

Follow-on (EC or NCA?) or stand-alone?
Follow-on (EC): Case AT. 39824 Trucks

Brief summary of facts

The claimant had bought ten Iveco trucks and sought compensation from Iveco S.p.A., which had been sanctioned by the European Commission for its participation in the cartel of truck manufacturers, for the damages resulting from the overcharge paid for the trucks due to that cartel. The defendant alleged that the action was time-barred, that there was no evidence of any damages caused to the claimant and that any hypothetical overcharge paid by the claimant was passed-on to its customers.

Brief summary of judgment

The claim was upheld. The action was not time-barred, since it was wiled within the general time limit of one year provided for damages resulting from tort liability under article 1968.2 of the Spanish Civil Code (the RDL 9/2017 that transposed the Damages Directive into Spanish law was not considered applicable). The *dies a quo* of the one-year period is the date of publication of the European Commission decision relating to the trucks cartel. The causation of damages to the claimant was presumed on the basis of the doctrine "*ex re ipsa*", according to which there is a presumption of existence of those damages that naturally or inevitably result from a certain infringement, the Oxera study, according to which 93% of cartels give rise to overcharges, and the findings of the European Commission decision itself. The full damages requested were considered evidenced in light of the expert report submitted by the claimant, that was deemed better founded that the one submitted by the defendant. Iveco S.p.A. did not bring any evidence of the alleged passing-on, although the burden of proof rests on the defendant.

SWEDEN

INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

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The applicable framework regulating private enforcement of competition law infringements in Sweden is the Competition Damages Act (2016:964) (the "**Competition Damages Act**"), which entered into force on 27 December 2016 and implements Directive 2014/104/EU on antitrust damages actions (the "**Damages Directive**"). There is currently no closed or ongoing damages case under the new rules. The former rules continue to apply to damage claims relating to infringements that occurred before 27 December 2016.

It has been possible to award damage claims in relation to companies that have violated the competition rules since the entry into force of the Swedish Competition Act in 1993. Despite this possibility, private enforcement of competition law has been limited.

The low number of antitrust damages cases is most likely due to the long-standing judicial tradition in Swedish law, which is based on a general restrictive approach to tort law. It is likely that the frequency of follow-on damages claims in particular (and the likelihood of success of those claims) may increase over time following the enactment of the Competition Damages Act. Indeed, the Competition Damages Act introduces a number of clarifications and new provisions that will benefit future claimants.

1. Jurisdiction

The authority responsible for public enforcement of competition law in Sweden is the Swedish Competition Authority (the "**SCA**") or *Konkurrensverket*.

Private enforcement claims based on the Competition Damages Act can be brought by anyone that has suffered damage due to a competition law infringement. Such claims shall be made to the Swedish Patent and Market Court in Stockholm which, since September 2016 has jurisdiction over competition damages actions as well as competition cases brought by the SCA. A new Patent and Market Court of Appeal has been established as a court of second—and generally final—instance in such cases.

2. Relevant legislation and legal grounds

The Swedish Competition Act (2008:549) ("**The Competition Act**") governs in principle all aspects of Swedish competition law. The act contains two general prohibitions: the prohibition of anti-competitive agreements and the prohibition of abuse of a dominant position (Chapter 2 Sections 1 and 7). The Competition Act also includes regulations on control of concentrations as well as relevant procedural rules relating to (for example) dawn raids and other investigatory measures of the SCA.

The two general prohibitions against anti-competitive agreements and abuse of dominance correspond to Articles 101 and 102 of the Treaty of Functioning of the European Union (the "**TFEU**") and are to be interpreted in line with EU law and the case-law of the courts of the European Union. Furthermore, Articles 101 and 102 TFEU are directly applicable to practices that may affect trade between EU Member States.

The Competition Act refers to the Competition Damages Act for provisions regarding damages due to competition law infringements. The Competition Damages Act provides that anyone who intentionally or negligently infringes competition law shall compensate the harm suffered. Consequently, in order for damages to be awarded under the Competition Damages Act, it must be established that (i) there has been an infringement of competition law, (ii) the infringement has committed intentionally or negligently, and (iii) there is a causal link between the infringement and the damage subject to the claim. The burden of proof in relation to these conditions lies with the claimant seeking damages.

As regards the first criterion, the Competition Damages Act provides that a final infringement decision of the Swedish Competition Authority or a Swedish court shall constitute full proof before the civil courts that the infringement occurred. The finding of a breach of the provisions of the Competition Act in a final ruling may not be re-examined in a subsequent action for damages.

There is also a relaxation of the burden of proof with regard to the third criterion. Indeed, Chapter 3 Section 4 of the Competition Damages Act establishes a rebuttable presumption that cartels cause harm. This presumption of harm does not apply to other types of competition law infringements.

3. *Rationae temporis* application of the Competition Damages Act

In accordance with the principle of non-retroactivity of the law established in the Swedish Constitution (Instrument of Government), the new substantial provisions of the Competition Damages Act, including but not limited to rules on limitation periods and presumptions relating to e.g. harm of cartels and passing on of costs, are applicable only to actions for damages resulting from infringements of competition rules (*i.e.* the facts causing liability) arising after the entry into force of the Competition Damages Act on 27 December 2016.

The transitional provisions of the Competition Damages Act explicitly establish that the following procedural rules of the Competition Damages Act shall apply to all actions brought after 25 December 2014:

- **Stay of proceedings** under Chapter 5 § 3 of the Competition Damages Act, according to which the Court may declare a case suspended if two or more parties have initiated a dispute settlement in good in relation to a claim covered by the case. The case before the Court shall be resumed no later than two years from the decision to suspend the proceedings.

- The **limitations to the possibility of general disclosure injunction** in accordance with the Swedish Code of Judicial Procedure (1942:740) that are included in chapter 5 §§ 4—7 of the Competition Damages Act (see also section 7 below).

- **Limitations to invoking certain written evidence** under Chapter 5 § 8 of the Competition Damages Act, according to which certain documents that have been provided to the SCA as part of leniency programmes or settlement proceedings are cannot be used as evidence in a follow-on damages action.

- The principle of ***res judicata*** contained in Chapter 5 § 9 of the Competition Damages Act, establishing that if a violation of competition law has been established through a final decision under the Competition Act, the question of infringement may not be re-examined in a case for damages under the Competition Damages Act.

4. What types of anti-competitive conduct are damages actions available for?

The Competition Damages Act is applicable for damages claims arising from an "infringement of competition law" which are defined to include:

i. Article 101 and Article 102 TFEU;

ii. Sections 1 and 7 in Chapter 2 of the Competition Act (the equivalent to Article 101 and 102 TFEU under Swedish law); and

iii. Equivalent national competition law of an EU Member State in accordance with Article 3(1) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

5. What forms of relief may a private claimant seek?

According to Chapter 3 Section 1 of the Competition Damages Act, the forms of relief available include compensation for actual loss (financial loss or loss of, or damage to, property) and loss of profit (including loss of interest).

The purpose is to restore the claimant's financial situation in which it would have been if the infringement never occurred *i.e.* the hypothetical financial situation absent the infringement. Punitive or exemplary damages are not available.

In addition, successful damages claimants are awarded interests. Interest accrues from the day the harm occurred to the day compensation payment is effectuated. The interest rate is 2% above the reference rate of the Swedish Central Bank from the time the damage was caused until legal proceedings to claim compensation were initiated. Thereafter, the interest rate is 8% above the reference rate.

6. Passing-on defence

Passing-on defence is available under Chapter 3 Section 2 of the Competition Damages Act. The right to compensation for actual loss can be reduced by an amount equivalent to any overcharge the injured party has passed on to its own buyers or any undercharge the injured party has passed on to its own suppliers. The same applies in the case of undercut prices passed on by the injured party to its suppliers. The burden of proof lies with the defendant.

Corresponding to Article 14 of the Damages Directive, the Competition Damages Act also provides for a rebuttable presumption that indirect customers have suffered some level of overcharge harm, to be estimated by the court. The Swedish legislator has also chosen to introduce a corresponding passing on presumption in relation to indirect suppliers.

7. Pre-Trial discovery and Disclosure, treatment of confidential information

Under the general principles of the Swedish Code of Judicial Procedure (1942:740), anyone in possession of written documents (interpreted widely) that can reasonably be expected to be of evidentiary value in a civil case can be obliged by the court to disclose such evidence to the court. Such disclosure may be ordered by injunction against an opposing party as well as a third party.

The possibility of making use of this general disclosure injunction for an antitrust damages claim is subject to two main exceptions provided for in the Competition Damages Act.

First, a party can only direct such injunctions for the disclosure of materials held by the SCA when a third party cannot provide the same information conveniently. Neither is such disclosure allowed when it is reasonable to assume that such disclosure would seriously hamper the SCA's ability to perform its duties.

Second, documents that have been provided to the SCA as part of leniency programmes or settlement proceedings, information produced by a natural or legal person specifically for the handling of a case by the SCA and information produced by the SCA and provided to the parties during the processing of a case are exempted from disclosure. There are also limitations imposed as to the use of such documents as evidence in damages proceedings. Furthermore, copies of other documents than those already mentioned and which someone has obtained only through access to the SCA's case file may be relied on as evidence only by that person or someone who has taken over his/her rights.

In addition, the general disclosure injunction can never be used for disclosure of information subject to legal privilege. There are also other exceptions governing personal integrity, trade secrets and public interests.

8. Limitation periods

Different limitation periods apply for damages that occurred prior to the entry into force of the New Competition Damages Act (27 December 2016) and damages that occurred post that date.

Damage that occurred prior to the entry into force of the new Competition Damages Act

According to the previous rules, the right to damages caused by an intentional or negligent infringement of any of the prohibitions contained in Chapter 2, Article 1 or 7 of the Swedish Competition Act, or in Article 101 and 102 TFEU shall lapse if no legal action is brought within ten years from the date on which the damage occurred.

For damage that has occurred before 1 August 2005, the earlier statute of limitation of the Competition Act applies, according to which the right to damages shall lapse if no legal action is brought within five years from the date on which the damage occurred.

Damages that have occurred after the entry into force of the Competition Damages Act

Under the Competition Damages Act, claimants can initiate damages claims within five years from the time the infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) of the behaviour and the fact that it constitutes an infringement of competition law, (ii) of the fact that the infringement of competition law caused harm to it, and (iii) the identity of the infringer.

The limitation period is interrupted if a competition authority in the EU takes action in respect of the infringement to which the claim relates. A new deadline runs from the day when there is a final infringement decision or when the authority terminates its procedure in some other way. In line with the Damages Directive, there are important rules about breach of the statute of limitation, e.g. in relation to settlement proceedings.

9. Appeal

Actions under the Competition Damages Act must be brought before the Patent and Market Court (which replaced the Stockholm District Court as the court of first instance in competition law cases as of 1 September 2016). A Patent and Market Court judgment may be appealed before the Patent and Market Court of Appeal.

As a general rule, the judgments and decisions of the Patent and Market Court of Appeal relating to competition damages cannot be further appealed. However, the Patent and Market Court of Appeal can allow for a ruling to be appealed to the Supreme Court if it is important for the application of the law that the appeal is examined by the Supreme Court.

10. Class actions and collective representation

It is possible to bring class action claims for antitrust damages claims. Such actions are regulated by the Swedish Group Proceedings Act (2002:599). The Group Proceedings Act contains specific procedural rules on group/class actions and is applicable to civil claims in general.

There are three ways in which group actions can be instituted under Swedish law: (i) class actions brought by an individual member of a group who is a natural person or a legal entity (private class actions), (ii) by an association of consumers or wage-earners (organisation class actions), and (iii) by a designated public authority (public class actions). The Group Proceedings Act does not specify any minimum number of claimants required for a group action to be brought. However, the court may accept a class action only if:

- the claims of the members of the group are based on circumstances that are common or of a similar nature;

- the class action is not deemed unmanageable due to substantial differences in the legal basis of the claims of different members of the group;
- the majority of the claims to which the action relates cannot be equally well pursued by private actions brought by individual members of the group;
- the group, taking into consideration its size and ambit, is otherwise appropriately defined; and
- the claimant, bringing the action on behalf of the group, is deemed an appropriate representative, taking into consideration the claimant's interest in the substantive matter, the claimant's financial capacity to bring a class action and other relevant circumstances.

Class actions are initiated on an opt-in basis through personal notice given to the court by each group member. Each member of the group must give notice to the court in writing within the period of time determined by the court that he or she wishes to be included in the group action. In the absence of such notice, the member is deemed to have withdrawn from the group. New group members can be allowed also in later stage of the proceedings, provided that this does not cause any significant delay of the case or other substantial inconvenience for the defendant.

Class actions are rare in Sweden, and there has not been any class action in relation to competition damages claims. It should also be mentioned that the general rule under the Code of Conduct of the Swedish Bar Association is that contingency fees are not allowed. However, contingency fees can be allowed in class actions and other cases where access to justice may be denied if contingency fees are not allowed.

11. Key Issues

Although the provisions on damages for infringements of competition rules have been in force for more than 20 years, only a limited number of competition damages cases have been tried by Swedish courts, none of which under the Competition Damages Act that entered into force on 27 December 2016.

Against the above background, it is too early to identify key issues in the application of the Competition Damages Act.

In relation to existing judgments, a key issue identified is the challenge for the claimants to fulfil its burden of proof in relation to the existence of an infringement causing ground for damages. The new Competition Damages Act brings about important rules which will probably open up for further follow-on competition damage litigations in Sweden.

Methodology for the selection of cases

Although the provisions on damages for infringements of competition rules have been in force for more than 20 years, only a limited number of competition damages cases have been tried by Swedish courts.

Excluded from the report are all cases where none of the court instances that tried the case has found an infringement of the competition rules and thus no basis for review of damages claims. The current number of such cases is five and one pending before the Patent and Market Court of Appeal.

Also excluded are cases where the parties have settled out of court and those subject to arbitration procedure. In relation to such cases, only limited information and no legal assessment of the circumstances is publicly available.

Country: Sweden	
Case Name and Number: Tele2 v Telia (T 5365-16)	
The case was heard under the provisions of the Swedish Competition Act of 1993	
Date of judgment: 21 December 2017	
Economic activity (NACE Code): J.61 Telecommunications	
Court: Svea Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: Tele 2 Sverige Aktiebolag (Tele 2)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** It is mentioned in passing, but since the alleged infringement took place several years before the Directive came into existence it was not deemed applicable to the matter before the court.
Defendants: Telia Company AB (Telia)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the Court found that even though Telia had been found liable for abuse of dominance by margin squeeze, the infringement had lasted a comparatively short period of time and had only targeted a subsection of the relevant market. In light of this, the Court found that the claimant had not been able to prove that it had suffered damages due to the infringement.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** SEK 708 million plus interest (US$ 70 million)
Key Legal issues: • Abuse of dominant market position by refusal to supply, price discrimination and margin squeeze • Vertical integration	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Claes Langenius, Partner, Advokatfirman Hammarskiold & Co, Claes.Langenius@hammarskiold.se; Sofia Falkner, Senior Associate, Advokatfirman Hammarskiold & Co, sofia.falkner@hammarskiold.se
Follow-on (EC or NCA?) or stand-alone? Followed from a decision on margin squeeze (SCA ref. Dnr 1135/2004, appeal to the Stockholm District Court ref. T 31862-04 and finally established by the Market Court ref. MD 2013:5). However, the damage case is classified as stand-alone.	

Brief summary of facts

Upon application by the Swedish Competition Authority and after preliminary ruling by the European Court of justice (C-52/09), the Stockholm District Court in December 2011 found that Telia had abused its dominance on the market for internet/broadband infrastructure by applying a margin squeeze on its competitors on the market for broadband via ADSL. The ruling was later upheld by the Market Court, which, however, reduced the fine due to the duration and scope of the infringement (MD 2013:5). Tele2 filed a damages claim against Telia in April 2005 and intervened in the dominance abuse case. In May 2016 the Stockholm District Court partly upheld Tele2's claim with reduced damages of SEK 240 million (EUR 24 million), slightly more than one-third of the damages claimed. Both parties appealed to the Svea Court of Appeal.

Brief summary of judgment

Svea Court of Appeal found that Telia had abused its dominant position through margin squeeze, which led to potential exclusionary effects on the relevant market. However, the court did not find that Tele2 had adduced enough evidence to prove it had suffered damage. The infringement had lasted a comparatively short period of time and had only targeted a subsection of the relevant market. The claim was therefore dismissed.

Country: Sweden	
Case Name and Number: Yarps v Telia (T 2673-16)	
The case was heard under the provisions of the Swedish Competition Act of 1993.	
Date of judgment: 29 June 2017	
Economic activity (NACE Code): J.61 Telecommunications	
Court: Svea Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: Yarps Network Services AB (Yarps)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** It is mentioned in passing, but since the alleged infringement took place several years before the Directive came into existence it was not deemed applicable to the matter before the court.
Defendants: Telia Company AB (Telia)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No, the Court found no abuse its dominant position in the market.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Approx. SEK 369 million plus interest (approx. US$ 36 million)
Key Legal issues: • Abuse of dominant market position by refusal to supply, price discrimination and margin squeeze • Vertical integration	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Claes Langenius, Partner, Advokatfirman Hammarskiold & Co, Claes.Langenius@hammarskiold.se; Sofia Falkner, Senior Associate, Advokatfirman Hammarskiold & Co, sofia.falkner@hammarskiold.se
Follow-on (EC or NCA?) or stand-alone? Followed from a decision on margin squeeze (SCA ref. Dnr 1135/2004, appeal to the Stockholm District Court ref. T 31862-04 and finally established by the Market Court ref. MD 2013:5). However, the damage case is classified as stand-alone.	

Brief summary of facts

Upon application by the Swedish Competition Authority and after preliminary ruling by the European Court of justice (C-52/09), the Stockholm District Court in December 2011 found that Telia had abused its dominance on the market for internet/broadband infrastructure by applying a margin squeeze on its competitors on the market for broadband via ADSL. The ruling was later upheld by the Market Court, which, however, reduced the fine due to duration and scope of the infringement (MD 2013:5).

In June 2006 Spray Network Services AB (later Yarps Network Services AB) filed a damages claim against Telia. In March 2016 the Stockholm District Court found that Telia had engaged in a margin squeeze and partly upheld Yarps' claims with reduced damages of SEK 65 million (US$ 6,5 million) plus interest. Both parties appealed to the Svea Court of Appeal.

Brief summary of judgment

The Svea Court of Appeal dismissed Yarps claim in full. The appeal court found that Yarps had not proven its allegations abuse of dominance, including margin squeeze. Unlike the district court, the appeal court found that Yarps failed to provide sufficient evidence that Telia's conduct had anti-competitive effects in the market. Therefore, no abuse of dominance was found. Yarps appealed to the Supreme Court, but was not granted leave to appeal.

Country: Sweden	
Case Name and Number: Europe Investor Direct et. al. v Euroclear Sweden (T 10012-08)	
The case was heard under the provisions of the Swedish Competition Act of 1993.	
Date of judgment: 19 January 2011	
Economic activity (NACE Code): K.64 Financial service activities, except insurance and pension funding	
Court: Svea Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: Europe Investor Direct AB (EID), Rutger Kahn Kommanditbolag (RKK), OÜ E-Direct (E-direct)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No, the case was heard before the introduction of the Directive and the Competition Damages Act.
Defendants: Euroclear Sweden AB (Euroclear)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, EID was awarded SEK 800,000 (US$ 80, 000), while RKK and E-Direct were awarded SEK 550,000 (US$ 55, 000) each.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** Approx. SEK 3.1 million (approx. USD 300 000), SEK 2.6 million (US$ 260 000) and SEK1.9 million (US$ 190 000)
Key Legal issues: • Abuse of dominant market position by refusal to supply	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Before and after method. The judgment describes only very briefly the quantification method; it relies on the concept of "reasonable amount" and explains that, even if the abuse had ceased, the business could not return to normal without a certain delay.

Individual or collective claims? Individual (through three legal entities)	**Name and contact details of lawyer who has drafted summary:** Claes Langenius, Partner, Advokatfirman Hammarskiold & Co, Claes.Langenius@hammarskiold.se; Sofia Falkner, Senior Associate, Advokatfirman Hammarskiold & Co, sofia.falkner@hammarskiold.se
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The case concerned an alleged abuse of market dominance by Euroclear. Euroclear is a company that offers securities management services to companies and was at the time of the alleged infringement the only authorised entity to issue data on individual shareholders contained in its registers in Sweden. In 1999, Euroclear initially stopped to deliver this data in the manner requested by the claimants, and later Euroclear offered to supply the information at a significantly higher price. Three customers EID, RKK and E-Direct claimed damages due to the alleged infringement.

Brief summary of judgment

Svea Court of Appeal found that Euroclears actions on the market, by firstly refusing to issue the data requested by the customers and then later de facto refusing to issue the data due to the significant increase in pricing, constituted an abuse of dominance. Furthermore, the court found that the abuse had caused damage, and awarded EID SEK 800,000 (US$ 80 000), RKK SEK 550,000 (US$ 55 000) and E-Direct SEK 550,000 (US$ 55 000) in damages.

TURKEY

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Contributors

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Private enforcement is yet to be developed for the Turkish competition regime. The jurisprudence of the judicial authorities has not been settled yet as there is a severe lack of finalised court rulings on action(s) for damages resulting from competition law infringements.

Accordingly, private enforcement of competition law is recognised in a form of antitrust litigation, which is governed by civil procedural rules in Turkey. Considering the extremely limited number of damages actions finalised by the High Court of Appeal in Turkey (due to the untested enforcement trends and difficulties in calculating the damage amounts), the elbowroom for this type of enforcement is rather restricted. However, the ongoing discussions on potential ways to improve private enforcement remain at the forefront among Turkish scholars, enforcers, and practitioners of competition law.

1. Jurisdiction

The Turkish Competition Authority ("**Authority**") together with its decisional arm the Turkish Competition Board ("**Board**") is the competent regulatory body responsible for the public implementation of Law No. 4054 on the Protection of Competition (the "**Competition Law**").

When it comes to private enforcement, Article 58 of the Competition Law provides that anyone who has suffered from a competition infringement that has an impact on the Turkish market for goods and services is entitled to seek damages. Actions for such damages can be brought before civil courts, commercial courts, or consumer courts based on the circumstances surrounding the case (such as the merchant status deemed for the parties or the amount of the damages). In other words, the Turkish judicial system does not provide for specialised courts to review cases related to competition law infringements. Considering the high number of cases coupled with the tremendous workload of the judicial system, specific local courts have been seen to gain meaningful experience or particular skills for such cases. However, on the administrative law side, the 13th Chamber of the Council of State has been driving the final review of the appeals concerning Board decisions. Therefore, it would be fair to say that the 13th Chamber, in comparison to the other judicial authorities, has earned more experience with competition law cases.

Under Turkish law, compensation claims arising from competition law violations are pursued in the form of unlawful acts. Hence, this procedure is governed by the Code of Civil Procedure ("CCP") which provides that the establishment of the unlawful act must fall under the jurisdiction of the court of the geographical district in which (i) the act has been committed, (ii) the damage has arisen, or (iii) the domicile of the claimant is located. The Law on the Protection of Consumers also grants power to adjudicate to the court of the geographic district where the consumer's domicile is located.

2. Relevant legislation and legal grounds

As mentioned above, private antitrust actions are governed under the Competition Law. As per Article 57, any person (legal or natural) responsible for the prevention, distortion, or restriction of competition through practices, decisions, contracts, agreements or abuse of dominance shall be obliged to compensate for any damages of the injured party. Additionally, the general provisions of the Code of Obligations on liability for unlawful acts, which are stipulated under Article 49, are also applicable in such instances.

Any party who has suffered from an unlawful act (e.g. a competition law infringement) has to cumulatively establish the following four conditions: (i) infringement of the Competition Law (which can automatically be fulfilled if there is a finalised Board decision on the infringement), (ii) fault, (iii) damage, and (iv) causation between the infringement and the damage suffered.

The burden of proof falls on the claimant for such claims. Although the Competition Law does not explicitly provide that indirect customers may raise claims, they can do so as long as there is a sufficient causal link between the infringement and the damages they have suffered. However, considering the difficulties in linking the damages to the infringement for indirect customers, the general opinion among practitioners and legal literature is that such claims are unlikely to prevail under Turkish law. As such, the Turkish law does not provide special tools to help the indirect victims in demonstrating the damages. However, there is no tangible example in case law on these issues.

As to stand-alone claims, according to the jurisprudence of the High Court of Appeal, a final Board decision (*i.e.* a decision that has gone through the administrative judicial review) is required to determine that there is an infringement of the Competition Law. In other words, civil, commercial and/or consumer courts do not rule on the violation of competition rules and the High Court of Appeals only recognises finalised Board decisions for the establishment of such violation. On this basis, even if an injured party intends to raise a stand-alone claim, such procedure will eventually evolve into a follow-on claim due to the jurisprudential requirement of a settled Board decision to establish the infringement. Hence, the theoretic ability to raise stand-alone claims is not thoroughly enforceable in practice.

3. What types of anti-competitive conduct are damages actions available for?

Anti-competitive agreements and abuse of dominant position are explicitly deemed by Article 57 of the Competition Law as infringements which allow their victims to seek compensation. With that said, the possibility to claim compensation for infringement of the Competition Law by way of creating or reinforcing a dominant position via mergers and acquisitions, failure to notify, or gun-jumping types of violations is also a topic of discussion within the Turkish doctrine. Considering that the concept of private enforcement of antitrust law violations is not very developed in Turkey, subsections such as damages by way of gun-jumping have not been fully discovered.

4. What forms of relief may a private claimant seek?

The Turkish Code of Obligations, as a general rule, does not provide for any punitive damages and limits the amount of compensation that the injured party is entitled to obtain to the actual amount of the damages incurred (material damages).

Accordingly, the Code of Obligations provides that the court will determine the amount of compensation by taking into consideration the level of fault on the defendant and the circumstances surrounding the case. The "level of fault" element is used for determining what portion of the damages the damaging parties will be responsible for. In other words, if the applicant or any other party also has a fault in the damages, then the court may distribute the level of fault among the parties at fault and determine a corresponding level of compensation. Therefore, the "level of fault" element does not lead up to the application of punitive damages. Instead, it is used to allocate the responsibility within the amount of actual (non-punitive) damages.

In parallel with the foregoing principles, the Competition Law determines the amount of compensation for antitrust related damages as the difference between the price the victims have paid and the price they would have paid had the infringement not taken place. The Competition Law also sets forth that competitors suffering from the infringement can claim compensation for all damages incurred by them.

Furthermore, private enforcement of competition rules—with the application of treble damages—grants an exception to the non-punitive compensation principle. Accordingly, if the infringement under consideration results from an agreement or decision of the infringing parties or the gross negligence thereof, the court—upon request—can determine a compensation amount up to three times the loss suffered by the claimant or the profits gained (or may be gained) via the infringing acts. The wording of this provision (*i.e.* Article 58) may be interpreted broadly to argue that all competition law violations include gross negligence and therefore warrant treble damages. However, Article 58 designates separate provisions for requesting compensation and for requesting treble damages (*i.e.* Article 58(1) and Article 58(2), respectively). Considering that only the treble damages provision refers to gross negligence, we may argue that the law attributes a somewhat higher level of negligence for such cases. Additionally, the treble damages provision also refers to the concept of agreement/decision, which seems to exclude bilateral violations and violations where the multilateral decision aspect is not present. Due to the lack of case law examples and jurisprudential guidance on the issue, we cannot fully anticipate the potential enforcement trends. On another note, fines imposed by the Board at the end of the investigation are not contingent on private enforcement processes and are not considered by the courts.

Claimants are also entitled to seek interim measures if there is an immediate risk arising from a delayed decision, and to seek specific performance where the court orders the defendant to perform certain actions (e.g. supply certain goods to the claimant). The "interim measure" or the "specific performance" options are used in cases where, for example, the damaging party continues its harmful conduct. In such cases, if the court is convinced of the fact that the applicant will suffer severe damage until the final verdict, it may order the defendant to act in a certain way or not to take certain actions until the trial is over. This is a general protective option granted to the courts. Therefore, if the infringement damaging the applicant is still going on (despite the Board decision, as the case may be) the court reviewing the damages action will be entitled to put the damaging

actions on hold over the course of the trial. As explained above, there are no legal obstacles against issuing a stand-alone claim. By extension, there are no legal obstacles against requesting interim measures in a stand-alone claim. However, the High Court of Appeals has consistently ruled that there should be a finalised Board decision for a damages action to proceed. Accordingly, if the damaged party asks for an interim measure from the court in a damages action (without a finalised Board decision), the court would be expected to treat the issue as a prejudicial question and wait for the Board's decision before rendering a judgment on the matter.

In case of a collective infringement, the participants in the infringement can be held jointly and severally liable. In other words, the claimant is entitled to request and collect the total amount of compensation from any of the defendants. In such a case, if the defendant—from whom the compensation is collected—is of the view that it has overpaid, it can initiate a recourse proceeding before the court to recover such extra amount from the other defendants, based on the unjust enrichment principles. During the recourse process, the court will distribute the compensation liability proportionally based on the level of fault concerning the damages for each of the infringing parties.

Lastly, infringing parties who were leniency applicants during the investigation of the Authority are not protected from the follow-on litigations and neither the Code of Obligations nor the Competition Law provides for any beneficial treatment for such parties.

5. Passing-on defence

Under the CCP, the burden of proof is on the claimant in actions for private antitrust litigations. Subject to the general evidence rules of civil law applicable to unlawful acts, the claimant has to establish the infringement of the Competition Law (via the finalised decision of the Board, which also fulfils the element of fault), the damages, and a causal link between the damage and infringement.

The decisional practice of the High Court of Appeal has not yet recognised the concept of passing-on defence. Therefore, if invoked during the court proceedings, the passing-on defence would be subject to the general provisions of the Code of Obligations and the defendant rising the passing-on defence would have to bear the burden of proof pursuant to Article 50.

6. Pre-trial discovery and disclosure, treatment of confidential information

The Turkish system does not contain any pre-trial discovery instruments as US civil law does. However, some of the discovery proceedings under the Turkish system are of similar nature with the common law jurisdictions' pre-trial discoveries.

At any rate, the pre-trial discovery process is deemed irrelevant for private antitrust litigations in Turkey because there is a jurisprudential requirement to obtain a Board decision prior to initiating an action for competition law related damages.

In general, testimonials, documentaries or any other kind of tangible documents are accepted as means of evidence in the court proceedings. On that basis, such evidence

of tangible nature shall be relevant and shall be deemed sufficient to prove or disprove a fact in connection with the merits of the case. Confession, oath, documents, and definitive judgment are classified as direct means of evidence while witness reports, expert opinions and viewing are referred to, by the CCP, as circumstantial means of evidence. Both direct and circumstantial means of evidence are admissible during private antitrust litigation. As court judgments constitute direct evidence, decisions of the Board in which an infringement of the Competition Law has been established will have the same effect. The parties are also entitled to request submission of evidence at the third parties' disposal to the court. The court, should it deem necessary, may also request evidence from third parties or governmental institutions.

If the court requests documents in the investigation file from the parties or the Authority during the litigation process, the requested party and/or the Authority are under the obligation to fully comply with this request and submit all documents without having the opportunity to omit any trade secrets or confidential information. As the leniency applicants are not protected from follow-on actions, the disclosure requirement shall also be applicable for the leniency applicants.

7. Statute of Limitation

The Competition Law does not regulate the statute of limitation for private antitrust litigation. Therefore, such claims are subject to the statute of limitation that applies to unlawful acts. Under CCP, the statute of limitation to request compensation is two years. This term starts from the date the claimant became aware of the damages and the responsible party. The general lack of case law guidance also continues here, however, and considering that the Board decisions are published in the public domain, it may be taken into account in determining the statute of limitation.

At any rate, the statute of limitation shall not exceed a total term of ten years, from the date of the act subject to compensation. In other words, the ten-year limitation—as of the date of the act—serves as a longstop date to bring the relevant claims.

8. Appeal

In civil law, decisions of the court of first instance are subject to a dual legal remedy mechanism. After the court of first instance renders its final decision, the parties might appeal the ruling before the Regional Court of Appeal. The Regional Court of Appeal is authorised to examine the procedural grounds of the ruling and its merits. Such review will include procedural and factual errors as well as any errors of law.

Once the Regional Court of Appeal passes its judgment, the parties may appeal this decision at the High Court of Appeal. High Court of Appeal is the third instance within the judicial review and is the last authority to render a judgment in civil procedure. The High Court will only review the procedural issues. Lastly, if the subject of the case (e.g. the amount of damages subject to compensation claim) is less than a certain monetary value, parties are not entitled to appeal the judgment. The appeal threshold is renewed periodically. Cases with a monetary value under approximately US$ 650 do not qualify for the first stage of the appeal process (*i.e.* the Regional Court of Appeals), while cases with a

monetary value under approximately US$ 10,000 do not qualify for the second stage of the appeal process (*i.e.* the High Court of Appeals).

9. Class actions and collective representation

The CCP provides that associations and other legal entities of similar content are entitled to initiate an action for determination concerning the rights of its sole members. Associations may also file to cure a breach of law or to prevent the breach of future rights. The context of the lawsuit and the content of the dispute must be connected with the objectives of the relevant association and there must be sufficient grounds to demonstrate the interest of the association members. The question of whether the Articles of Association grant the ability to launch a lawsuit is also a topic of discussion while assessing the standing of associations in such lawsuits.

However, a class action that would include any potential claimant is not available under Turkish law.

10. Key issues

The key issue preventing the private enforcement of antitrust in Turkey may be singled out as the lack of tangible jurisprudential guidance. This issue not only decreases the associated degree of certainty among the ranks of antitrust practitioners but also presents a discouraging impact on the potential applicants that have suffered from a competition law violation.

In most cases, parties suffering from a competition law violation are reluctant to even initiate a damages action despite the existence of a Board decision establishing the unlawful act. The primary reasons for such reluctance emerge as the length of lawsuit before reaching a finalised ruling (three to five years on average), as well as the uncertainty of the case law and final outcome. Due to the general lack of case law examples, we cannot anticipate the practicality of settlements in antitrust related damages actions. Similarly, another important factor is the lack of guidance for the calculation of the damages and, in certain cases, the fear of commercial retaliation from the infringing party.

On the other hand, the above issue also indicates that Turkish practice for antitrust damages is open to developments. Accordingly, as the number of cases increases and the courts are, in one way or another, finalising their rulings; an increase in the number of new applications is believed to be seen in an array of applicants ranging from ordinary customers to large conglomerates in competition with the accused infringer.

Methodology for the selection of cases

The selection criteria predominantly focus on cases where the judicial review has been initiated and the ruling has been finalised. Among such finalised rulings, only the cases where the courts have ruled in favour of the applicant and granted quantifiable compensation for the antitrust related damages are referenced. Considering that the decisional practice of the Turkish courts provides only a limited number of examples, the

selection criteria do not narrow the scope by applying a further materiality threshold based on the amount of the award or the damage.

Country: Turkey	
Case Name and Number: 2015/1008 E., 2017/1325 K.—(Based on the infringement decision of the Turkish Competition Board numbered 8 March 2013 and numbered 13-13/198-100)	
Date of judgment: 22 March 2019	
Economic activity (NACE Code): K.64.30—Trusts, funds and similar financial entities	
Court: Istanbul Commercial Court of First Instance, 4th Chamber	**Was pass on raised (yes/no)?** No
Claimants: Mustafa Oğuz Bülbül (Customer of the infringing bank in vehicle loan)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Türkiye Vakıflar Bankası T.A.O.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—TRY 1.298 (approximately US$ 235—EUR 210)—The client of the infringing bank was awarded compensation amounting to two times of his actual damaged occurred due to the artificially increased interest rate on his vehicle loan.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The amount of compensation awarded to the claimant is below the threshold to apply for appeal. Therefore, the ruling is final and binding.	**Amount of damages initially requested:** The amount of damages initially requested was three times the actual damages accrued by the claimant without expressing an explicit amount. The Turkish competition law regime allows the victims of an anti-competitive agreement to request compensation up to three times their actual damages. The amount of initial request is based on the amount of damages which needs to be calculated by the civil courts. Hence, the claimant requested his damages to be calculated by the court and the compensation amount to be set as three times of such damages. However, the court has set the compensation amount as only two times the actual damages TRY 1.298 (approximately US$ 235—EUR 210) based on the merits of the case.

Key Legal issues: • Anti-competitive agreement • Fixing interest rates in deposit, loan and credit card services	**Is the dispute likely to be settled privately?** No—The dispute is not likely to be settled privately. The civil procedural law—which governs damage claims arising from competition law violations—allows private settlements. The parties may have a mutual agreement on the merits of an ongoing lawsuit and submit this settlement agreement to the civil court. However, the jurisprudence of civil courts on antitrust related damage claims are not maturely settled yet. Additionally, the calculation of damage amount associated with an individual claim is rather difficult in collective infringements (such as cartel cases or concerted practices). Therefore, the outcome of a damage claim is not reasonably predictable and, as a result, the parties are not inclined to negotiate private settlements.
Direct or indirect claims? Direct	**Method of calculation of damages:** Under Turkish law, civil courts are responsible for the calculation of the damages. However, the decisions of such courts have not provided any tangible guidance on the method of calculation so far.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Şahin Ardiyok, Senior Partner, Balcıoğlu Selçuk Ardiyok Keki Attorney Partneship, SArdiyok@baseak.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (Based on the infringement decision of the Turkish Competition Board numbered 8 March 2013 and numbered 13-13/198-100)	

Brief summary of facts

In 2013, Türkiye Vakıflar Bankası T.A.O. ("Bank"), together with 11 other banks, were found to have engaged in an anti-competitive agreement to determine the interest rates in certain retail banking services (*i.e.* deposits, loans and credit cards). The fining decision of the Competition Board was appealed before and approved by the Ankara Regional Administrative Court and the High Council of State (13th Chamber) in 2014 and 2015,

respectively. Upon the approval of the fine by the highest appellate court in 2015, Mustafa Oğuzcan Bülbül ("Client"), who has suffered from the infringement through his contractual relationship with the Bank on a vehicle loan, has filed an action for damages.

Brief summary of judgment

After having reviewed the merits of the case and the parties' arguments, together with expert witness reports, the 4th Chamber of Istanbul Commercial Court of First Instance ruled that the Bank had violated competition law through an anti-competitive agreement with its competitors and it was at fault in this infringement. The determination on the elements of violation and fault was substantially based on the relevant Board decision and echoed the findings therein.

The court of first instance also decided that the Client had paid more on interest than he would have in the absence of the infringing agreement and therefore established a causal link between the infringement and the damage.

Accordingly, the court exercised its discretion and awarded the Client with a (punitive) compensation amounting to two times his actual damages to be collected from the Bank. As the amount of compensation awarded to the Client is below the threshold to apply for appeal, the ruling of the court of first instance became final and binding, effective as of the decision date.

UKRAINE

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The number of private antitrust damages actions in Ukraine is quite limited. This is due mostly to the lack of a specific regulation in this area. While Ukraine's Antimonopoly Committee (the "**AMC**") has been successful in promoting fair competition in Ukraine since 2015, national competition legislation is still under reconstruction. Particularly, further harmonisation of the Ukrainian competition regulation with that of the European Union is anticipated as stipulated by the Ukraine-EU Association Agreement.

1. Jurisdiction

Although it has exclusive jurisdiction to enforce competition law in Ukraine, the AMC is not competent to resolve private antitrust damages actions.

Victims of anti-competitive practices may however seek compensation before commercial courts. In particular, the *Protection of Economic Competition Law* (the "**Competition Law**") entitles a person who suffered damages as a result of concerted practices, abuse of dominance, merger control violations or any other violations provided by this law to file a claim for the compensation for such damages with a commercial court.

Also, some violations, for instance, illegal use of business entity's reputation, illegal collection and disclosure of business secrets, inducing to boycott, and so forth, qualify as anti-competitive practices under the *Protection from Unfair Competition Law* (the "**Unfair Competition Law**"). Victims of such violations are also entitled to seek compensation for damages before the Ukrainian court. While the Unfair Competition Law does not provide that commercial courts have exclusive jurisdiction over damages actions resulting from a breach of this law, such claims are heard by commercial courts as well.

Ukrainian law does not expressly establish that the AMC findings of antitrust violations serve as a pre-requisite to pursuing antitrust damages action (**follow-on actions**). However, the existence of relevant AMC decision is implied. This is due to the exclusive authority of the Ukrainian antitrust authority in establishing antitrust violations. In other words, the Ukrainian court lacks jurisdiction to establish a fact of the antitrust violation.

For instance, in case *Nibulon v. Ukrzaliznytsya* No 910/4425/16 dated 3 July 2018, the Supreme Court rendered a landmark decision (the "**Nibulon Case**") setting further principles, including in relation to potential inadmissibility of stand-alone actions under Ukrainian law.

In the *Nibulon Case*, the Supreme Court concluded that the AMC has exclusive authority to decide whether an undertaking violated the Competition Law. Therefore, a victim that allegedly suffered damage is entitled to seek compensation for antitrust damages before the Ukrainian court, provided that a relevant AMC decision has been rendered. The

court has no jurisdiction to decide whether certain actions shall qualify as a violation of the Competition Law. Although the Supreme Court did not consider the issue of stand-alone actions specifically, considering the reasoning of the court in terms of the exclusive competence of the AMC, stand-alone claims may be regarded by Ukrainian courts inadmissible.

Therefore, in Ukraine, only follow-on actions are available to victims of antitrust violations.

2. Relevant legislation and legal grounds

To be valid, a claim for damages must be based on both:

i. civil liability legislation:

- the Civil Code of Ukraine (Articles 22, 1166, 1167 and 1190 of the Civil Code of Ukraine); and / or
- the Commercial Code of Ukraine (Articles 224-227, 255 of the Commercial Code of Ukraine);

ii. and the relevant antitrust legislation: the Competition Law (Article 55) or the Unfair Competition Law (Article 24) which, from a procedural point of view, is subject to the same enforcement regime.

As stated above, private antitrust damages actions are considered by commercial courts. Therefore, the proceedings are regulated by the Commercial Procedure Code of Ukraine.

There are four component elements of any tort claim (including antitrust damages actions), in particular:

i. unlawful behaviour, *i.e.* the anti-competitive behaviour by an undertaking held liable for competition law infringement (the relevant decision of the AMC, which has a preclusive effect);

ii. the damage (actual (direct) damages, loss of profit[1], moral damages[2]);

iii. causation between the unlawful behaviour and damages such claimant has suffered. Damages shall serve as a direct and objective consequence of relevant violation; and

iv. fault. Under Ukrainian law fault is presumed. Fault in this context means an intention to cause harm or negligence.

The above criteria are cumulative. The burden of proving damages, unlawful behaviour and causal link between the same rests on the claimant, while the defendant has to prove the absence of its fault.

1 Ukrainian law provides that claims for compensation for damages in the form of loss of profit shall be duly substantiated with specific calculations and evidence confirming real opportunity of obtaining such income. Presence of theoretical opportunity of receipt of the income does not constitute a ground for its recovery.

2 Compensation for moral damages is available under the Commercial Code of Ukraine.

As stated above, any person who suffered damage as a result of a violation of either the Competition Law or Unfair Competition Law is entitled to bring a claim for recovery of damages. Therefore, indirect purchasers and ultimate customers potentially may also bring actions for damages.

3. What types of anti-competitive conduct are damages actions available for?

Damages actions are not limited to certain types of Competition Law or Unfair Competition Law violations.

In turn, the Competition Law provides that double damages are available for the following types of violations:

i. concerted practices;

ii. abuse of dominance;

iii. implementation of a notifiable transaction failing to obtain merger clearance;

iv. implementation of a conditionally approved merger or concerted practices failing to comply with conditions imposed by the AMC; and

v. imposition of restrictions on business activity of an undertaking following its application to the AMC with a complaint regarding an alleged antitrust violation.

Double damages are not available in actions resulting from so-called informational violations,[3] illegal use of business entity's reputation, illegal collection and disclosure of business secrets, inducing to boycott, and so forth.

4. What forms of relief may a private claimant seek?

Neither the Competition Law nor the Unfair Competition limits forms of relief available to potential claimants in addition to compensation for damage suffered. There exist different forms of relief that are potentially available to victims of antitrust violations:

i) Compensation for damage suffered.

The effective law does not establish any mechanism for calculation of antitrust damages.

As stated under Section 3, the Competition Law provides that double damages are available for certain types of Competition Law violations. However, punitive damages are not available under Ukrainian law.

Damages, which resemble a monetary value of harm, may, pursuant to Article 22(2) of the Civil Code of Ukraine, consist of:

3 For instance, untimely provision of information in response to the AMC request, provision of untrue, incomplete data or failure to provide information.

1) actual (direct) damages (*i.e.*, losses incurred by a person as well as expenses, which a person has incurred or should incur in order to restore its violated rights;

2) loss of profit.

Ukrainian law provides that claims for compensation for damages in the form of loss of profit shall be duly substantiated with specific calculations and evidence confirming real opportunity of obtaining such income. Presence of theoretical opportunity of receipt of the income does not constitute a ground for its recovery. Moral damages are also available and may be awarded both to individuals and legal entities.[4]

The fine imposed by the AMC does not influence the amount of damages that may be awarded to a successful claimant.

The highest amount of antitrust damages that have ever been awarded in Ukraine is *circa* US$ 4,500,000 in the *Nibulon Case*.

ii) Other forms of relief

A claimant may also ask the court to invalidate an agreement (certain provision of an agreement). Such relief is available if such an agreement was made in violation of the Competition Law or the Unfair Competition Law and, as a result, affected the rights of a claimant.

Further, suppose an antitrust violation involves the publication of false and/or inaccurate, or incomplete information regarding a business entity. In that case, such entity may claim for a public refutation of such information. So far, we have not identified any such case.

In addition to the above mentioned forms of relief, a claimant may also apply for interim relief. For instance, a court may issue a freezing injunction over the defendant's assets or prohibit the defendant or third parties to take certain actions.

The court may grant interim relief on an *ex parte* basis. Before granting interim relief, the court will weigh up the interests of parties and consider:

1) the potential harm for either of parties resulting from the granting or non-granting of such interim relief, and

2) whether the rights and interests of third parties will be (are likely to be) infringed by such interim relief.

Accordingly, a party seeking interim relief should convince the court that it would suffer irreparable harm if interim relief is not granted.

Importantly, the court may order a party applying for interim relief to provide a cross-undertaking (security) in the form of a deposit lodged on the account of the court, a bank guarantee, security, etc.

4 Compensation for moral damages is available under the Commercial Code of Ukraine.

5. Passing-on defence

The passing-on defence is not yet regulated under Ukrainian law. While there is no court practice involving passing-on defence, such defence (if appropriate) may be raised. Considering that there is no specific rule regulating the issue either prohibiting or allowing the passing-on defence, there is no statutory limitation with respect to its availability. Under Ukrainian law, there is no presumption that a direct or indirect purchaser is deemed to have passed on the surcharge to its own customers.

Considering the requirements of the Commercial Procedure Code that each party should prove those circumstances to which it refers to support its claim or defence, it is for the defendant to prove that the claimant in fact passed on the surcharge to its own customers.

6. Pre-trial discovery and disclosure, treatment of confidential information

Ukrainian law does not provide for a discovery procedure. However, a claimant is entitled to request the disclosure of documents (or any other evidence) by the defendant if:

i. the claimant cannot obtain such documents; and

ii. such documents are considered as necessary to prove the alleged facts relevant to the case.

The judge may also order the production of documents from third parties, including from the AMC. As a matter of practice, the AMC is reluctant to disclose its case files even when its own decisions are being challenged. In addition, the AMC usually applies for closed court proceedings relying on confidentiality of materials submitted by parties to the AMC investigation. Confidentiality does not apply automatically to materials submitted by parties to relevant AMC investigation. First, such documents shall be marked as confidential. Second, parties shall provide justification when applying for confidentiality.

Furthermore, a leniency applicant is entitled to apply for non-disclosure of its identity. Such application may be allowed by the AMC if the applicant provided justification that such non-disclosure will be beneficial for the AMC investigation. Notably, the effective Competition Law envisages that only first leniency applicant may enjoy benefits of the leniency programme.

7. Statute of Limitation

A general limitation period of three years is applicable. The limitation period starts when the claimant learned or could have learned of the violation upon its rights or when the claimant learned who violated its rights.

In the *Nibulon Case*, the Supreme Court confirmed that the limitation period starts from the day on which the AMC's decision is issued.

8. Appeal

A decision of the court of first instance may be appealed to the court of appeal on the grounds of:

i. failure to fully identify the circumstances relevant to the case;

ii. lack of evidence with respect to circumstances relevant to the case;

iii. inconsistency of the conclusions set forth in the first instance court's decision with the established circumstances of the case;

iv. breach of material law or procedural law (if the latter resulted in an improper court decision).

A cassation appeal against the decision of the Court of Appeal (on limited grounds) may be filed with the Supreme Court (Commercial Cassation Court of the Supreme Court). In exceptional circumstances, the Supreme Court may transfer a case to the Grand Chamber of the Supreme Court, if it considers that it is necessary to deviate from the finding on an issue of law made in similar circumstances, or if the case concerns an exceptional legal problem and such transfer is required to ensure formation of the consistent court practice. A case shall be transferred to the Grand Chamber if parties to such proceedings challenge jurisdiction: either the subject matter jurisdiction rules or subjective jurisdiction rules.

9. Class actions and collective representation

Ukrainian law does not provide for class actions. However, several claimants may file a joint action against the same defendant(s) if:

i. the subject matter of the dispute is related to the claimants' / defendants' common rights or obligations;

ii. the rights or obligations of several claimants or defendants arose from the same reasons;

iii. the subject matter of the dispute is the similar rights and obligations.

The criteria mentioned above are cumulative.

Each of the claimants or defendants shall however act independently in the court proceedings.

Methodology for the selection of cases

In Ukraine all court decisions are public and should be published in the Unified State Register of Court Judgments.[5] The cases related to damages actions have been selected for this chapter.

5 According to Article 2 of the Law of Ukraine "On access to court decisions", all court decisions are public and should be published in the electronic form not later than on the next day after their issuance and signature subject to certain exceptions. If the trial was closed, the court decision shall be published with the exception of the information which under the court decision is protected from disclosure. According to paragraph 3 of Final and Transitional provisions of the Law of Ukraine "On access to court decisions", the regular disclosure of electronic copies of court decisions of the Supreme Court of Ukraine, higher specialized courts, appeal and local administrative courts, appeal and local commercial courts, appeal courts of general jurisdiction in the Unified State Register of Court Judgments should be ensured by no later than 1 June 2006. In turn, the disclosure of court decisions of local courts of general jurisdiction should be ensured by no later than 1 January 2007.

Country: Ukraine	
Case Name and Number: Case No 927/81/16	
Date of judgment: 26 April 2018	
Economic activity (NACE Code): D.35—Electricity, gas, steam and air conditioning supply	
Court: Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: LLC Torhova enerhetychna kompaniya "Elkom"	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: PJSC "Chernihivoblenerho"	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—UAH 365,944 (*circa* US$ 13,500). The awarded amount was reduced (in comparison with what was initially requested) due to lack of standing in relation to amount of profit loss (for certain periods).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: After a number of rounds of review of the first instance court decisions, the Supreme Court rejected the cassation appeal of Chernihivoblenergo and left unchanged the relevant decisions of the first instance court and the Court of Appeal. The Supreme Court (as a cassation instance court) decision rendered in the case is final, binding and cannot be appealed.	**Amount of damages initially requested:** UAH 528,182 (circa US$ 20,000)
Key Legal issues: • Abuse of dominance • Follow-on action	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** 2 * (direct loss + loss of profit (expected profit—net back price for goods)

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Daryna Ushchapivska, Associate, Kinstellar Kyiv, Daryna.Ushchapivska@kinstellar.com
Follow-on (EC or NCA?) or stand-alone? Follow-on, decision of the Administrative Chamber of Chernihiv region Department of the Antimonopoly Committee of Ukraine N17— рк dated 26 November 2015 in case No 02-05/17-2015	

Brief summary of facts

In 2015, LLC "Torhova enerhetychna kompaniya "Elkom" (**Elkom**), a business entity active in the electricity market, particularly as a supplier of the electricity, filed with the Administrative Chamber of Chernihiv region Department of the Antimonopoly Committee of Ukraine (**AMC**) a complaint alleging the abuse of dominance by PJSC "Chernihivoblenergo" (**Chernihivoblenergo**) in the regional electricity transmission (distribution) market.

Elkom claimed that Chernihivoblenergo being a supplier of the electricity at a regulated tariff and a monopolist in the regional electricity transmission (distribution) market refused to supply electricity to Elkom (as a supplier of the electricity at an unregulated tariff) and, therefore, restricted Elkom's access to the electricity market.

On 26 November 2015, the AMC issued a decision fining Chernihivoblenergo for abuse of dominance in the regional market of electricity transmission (distribution). The AMC established that Chernihivoblenergo held 100% market share in the Chernihiv region during material time and groundlessly rejected to supply electricity to Elkom at a regulated tariff.

Further, Elkom filed with the court a claim on private enforcement of antitrust damages (follow-on action). The first instance court upheld Elkom's claim in part. After a number of rounds of review of the first instance court decisions due to pending proceedings on the challenge of the relevant AMC decision establishing the fact of the antitrust violation,[1] the Supreme Court rejected the cassation appeal of Chernihivoblenergo and left unchanged the relevant decisions of the first instance court and the Court of Appeal.

Brief summary of judgment

The Supreme Court rejected the cassation appeal of Chernihivoblenergo and left unchanged the relevant decisions of the first instance court and the court of appeal. The Supreme Court relied on the decision of the AMC imposing the fine for abuse of dominance on Chernihivoblenergo as one of the evidences provided by the party in order to prove the infringement and the causal link between infringement and damages.

1 The Court of cassation upheld relevant AMC decision.

Particularly, Chernihivoblenergo argued that due to the existence of contractual relations between parties, Elkom was not entitled to pursue a claim for recovery of antitrust damages. However, the Supreme Court concluded that the damages claimed by Elkom are not contractual. Such damages were a consequence of the Competition Law violation, *i.e.* abuse of dominance by Chernihivoblenergo.

Country: Ukraine	
Case Name and Number: Case No 910/4425/16	
Date of judgment: 3 July 2018	
Economic activity (NACE Code): H49.2—Freight rail transport	
Court: Supreme Court	**Was pass on raised (yes/no)?** No
Claimants: LLC "Nibulon"	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: PJSC "Ukrzaliznytsya" (Ukrainian Railway)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—UAH 120,283,293* (circa US$ 4,500,000). An awarded amount was reduced (in comparison with initially requested) due to lack of standing in relation to inflatory losses and annual interest *However, currently Ukrzaliznytsya challenged enforcement writ issued by the court due to partial payment allegedly made by Ukrzaliznytsya in favour of Nibulon.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: After a number of rounds of review the Supreme Court rejected the cassation appeal of Ukrzaliznytsya and upheld resolution of the court of appeal, according to which the claim of Nibulon was allowed. The Supreme Court's decision rendered in the case is final, binding and cannot be appealed. However, currently Ukrzaliznytsya challenged the enforcement writ issued by the court due to partial payment allegedly made by Ukrzaliznytsya in favour of Nibulon.	**Amount of damages initially requested:** UAH 174,753,200 (circa US$ 6,520,000.) (including UAH 120,283,293* (circa US$ 4,500,000) of losses due to competition law infringement, UAH 49,056,791 (circa US$ 1,800,000) of inflatory losses, UAH 5,413,115 (*circa* US$ 200,000) 3% annual interest)

Key Legal issues: • Abuse of dominance • Follow-on • Limitation period	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Daryna Ushchapivska, Associate, Kinstellar Kyiv, Daryna.Ushchapivska@kinstellar.com
Follow-on (EC or NCA?) or stand-alone? Follow-on, Decision of the AMC No 576-p dated 16 July 2013	

Brief summary of facts

In 2013, the AMC rendered a decision (upon relevant complaint of Nibulon, a Ukrainian agricultural company specializing in production and export of grains wheat, barley, corn), according to which Ukrzaliznytsya was fined for abuse of dominance in the market of cargo transportation by charging unreasonably high tariff.

Nibulon filed with the court a claim on private enforcement of antitrust damages. After a number of rounds of review the Supreme Court rejected the cassation appeal of Ukrzaliznytsya and upheld the resolution of the court of appeal, according to which claim of Nibulon was allowed. Ukrzaliznytsya took a position that, first, Nibulon was not entitled to claim for compensation for antitrust damages due to existing contractual relations between parties. However, the Supreme Court concluded that the damages claimed by Nibulon were not contractual. Such damages were a consequence of the Competition Law violation, *i.e.* abuse of dominance by Ukrzaliznytsya.

Brief summary of judgment

This is a landmark decision of the Supreme Court in terms of private enforcement of antitrust damages. In particular, the Supreme Court concluded that the AMC has exclusive authority to decide whether an undertaking is in breach of the competition legislation. Therefore, a party that suffered damages has a right to apply to a court with a claim on enforcement of antitrust damages when relevant decision of the AMC is rendered.

In addition, the Supreme Court agreed with the reasoning of the Court of appeal that limitation period starts from the moment of issuance of the decision by the AMC.

Although, the Supreme Court did not consider the issue of stand-alone claims, considering reasoning of the court in terms of exclusive competence of the AMC, it can be concluded that stand-alone claims may be regarded by the Ukrainian courts inadmissible.

Country: Ukraine

Case Name and Number: Case No 910/12634/18

Date of judgment: 16 April 2019

Economic activity (NACE Code): H.51—Air transport

Court: Northern Commercial Court of Appeal	**Was pass on raised (yes/no)?** No
Claimants: PJSC Aviation Company International Airlines of Ukraine	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: LLC Amic Aviation Ukraine	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Parties concluded settlement agreement, according to which LLC Amic Aviation Ukraine undertook to pay US$ 300 000 to PJSC Aviation Company International Airlines of Ukraine.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appeal proceedings were initiated at the Northern Commercial Court of Appeal. Parties concluded settlement agreement, which was approved by the relevant court ruling.	**Amount of damages initially requested:** UAH 21,599,991 (*circa* US$ 800,000.00)
Key Legal issues: • Abuse of dominance • Follow-on • Preclusive effect of the decision of the Antimonopoly Committee	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Direct losses * 2
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Daryna Ushchapivska, Associate, Kinstellar Kyiv, Daryna.Ushchapivska@kinstellar.com

Follow-on (EC or NCA?) or stand-alone? Follow-on, Decision of the AMC No 483-p dated 22 September 2015	

Brief summary of facts

In September 2015, the AMC rendered a decision according to which LLC Lukoil Aviation Company (changed its name to LLC Amic Aviation Ukraine) (**AMIC**) was fined for abuse of dominance in the market of sale of aviation fuel (including refuelling of aircrafts) at the International Airport of Odesa and the International Airport of Kharkiv. The AMC concluded that AMIC drove up the price for aviation fuel for 24%.

AMIC initiated court proceedings challenging the relevant AMC decision. AMIC argued that the AMC incorrectly applied the methodology for the determination of the dominant position, failed to conduct feasibility study within the territorial boundaries of the relevant market, failed to establish market price for the aviation fuel at all airports of Ukraine, and so forth.

The first instance court concluded that AMIC's application was groundless and dismissed its claim. Decision of the first instance court was further upheld by the Court of Appeal and the Supreme Court.

Following the above mentioned events, PJSC International Airlines of Ukraine, the flag carrier and the largest airline of Ukraine and a customer of AMIC, applied to the court for enforcement of antitrust damages. Its claim was allowed in full. AMIC filed statement of appeal against first instance court judgment.

Further, the Northern Commercial Court of Appeal approved the amicable settlement agreement between parties.

Brief summary of judgment

The court in its decision concluded that the decision of the AMC and decision of the court dismissing claim on challenge of the relevant AMC decision (if such proceedings are initiated) have a preclusive effect and, therefore, a competition law infringement was established by proper evidence.

Further, the Northern Commercial Court of Appeal approved the amicable settlement agreement between parties.

UNITED KINGDOM

INTERNATIONAL CHAMBER OF COMMERCE

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The contents of this note relate to the law of England and Wales, which is formally a separate jurisdiction within the United Kingdom. Where reference is made to law deriving from European law this is the same throughout the United Kingdom, and the principles set out will apply broadly in Scotland and Northern Ireland. However, this note does not specifically address the position in those jurisdictions.

In the United Kingdom there is a long-established regime for individual and corporate claimants to bring claims against others for losses caused by anti-competitive behaviour, that is breaches of Article 101 or Article 102 on the Treaty on the Functioning of the European Union ("**TFEU**") and/or Chapter 1 (anti-competitive agreements) and Chapter 2 (abuse of a dominant position) of the Competition Act 1998, as amended ("**CA 1998**"). The CA 1998 was expanded in 2015 by the Consumer Rights Act 2015 ("**CRA 2015**") and further updated from 9 March 2017 to implement the EU Damages Directive to the extent that the Directive's provisions were not already part of United Kingdom law.

As discussed in Section 10, Brexit is not expected to change the current regime in the short term, since it is based on United Kingdom statute (some of which implements EU Directives, and which is otherwise closely aligned with EU law) and common law.

1. Jurisdiction

The United Kingdom has a specialist competition claims court, the Competition Appeal Tribunal ("**CAT**"), but claims, other than collective actions, may also be brought in the High Court of England and Wales. The established regime in the United Kingdom makes it an attractive jurisdiction for such claims because of the experience of judges in such cases, and the availability of specialist economic experts in the CAT (who form part of the tribunal).

In addition, recent changes to the law have been introduced to allow collective actions to be brought efficiently on behalf of groups of claimants (both on an "opt-in" and an "opt-out" basis). These must be brought in the CAT. Other than the collective actions the CAT and the High Court have a broadly similar function in respective of competition claims. The CAT also offers a "fast track" procedure for less complex claims which it aims to decide quickly (as soon as practicable and in any event within six months) with limited risk as to costs.

2. Relevant legislation and legal grounds

A civil claim for damages arising from anti-competitive behaviour is generally brought as a claim in tort for breach of statutory duty, namely breach of CA 1998 and/or the TFEU. A claimant may bring a private action based on an infringement decision of the United

Kingdom or EU competition authorities (in the United Kingdom, the Competition and Markets Authority ("CMA") (often know as a "follow-on" claim) or, in cases where no decision has been reached, a so-called "stand-alone claim". These claims may now be brought in either the High Court or the CAT. Prior to the implementation of the CRA 2015 the CAT could not hear stand-alone claims.

If the English court has jurisdiction, claims can be brought under foreign laws as well as English law.

Where there has been such a decision, this is binding evidence of the defendant's anti-competitive conduct under English common law and section 58A of the CA 1998. Claimants will still need to prove causation (that is, that the particular behaviour caused them loss) and the quantum of the loss. The defendant may seek to argue "pass-on" in the context of proof of loss, to reduce any liability.

Claimants may also bring claims based on the torts of "interference with business by unlawful means" and "conspiracy to injure by the use of unlawful means". These are not specific competition-related claims, but may apply in situations where there has been a breach of competition law. In practice, these causes of action tend only to be relied on where it may be difficult to establish a breach of statutory duty because of the territorial scope of the infringement. One key challenge for claimants in bringing these actions is that they must demonstrate an intention to injure the claimant, which is often hard to establish.

Following the implementation of the Damages Directive[1] and other changes to the relevant law, slightly different rules apply to certain aspects of claims depending on when the infringing behaviour occurred or was established. These variations affect limitation periods and the collective actions regime in particular, and are dealt with in the relevant sections below. The Damages Directive provisions relating to limitation only apply in the United Kingdom where claims relate to infringements occurring after 9 March 2017.

3. What types of anti-competitive conduct are damages actions available for?

Claims may be brought for any conduct which is a breach of competition law, *i.e.* Articles 101 or 102 of the TFEU or the relevant provisions of CA 1998. United Kingdom competition law expressly permits claims in the CAT for damages for breaches of Articles 101 and 102 as well as:

(a) agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the UK; and

(b) any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

As noted above, claims may also be brought in the High Court, and claims for "breach of statutory duty" may be based on other statutes regulating the behaviour of companies in

1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

certain sectors, such as the utilities. Such claims may therefore have the same objective as claims for breaches of the dedicated competition legislation, often fair access to networks.

4. What forms of relief may a private claimant seek?

The damages available in relation to competition claims are the same as those available for any tort under English law, and are subject to the same "tests" of liability, causation and proof of financial loss.

Claims are typically brought for financial loss arising from an overcharge in price, if the overcharge is not passed on by the claimant, loss of sales/profit arising from higher prices where the overcharge is passed on, and interest on the damages in either case. In cases of abuse of dominant position, the claimant typically seeks loss of profits and/or loss of opportunity.

In addition, where the claimant has a contract with the defendant that it believes is void for illegality because some or all of the provisions are contrary to competition law it may seek a declaration that the contract or certain clauses are unenforceable.

English courts, including the CAT, also have the power to grant injunctions based on a breach of competition law, requiring certain behaviour to cease, or compelling the defendant to take certain steps.

5. Passing-on defence

English law has recognised the principle of "pass-on" for some time, that is, that a defendant can defend the amount of a claim by demonstrating that all or part of the loss caused by the anti-competitive behaviour was passed on to a customer of the claimant. The courts have, however, only recently considered it in any detail because of the small number of competition litigation claims progressing all the way to trial. The recent *Sainsbury's v MasterCard* decision by the CAT,[2] which was confirmed by the Court of Appeal[3] (and may not now be further appealed) represents the current position.

Following the *Sainsbury's* judgment defendants wishing to plead pass-on must establish a clear causal link between the overcharge arising from the anti-competitive behaviour and an increase in prices charged by the claimant. In cases where the claimant's prices are composed of a large number of different elements—which will often be the case for large companies, or manufacturers—a defendant is likely to find this difficult.

Aspects of the pass-on principle have now also been codified by the Damages Directive. There is now a rebuttable presumption that there is 'upstream' pass-on of an overcharge to an indirect purchaser claimant. Furthermore, it is confirmed that the burden of proof in proving "downstream" pass-on (reducing the value of a claimant's claim) falls on the defendant. However, this rule applies to claims arising (and brought) after the implementation of the Damages Directive and it is likely therefore, given the typical delay

2 *Sainsbury's v MasterCard* [2016] CAT 11

3 *Sainsbury's v MasterCard* [2018] EWCA 1536 (Civ)

before anti-competitive behaviour comes to light, that the *Sainsbury's* principle will be the predominant approach for some time.

6. Pre-trial discovery and disclosure, treatment of confidential information

The English rules regarding the disclosure by all parties to litigation of documents both supporting and adverse to their case remains a very important factor in competition litigation. Disclosure is particularly important because it is often the case that the defendants will have control of many of the documents necessary to determine the overcharge and the precise nature of the infringing conduct. The disclosure regime in England is being overhauled to reduce, where appropriate, the burden and cost to the parties, but these changes do not yet apply to competition claims.

The English Civil Procedure Rules contain a specific Practice Direction relating to the disclosure of documents in competition claims (Practice Direction 31C). This relates, in particular, to applications seeking evidence in the file of the competition authority, and implements (together with amendments to CA 1998) the provisions of the Damages Directive.

Documents that may be considered as simply "commercially confidential" are not afforded any protection under the English rules. They should be disclosed as long as they are relevant to the case of either party.

In general, the court will not expect a claimant to be able to present its evidential case in detail prior to disclosure where the evidence required by the claimant will only become available during the disclosure process.

7. Statute of Limitation

For claims not falling under the Damages Directive regime, the general limitation period for an English law tortious claim under the Limitation Act 1980 is six years from the date "on which the cause of action accrued". However, there is an important exception in section 32 of this act where there has been concealment of the facts giving rise to the action. In such a case the period of limitation does not begin to run until the claimant "has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it".

The date on which this "discovery" occurs will depend on the facts of each individual case and there is limited case law on how the test applies in follow-on competition damages cases, where information may become available over a lengthy period in multiple jurisdictions but regulators may reveal few details. The test is now generally accepted to be the "statement of case" test laid down in the *Arcadia*[4] case, that is, the date on which the claimant knew the concealed facts which were essential for him to prove in order to establish a *prima facie* case. In practice the date of publication of a decision is likely to be the latest such date, although in some cases the facts may be found to be known to the claimant at an earlier date, and detailed analysis is likely to be required in each case. Recent

4 *Arcadia Group Brands Limited & Ors v Visa* [2014] EWHC 3561 (Comm)

case law[5] suggests that possessing some actual knowledge that could enable the claimant to discover other facts may be sufficient to start time running.

Prior to CRA 2015, a claim in the CAT could only be brought within two years of a final decision (subject to no further appeals). However the CAT limitation period (other than for collective claims, discussed below) has now been brought in line with the non-specialist courts for causes of action accruing after 1 October 2015 (when the CRA 2015 came into force). However, given the period that may elapse before a cartel is uncovered, this provision will continue to have force for some time to come.

Since the implementation of the Damages Directive, the date on which the limitation period starts to run has been codified across the EU for causes of action accruing after that date (subject to one important point on suspension of the period). Limitation for such causes of action now runs from the later of the dates (i) when the infringing behaviour ceases or (ii) the "date of knowledge" of certain facts. Unless the question of when the latter date falls is the subject of references to the EU courts the similar "statement of case" test may well continue to prevail in the United Kingdom.

Where the Commission or CMA is still investigating, however, or a decision has been appealed, the limitation period will be suspended until the investigation concludes, and any appeals are then determined. This is likely to mean that the date of any decision becomes the de facto start of the limitation period, since it will generally be hard to argue that any knowledge of the behaviour existed before the announcement of an investigation. It must be remembered, however, that this applies only to claims relating to infringements occurring after 9 March 2017, in accordance with the United Kingdom legislation implementing the Damages Directive.

8. Appeal

Appeals against judgments of the Competition Appeal Tribunal (which, despite its name, is a first instance court for civil competition claims) or the High Court, must be made to the Court of Appeal. Permission is required for all appeals, which may be granted by the lower court or, if not, sought from the Court of Appeal. The same rules apply to competition damages claims as to other civil claims in relation to the grounds on which appeals are permitted.

9. Class actions and collective representation

The courts of England and Wales have long-established processes for coordinating and consolidating similar claims into group or multi-party claims of multiple (though not "mass") claimants, including a facility for "representative" claims although this is not widely used. Since 1 October 2015, the United Kingdom CAT regime also offers "opt-in" and "opt-out" collective actions, in which a single representative may be certified by the CAT to lead a claim on behalf of a wider, defined, group of claimants facing "common issues". The certified group may consist either of all claimants fulfilling defined criteria unless they actively choose not to participate (an "opt-out" action) or of all claimants fulfilling approved criteria who choose to participate ("opt-in"). The classes may encompass many thousands of

5 *Granville Technology Group Limited and ors v Infineon Technologies AG and ors* [2020] EWHC 415 (Comm)

claimants and the regime is at least partly aimed at litigating claims that may be too small to bring on an individual basis, such as those of consumers.

The process for bringing a collective action is as follows:

(a) A proposed "class representative" issues a claim form together with a detailed document setting out:

i. Whether the claim is to be certified as "opt-in" or "opt-out";

ii. How the class is to be defined;

iii. What the "common issues" faced by the members of the class are;

iv. Why the class representative is suitable to be certified; and

v. How the claim will be managed (communications with the class members, funding, how defendants' costs will be met in the event of an adverse costs order, distribution of any award, etc.).

(a) A hearing is held at which the CAT considers whether to certify (i) the class, and on what basis; and (ii) the class representative. (These decisions are taken independently.) The CAT may certify the class on a different basis to that in the representative's application. The defendants may oppose the certifications if they have reasonable grounds to do so.

(b) If the claim is certified it then proceeds in the usual way, except that it must be "advertised" to potential class members (for opt-in) or to class members who may wish to pursue a separate claim (for opt-out).

(c) If there is an award in favour of an opt-out class, the representative must make efforts to distribute it to all qualifying members. If the award is not fully distributed the default position is that the balance is payable to a nominated statutory charity. However, the CAT has the power to allow the release of funds to others, including for payment of the expenses of the claim including amounts due to a third party funder, or even return of a portion to the defendants.

(d) If a full or partial settlement is reached, the CAT must approve the terms.

The regime is still in its infancy, with no class representative having yet been successfully certified, even after four years of the regime being in place, but important principles have been established by the CAT and the Court of Appeal in relation to what a suitable representative might look like, how the "common issues" might be determined, how a certifiable class should be defined and what economic evidence might be required at the certification stage. In an important judgment in 2017 the CAT confirmed that collective claims could benefit from third party litigation funding and that a portion of any damages awarded could be used to pay the funder's return as a legitimate expense of the claim. This seems likely to increase take-up of the regime.

Under the transitional provisions of the CRA 2015, if the facts giving rise to the claim arose before 1 October 2015, the collective claims procedure is only available to claimants where

the claim is a follow-on claim and is based on a decision after that date (since the CAT did not have jurisdiction over stand-alone claims before 1 October 2015).

The two-year limitation period (from the date of the decision becoming final) for bringing a CAT claim still applies to the collective action regime where the facts giving rise to the claim arise before 1 October 2015. Where claims arise after 1 October 2015, the six-year limitation period set out in Section 7 above will apply.

10. Key issues

As noted above, the competition damages regime is well-established in the United Kingdom and many issues are settled law. Areas where the law continues to evolve are:

i. **Limitation**—which, as described above, will begin to be affected by the provisions implementing the Damages Directive, but where there is still a long "tail" of cases that fall within the pre-Directive regime; and

ii. **Collective actions**—where questions have yet to be finally answered on questions such as how detailed the methodology for calculating damages must be for very large classes, and how certification should proceed where there are multiple applications for certification as a representative; and

iii. **Pass-on**—where the courts are seeking to balance the burden of proof on a defendant to show that a claimant has passed on any overcharge (further strengthened by the implementation of the Damages Directive), with the principle that a claimant should be permitted to recover only the loss it has actually suffered. This can be a difficult area, and very fact-dependent, particularly where a claimant's selling prices result from numerous input costs and are affected by strategic pricing policies. The position is further complicated by the possibility that the provisions introduced by the Damages Directive may now be amended following Brexit.

Brexit

The departure of the United Kingdom from the EU is unlikely to undermine the current regime to a significant extent, much of which exists independent of EU law. Under the current provisions of the European Union (Withdrawal) Act 2018, the United Kingdom will bring all EU law into force as United Kingdom law on the date of withdrawal, thus preserving the current body of law, with consequential amendments to reflect the United Kingdom's new status as a non-EU-member. Although the UK parliament will have the right to amend the retained law over time, without reference to the EU, at time of writing there are no proposals for any material amendments to the detailed provisions that arose from the implementation of the Damages Directive, although EU infringement decisions made after the Brexit transition period (*i.e.* after 31 December 2020) will cease to be binding on the English courts as regards follow-on claims.

United Kingdom claimants will retain the right to bring follow-on claims in England and Wales for breaches of EU law arising from EU decisions pre-dating the date of the United Kingdom's withdrawal. Standalone claims in such circumstances (where the claim does not directly arise out of a decision) have always been, and remain, possible. For breaches

relating to subsequent EU decisions, irrespective of any ongoing arrangements with the EU, it is likely that the English courts will continue to view such Decisions as *prima facie* evidence of anti-competitive behaviour, although defendants may be able to rebut this presumption. UK claimants will of course need to prove that such anti-competitive behaviour in the EU/EEA had an effect that extended to the UK market and/or that the infringement itself included the UK market, that is, went beyond the scope of any EU decision. This may require expert economic evidence on the market (which is also currently the case in most claims), or the establishment of a breach of UK competition law, in respect of which the English disclosure rules are likely to assist.

In either case, even if no framework is agreed with the EU, the English courts, including the CAT, will nevertheless have jurisdiction to hear competition claims where the claimants are able to meet the present "tests" for claims involving defendants outside the UK. These "common law" tests include instances where damage has arisen in the UK, or a liable party is a UK-registered company, for example.

Methodology for the selection of cases

The United Kingdom has a substantial history of competition-related claims being brought in the High Court and the specialist Competition Appeal Tribunal. Most cases do not proceed to a full trial; it is assumed that they are settled. For this reason there is little information on the level of damages obtained by claimants, and any sums awarded in cases proceeding all the way to trial are likely to be misleading because they represent a substantially incomplete picture.

The cases selected by the authors represent those in which points of particular legal interest have been raised, primarily by way of interim applications. A number raise novel issues not yet decided and continue to be monitored. These relate in particular to the limitation and collective action issues discussed in the memo, and to the question of the jurisdiction of the English courts. The list is not exhaustive.

Country: United Kingdom	
Case Name and Number: Mr Phillip Evans [as class representative] v Barclays Bank PLC and others	
Date of judgment: Issued 11 December 2019	
Economic activity (NACE Code): K.66.19—Other activities auxiliary to financial services, except insurance and pension funding	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** Not yet known
Claimants: Mr Phillip Evans	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Not yet known.
Defendants: Barclays Bank PLC, Citibank N.A., MUFG Bank Ltd, JP Morgan Europe Limited, UBS AG and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Pending
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Merits not yet heard	**Amount of damages initially requested:** Pending
Key Legal issues: • Opt-out collective proceedings under section 47B of the Competition Act 1998, follow-on damages and breach of Article 101 of the TFEU • Two "competing" class representatives are seeking to be appointed in opt-out proceedings, which is a novel issue for CPO applications	**Is the dispute likely to be settled privately?** N/K
Direct or indirect claims? Indirect	**Method of calculation of damages:** Pending
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone?	
Follow-on—(EC): Case AT. 40135 FOREX	

Brief summary of facts

The collective proceedings combine follow-on claims for damages under S. 47A of the CA 1998 caused by the proposed Defendants' infringement of Article 101(1) of the TFEU as determined in two EU cartel decisions from 16 May 2019:

1) The Forex—3-way Banana Split cartel involving UBS, Barclays, RBS, Citigroup and JP Morgan and operating between 18 December 2007—31 January 2013

2) The Forex—Essex Express cartel, involving UBS, Barclays, RBS and MUFG Bank and operating between 14 December 2009—31 July 2012.

Two applications have been made for "opt-out" claims. As long as no collective action has yet been certified, this is not prohibited, and it is possible for the classes certified to be defined differently (avoiding overlap) to allow this. In the present case(s) the definition is essentially the same and therefore only one can be certified. If both representatives/claims meet the conditions for certification the court will need to make new case law to decide which should proceed.

Brief summary of judgment

The defendants applied for a preliminary hearing to be held on which opt-out claim (Evans or O'Higgins) should proceed, since it was common ground among the parties that both could not be certified. The CAT ruled in February 2020 that the question would not be heard as a preliminary issue before the main certification proceedings since it raises novel legal issues. The certification hearing is expected in March 2021, once the *Merricks v MasterCard* Supreme Court judgment has been handed down. This case was the first large scale opt-out application and raised multiple issues relevant to whether such claims should be certified. The courts appear reluctant to certify further actions until these points have been finally decided.

Country: United Kingdom	
Case Name and Number: Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and others	
Date of judgment: Issued 29 July 2019	
Economic activity (NACE Code): K.66.19—Other activities auxiliary to financial services, except insurance and pension funding	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** Not yet known
Claimants: Mr Michael O'Higgins FX Class Representative Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Not yet known.
Defendants: Barclays Bank PLC, Citibank N.A., MUFG Bank Ltd, JP Morgan Europe Limited, UBS AG and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Pending
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Merits not yet heard	**Amount of damages initially requested:** Pending
Key Legal issues: • Opt-out collective proceedings under section 47B of the Competition Act 1998, follow-on damages and breach of Article 101 of the TFEU • Two "competing" class representatives are seeking to be appointed in opt-out proceedings, which is a novel issue for CPO applications	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Indirect	**Method of calculation of damages:** Pending
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone?	
Follow-on—(EC): Case AT. 40135 FOREX	

Brief summary of facts

The collective proceedings combine follow-on claims for damages under S. 47A of the CA 1998 caused by the proposed Defendants' infringement of Article 101(1) of the TFEU as determined in two EU cartel decisions from 16 May 2019:

1) The Forex—3-way Banana Split cartel involving UBS, Barclays, RBS, Citigroup and JP Morgan and operating between 18 December 2007—31 January 2013

2) The Forex—Essex Express cartel, involving UBS, Barclays, RBS and MUFG Bank and operating between 14 December 2009—31 July 2012.

Two applications have been made for "opt-out" claims. As long as no collective action has yet been certified, this is not prohibited, and it is possible for the classes certified to be defined differently (avoiding overlap) to allow this. In the present case(s) the definition is essentially the same and therefore only one can be certified. If both representatives/claims meet the conditions for certification the court will need to make new case law to decide which should proceed

Brief summary of judgment

The CAT ruled in February 2020 that the question of which opt-out claim (Evans or O'Higgins) should be allowed to proceed would not be heard as a preliminary issue before the main certification proceedings. That hearing is expected in March 2021, once the *Merricks v MasterCard* Supreme Court judgment has been handed down.

Country: United Kingdom	
Case Name and Number: Justin Gutmann v First MTR South Western Trains Limited and Another & Justin Gutmann v London & South Eastern Railway Limited	
Date of judgment: Issued 27 February 2019	
Economic activity (NACE Code): H49.1—Passenger rail transport, interurban	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** No
Claimants: Justin Gutmann as class representative for certain purchasers of train tickets	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Not yet known.
Defendants: First MTR South Western Trains Limited and Another London & South Eastern Railway Limited (related actions)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Not yet heard	**Amount of damages initially requested:** Not yet known
Key Legal issues: • Abuse of dominance • Collective action on a stand-alone basis • Certification of the class	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Not yet certified
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claims are for the damages of a large number of rail passengers who have suffered loss as a result of the conduct of the Respondent/Proposed Defendant. The proposed class

members are holders of Transport for London ("TfL") zonal tickets ("Travelcards") who have been effectively compelled by circumstances in the control of the Respondent/Proposed Defendant to pay twice for parts of rail journeys which overlapped with the zone of validity of their Travelcards. The claimants were unable to purchase so-called 'boundary zone' fares or 'extension tickets', which are fares valid for travel to or from the outer boundaries of TfL's fare zones, intended to be combined with a Travelcard whose validity stretches to the relevant zone boundary ("Boundary Fares"). The Applicant/Proposed Class Representative alleges that by not making Boundary Fares sufficiently available for sale the Respondent/Proposed Defendants have abused their position of dominance on the relevant markets.

Brief summary of judgment

The claim is a fairly rare case of a stand-alone competition claim, in which the claimants will need to prove that the defendants' omissions (failure to promote/facilitate the availability of cheaper rail tickets) are a breach of competition law at all. The case will also need to take into account the regulated nature of the market in question. There are also likely to be issues of causation (whether the claimants would have purchased the cheaper tickets in any event) and pass-on (since many tickets are likely to have been purchased for business journeys and reimbursed). The characteristics of the claimants may be considered too variable for certification as a class (raising similar issues of quantification and the "recovery principle" as in *Merricks*) and quantum is likely to be heavily disputed by the defendants.

Country: United Kingdom	
Case Name and Number: UK Trucks Claim Limited v Iveco Magirus AG and Daimler AG	
Date of judgment: Issued 18 May 2018	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: UK Competition Authority Tribunal	**Was pass on raised (yes/no)?** Not yet known but likely
Claimants: UK Trucks Claim Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** Not yet known.
Defendants: Iveco Magirus AG and Daimler AG	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Not yet heard	**Amount of damages initially requested:** N/A
Key Legal issues: • Collective proceedings under Section 47B of the Competition Act 1998 • Breach of Article 101 of the TFEU • Follow on Damages • Opt-out proceedings	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Both might be included—lease and purchase vehicle owners may be included in the class	**Method of calculation of damages:** Not yet reached this stage
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

UKTC is applying for a collective proceedings order ("CPO") permitting it to act as the class representative bringing a collective damages action on an opt-out basis. The proposed collective proceedings would combine follow-on actions for damages arising from a July 2016 decision of the European Commission finding that five EEA truck manufacturers participated in an illegal cartel, in breach of Article 101 TFEU. UKTC claims that a number of common issues arise in respect of the proposed class. UKTC also submits that it is just and reasonable for it to be appointed as class representative. UKTC also submits that the claims are suitable to be brought in collective proceedings and it is practical for the claims to be brought on an opt-out basis. This application for certification is to be heard at the same time as that for the RHA opt-out action.

The main CPO Applications hearing was re-listed for 13-20 December 2019 but has been vacated pending the appeal to the Supreme Court in *Merricks v Mastercard Inc*.

Brief summary of judgment

The main hearing for the CPO application is adjourned to await the outcome of *Merricks v Mastercard* which is still pending its final appeal. (*Merricks* was the first large scale opt-out application and raised multiple issues relevant to whether such claims should be certified. The courts appear reluctant to certify further actions until these points have been finally decided.)

A preliminary issue hearing considered the litigation funding agreement, whereby the amount paid to the litigation funder is determined by reference to the damages recovered by the claimant. The defendants claimed that the funding was insufficient and that the claimants would be unable to pay any adverse costs orders. On 28 October 2019 the court found that the challenges raised by the truck companies were not grounds to refuse to certify the class representative.

Country: United Kingdom	
Case Name and Number: Road Haulage Association Limited—v—Man SE and others	
Date of judgment: Issued 27 July 2018	
Economic activity (NACE Code): Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** Not yet known but likely
Claimants: Road Haulage Association Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Man SE & others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending	**Amount of damages initially requested:** N/A
Key Legal issues: • Collective proceedings under Section 47B of the Competition Act 1998 • Breach of Article 101 of the TFEU • Follow on Damages • Opt-in proceedings	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct and indirect is proposed (class includes purchasers of pre-owned vehicles)	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39824 Trucks	

Brief summary of facts

RHA is applying for a collective proceedings order ("CPO") permitting it to act as the class representative bringing a collective damages action on an opt-in basis. The proposed collective proceedings would combine follow-on actions for damages arising from a July 2016 decision of the European Commission finding that five EEA truck manufacturers participated in an illegal cartel, in breach of Article 101 TFEU. RHA claims that a number of common issues arise in respect of the proposed class. RHA also submits that it is just and reasonable for it to be appointed as class representative. RHA also submits that the claims are suitable to be brought in collective proceedings and it is practical for the claims to be brought on an opt-in basis. This application for certification is to be heard at the same time as that for the UK Trucks opt-out action (submitted 18 May 2019).

The main CPO Applications hearing was re-listed for 13-20 December 2019 but has been vacated pending the appeal to the Supreme Court in *Merricks v MasterCard Inc*.

Brief summary of judgment

Pending—[case was adjourned to await the outcome of *Merricks v Mastercard* which is still pending its appeal]

One of the issues in the case will be the interplay between this application for an "opt-in" claim and the UKTC claim which relates to the same cartel and seeks an "opt-out" certification. Since the latter will potentially catch the same claimants as the former, the definition of the opt-out class will need to address this and anticipate certain claimants joining the opt-in class later.

Country: United Kingdom	
Case Name and Number: Unlockd Ltd and Unlockd Media Technology Ltd v Google Ireland Ltd, Google Commerce Ltd and Google LLC	
Date of judgment: Claim withdrawn	
Economic activity (NACE Code): J.58.2—Software publishing	
Court: High Court UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** No
Claimants: Unlockd Ltd and Unlockd Media	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Google Ireland, Google Commerce and Google LLC	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Judgment on interim injunction and service out of jurisdiction given. No judgment—unlocked discontinued claim.	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 102 of the TFEU and Chapter II prohibition • Claim of abuse of dominance	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Unlockd Ltd and Unlockd Media Technology Ltd (the claimants) develop a software application (app) for users of smartphones using the Android operating system as a means of delivering advertisements to consumers on the unlocking of their Android device. The app is available for download on Google's digital distribution service Google Play Store, for which Google Ireland Ltd (D1) was the relevant counterparty, and made use of their advertising service Admob, for which Google Commerce Ltd (D2) was the relevant counterparty.

The claimants entered into a partnership with a mobile telephone provider, Tesco Mobile, whose own app incorporated the claimants' app. The defendants contended that the way in which the claimants' service operated breached several of their fundamental advertising policies and informed the claimants that it would withdraw the Admob services and remove the app from Play Store.

The claimants brought an action based on breach of competition law against Google Ireland Ltd (D1), Google Commerce Ltd (D2) and Google LLC (D3). D3 is incorporated in Delaware and based in California. It is the parent company of D1 and D2, which are both incorporated in Ireland.

The claim that the defendants are in breach of Article 102 of the TFEU and the Chapter II prohibition of the Competition Act 1998. In the alternative, Unlockd also alleges a breach of Article 101 of the TFEU and the Chapter I prohibition based on alleged collusion between the three Google defendants.

Brief summary of judgment

Interim Injunction

The High Court granted a limited injunction against Google, to prevent it withdrawing or suspending a service used by the app for delivering mobile phone advertisements. The High Court found that it would be excessive to say that the business would fail if the injunction was not granted but that there was an appreciable risk that the relationship with Tesco would be damaged to such an extent that damages would not be an appropriate remedy for the applicants.

Service out of jurisdiction

The Claimants applied to serve Google LLC outside the jurisdiction of England & Wales. The English rules on jurisdiction permit non-UK companies to be sued in England & Wales if the claim and/or the parties fulfil certain conditions Google accepted that if the abuse of dominance claim was limited to behaviour within the EU, however, it refused service in relation to infringements of competition law relating to suspensions or refusal to supply which were carried out outside the EU. The High Court agreed that Article 102 TFEU could not be applied to actions that took place outside the EU, were not implemented in the EU and did not have an immediate and substantial effect in the UK. The High Court therefore granted the Claimant's permission to serve out of jurisdiction only in so far as it related to suspensions/ refusals to supply which took place within the EU.

The High Court transferred the case to the CAT to allow the competition issues to be considered by the experts there.

On 21 May 2019 the CAT gave a ruling awarding costs in favour of Google after it was withdrawn by Unlockd (due to lack of funding).

Country: United Kingdom	
Case Name and Number: Apple Retail UK Limited and others v Qualcomm UK Limited and Qualcomm Incorporated	
Date of judgment: Jurisdiction judgments in May and October 2018. Case settled.	
Economic activity (NACE Code): C.26.30—Manufacture of communication equipment	
Court: High Court	**Was pass on raised (yes/no)?** N/A
Claimants: Apple Group	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Qualcomm UK Limited and Qualcomm Incorporated	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Summary judgment on certain parts of claim/ judgment on jurisdiction given. Case settled April 2019.	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 102 of the TFEU and Chapter II prohibition • Claim of abuse of dominance. • Patent dispute (FRAND terms) • Jurisdiction challenge	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The claimants, six companies within the Apple group (including a UK company, Apple Retail UK Limited, and the US parent company, Apple Inc), brought an action in the High Court (Patents Court) against Qualcomm UK Limited (the First Defendant) and Qualcomm Incorporated (the Second Defendant).

The claimants brought a single claim against the First Defendant (a UK company). They alleged that the First Defendant was in breach of a contract made by the First Defendant, as a member of the European Telecommunications Standards Institute ("ETSI"), requiring it to comply with ETSI Directives, including ETSI's Rules of Procedure and Intellectual Property Rights ("IPR") Policy. It was pleaded that "Qualcomm", meaning, apparently, both Defendants, had agreed to license Essential IPR on fair reasonable and non-discriminatory ("FRAND") (Clause 6.1 of the IPR Policy) terms and that the First Defendant breached Clause 6.1 by not doing so. Clause 6.1 relates to the "owner" of the relevant IPR.

In relation to the Second Defendant, the claimants alleged the invalidity of five patents (the patent claims). They also brought a number of additional claims, including an allegation that the Second Defendant had, contrary to Article 102 TFEU, Article 54 of the EEA Agreement and the Chapter II prohibition of the Competition Act 1998, abused its dominant position in the relevant market or markets by overcharging, *i.e.* levying a non-FRAND charge.

Brief summary of judgment

Summary judgment and jurisdiction ruling: May 2018

The High Court held that the claim against the First Defendant had no real prospect of success. Qualcomm (UK) Limited was not the owner of the relevant patents. Therefore, it had not taken on any relevant obligation under ETSI's IPR Policy and could not be seen to have been in breach of any such obligation. Therefore, the High Court granted Qualcomm (UK) Limited summary judgment in relation to the claims against it.

In relation to Second Defendant, the High Court was asked to examine whether Apple should have been granted permission to serve certain of these claims on Qualcomm out of jurisdiction. In relation to the abuse of dominance claim, the High Court decided that it should hear further arguments on whether Apple had established to the sufficient standard that it had suffered damage arising from the alleged overcharge in the jurisdiction, to meet the test for damage arising from a tort in Civil Procedure Rule Practice Direction 6B ("Gateway 9"). It therefore gave directions for further evidence to be submitted. However, it did hold that the High Court would be a proper forum to hear claims that a UK company (Apple Retail UK Limited) had suffered loss in England as a result of Qualcomm's alleged abuse of a dominant position contrary to Article 102 of the TFEU.

At the subsequent hearing on the further evidence the High Court decided to allow jurisdiction in this case on the basis of Gateway 9.

Country: United Kingdom	
Case Name and Number: Walter Hugh Merricks CBE—v—MasterCard Inc and others	
Date of judgment: Issued 08/09/2016—Supreme Court judgment on preliminary issue awaited	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** The merits have not yet been heard, but it is expected that this will be an issue.
Claimants: Walter Hugh Merricks CBE on behalf of a class of UK adults making purchases from retailers accepting MasterCard. [Collective action]	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe SPRL (together MasterCard)	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Ongoing
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes, on a preliminary issue. Application for CPO was dismissed but on appeal to Court of Appeal this was overturned. The merits of the claim were not considered, since this was a preliminary hearing on certification of the class. The defendants successfully sought permission to appeal to the Supreme Court, which heard the case in May 2020. Judgment is awaited.	**Amount of damages initially requested:** N/A
Key Legal issues: • Collective proceedings under section 47B of the Competition Act 1998. • Third party funding of collective actions. (Leading case on third party funding and recoverability of costs from damages) • Follow-on damages • Opt-out proceedings and criteria for certification. (Leading case on criteria)	**Is the dispute likely to be settled privately?** N/A

Direct or indirect claims? Indirect	**Method of calculation of damages:** Not yet reached this stage
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/34579 MasterCard I	

Brief summary of facts

The action is based on the European Commission's 2007 decision finding that MasterCard's EEA multilateral interchange fees ("MIFs") breached Article 101(1) TFEU.

Mr Merricks (the applicant/ proposed class representative) applied for a collective proceedings order ("CPO") permitting him, to act as the class representative bringing opt-out collective proceedings. According to this application, the issues arising in the proposed collective proceedings are common to the proposed class. The proposed collective proceedings are concerned with a single infringement of Article 101 of the TFEU that caused charges to be imposed upon businesses. These charges are said to have been higher than they would have been had it not been for the infringement and to have been passed on by businesses to all individuals who purchased goods and/or services from them. The relief sought in these proceedings is damages, to be assessed on an aggregate basis and interest and costs.

Brief summary of judgment

On 21 July 2017, the CAT ruled that the claims in this case were not eligible for inclusion in collective proceedings. To establish a claim against MasterCard for damages arising from its elevated multilateral interchange fees, an individual claimant would, inter alia, have to be able to demonstrate the degree to which a retailer passed through overcharges and the percentage impact on its prices. As there is likely to be significant variation between different kinds of goods and services and different kinds of retailer, the issue of pass-through could not be considered to be a common issue. The amount spent by an individual consumer with retailers accepting MasterCard cards would also not be a common issue.

These difficulties could not be overcome in this case by claiming aggregated damages that would then be distributed to the class members. The CAT did not consider that the applicant had presented a sustainable methodology which could be applied in practice to calculate a sum which reflected an aggregate of individual claims for damages. In addition, the applicant had not put forward a reasonable and practicable means for estimating the individual loss which could be used as the basis for distribution.

Therefore, the CAT concluded that these claims were not suitable to be brought in collective proceedings and the CAT could not make a CPO in this case. Nevertheless, the CAT concluded that it could have authorised the applicant as a class representative, subject to him making an amendment to his third-party funding agreement. MasterCard had disputed this on the basis of the alleged inadequacy of the funding agreement, rather than due to the personal skills of the applicant. The CAT's judgment includes consideration of the new provisions relating to costs and funding of collective proceedings under section 47C of the Competition Act.

On appeal the Court of Appeal overturned the CAT judgment, finding:

On the question of the feasibility of calculating loss, the Court of Appeal ruled that the "expert methodology [had to be] capable of assessing the level on pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology". It was not necessary for the claimant to operate the methodology in order to gain certification, much less to produce all the relevant data. The test that Mr Merricks had to pass was to show he had a "real prospect of success". The Court found the CAT had applied a higher test.

On the question of the variance in actual loss, that there was nothing in law to prevent over-compensation of some class members, if that was the result of the aggregate approach to calculating total damages. The Court's view was that the introduction of a collective damages regime showed that there was no obligation to make an award "with reference to individual loss". If there were such an obligation, this would "negate" the power to make an aggregate award in "large-scale opt-out proceedings".

The Court did not reject the need to attempt to make a distribution by reference to actual loss entirely. It merely found that distribution on that basis was unlikely to be practicable in this case.

The defendants successfully sought permission to appeal to the Supreme Court, which heard the case in May 2020. Judgment is awaited.

Country: United Kingdom	
Case Name and Number: Dorothy Gibson—v—Pride Mobility Products Limited	
Date of judgment: Issued 25/05/2016, CAT judgment issued 31/03/2017	
Economic activity (NACE Code): C.29.10—Manufacture of motor vehicles	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** No
Claimants: Dorothy Gibson	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Pride Mobility Products Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Claim failed
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Withdrawn in May 2017 following decision by the CAT that the class as described could not be certified for collective proceedings.	**Amount of damages initially requested:** N/A
Key Legal issues: • Collective proceedings under section 47B of the Competition Act 1998 • OFT decision finding breach of the Chapter I prohibition. • Follow-on damages • Opt-out proceedings. (Leading case on scope of class)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-up on NCA OFT Decision CE/9578-12	

Brief summary of facts

The action was based on the OFT's 2014 decision that a manufacturer of mobility scooters, Pride Mobility Products Limited, and eight of its retailers had breached the Chapter I prohibition by agreeing to restrictions on advertising discounts online. The Applicant/ Proposed Class Representative (Ms Dorothy Gibson) made an application for a collective proceedings order ("CPO") permitting her to act as the class representative bringing opt-out collective proceedings. The proposed collective proceedings were to combine follow-on actions for damages arising from the OFT's decision. The proposed class was any person who purchased a new Pride mobility scooter in the UK between 1 February 2010 and 29 February 2012. According to the application, the issue common to all class members was whether the infringements, and the common practice of Pride Mobility that underlay them, were effective in raising prices for consumers, and if so by how much. The Applicant/Proposed Class Representative submitted that it was just and reasonable for her to be appointed as class representative and that the claims were suitable to be brought in collective proceedings. The relief sought was damages, to be assessed on an aggregate basis.

Brief summary of judgment

The CAT found that the claim was based both on the OFT's infringement decision and on "umbrella claims" and that the latter could not be the subject of a follow-on claim as formulated because the "common issues" were not sufficiently common. No economic evidence had been provided on the possibility of further sub-classes being certified which might be a possible solution to this problem. The CAT also had no jurisdiction to certify the stand-alone claim as a collective action (at that time).

However, the CAT found that the claimant representative might be certified and it did not find that there was no prospect of the certification of the stand-alone claim going ahead. Therefore, at the hearing of the CPO application, the CAT ruled that it would be appropriate to grant the Applicant an adjournment to re-formulate the claim.

In fact the claimant representative chose not to proceed with the claim, which was therefore discontinued.

Country: United Kingdom	
Case Name and Number: Granville (and others) v Infineon Technologies AG, Micron Europe Limited (and others)	
Date of judgment: Issued: 18 May 2016, Judgment on part of the claim: 25 February 2020	
Economic activity (NACE Code): C.26.2—Manufacture of computers and peripheral equipment	
Court: Commercial Court	**Was pass on raised (yes/no)?** Not in the preliminary issue hearing—it is an issue in the main claim.
Claimants: Granville Technology Group Limited, VMT Limited and OT Computers Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** DD does not apply and the factual position meant that it was unlikely to have been relevant in any case.
Defendants: Infineon Technologies AG, Micron Europe Limited and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes. Defendants' loss against OTC appealed to the Court of Appeal.	**Amount of damages initially requested:** N/A
Key Legal issues: • Limitation (heard as preliminary issue) • Key issue: whether reasonable diligence of a liquidator is subject to a different test than for a trading company	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct and indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/38511 DRAMS	

Brief summary of facts

The claimants (in liquidation) brought damages against members of the price-fixing cartel in direct random-access memory ("DRAM") and Rambus DRAM established in the Commission Decision of 19 May 2010.

The claimants were subject to a limitation period of 6 years but argued that Section 32(1)(b) of the Limitation Act provided that the limitation period would not begin to run until a concealed right of action was discovered or could have been discovered with reasonable due diligence.

Brief summary of judgment

The first and second claimants' claims were time barred, because they could, with reasonable diligence, have discovered the facts of the claim before the Decision was published (in part due to the actual knowledge of the trading company).

The third claimant (acting by its liquidator) was not reasonably on notice of matters meriting further enquiry such that it could be said that, had it exercised reasonable diligence, it could have discovered matters sufficient to enable it to plead a viable claim. (The third claimant had no actual knowledge prior to the Decision.) Its claims were not therefore time-barred.

Country: United Kingdom	
Case Name and Number: Shadhid Latif & Mohammed Abdul Waheed—v—Tesco Stores Limited	
Date of judgment: Issued 05 February 2016—Discontinued	
Economic activity (NACE Code): G.46.3—Wholesale of food, beverages and tobacco	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** N/A
Claimants: Shahid Latif & Mohammed Abdul Waheed	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Tesco Stores Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Settled
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The claimants withdrew their claim following settlement—Tesco released the covenant.	**Amount of damages initially requested:** N/A
Key Legal issues: • Stand-alone damages action under section 47A of the Competition Act • Alleged breach of the Chapter I prohibition • Alleged breach of the Chapter II prohibition • CAT Fast-track procedure • Claim for an injunction in a restrictive covenants case relating to land	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

In 1997, the claimants sold land to Tesco. Under the transfer agreement, the land retained by the claimants was subject to a covenant "not to use or permit any of the Retained Land to be used for the sale of food convenience goods or pharmacy products".

The claimants' damages action was based on an alleged breach of the Chapter I, or, in the alternative, the Chapter II prohibition of the Competition Act 1998 by Tesco, as well as the common law doctrine of restraint of trade. In particular, the claimants submitted that:

- The transfer agreement and/or the covenant constituted an agreement and/or concerted practice that has/have the object or effect of preventing, restricting and/or distorting competition on the relevant market within the UK.
- Further or alternatively, Tesco was dominant and/or had a significant market share and/or significant market power that the covenant protects, thereby preventing, restricting and distorting competition.
- The covenant adversely affected trade within the UK as it adversely affected the ability of the claimants to develop and lease the retained land and/or it adversely affected the sale of groceries and pharmacy products within the relevant geographic market.
- Further or alternatively, the covenant infringed the common law doctrine of restraint of trade and/or the Competition Act because it is wider in scope and duration than was necessary to protect Tesco's legitimate interests, if any, which may have existed in 1997.

This was only the second claim brought under the CAT Fast Track procedure, which is designed to result in a trial being held within six months. The procedure is designed to limit the costs faced by individuals and SMEs, and to provide certainty as early as possible.

Brief summary of judgment

Case settled without judgment.

Country: United Kingdom	
Case Name and Number: Socrates Training Limited v The Law Society of England and Wales	
Date of judgment: Issued 04 April 2016—Judgment 26 May 2017	
Economic activity (NACE Code): J.63.9—Other information service activities	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** No
Claimants: Socrates Training Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: The Law Society of England and Wales	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The parties have agreed settlement and claim discontinued Judgments on liability, matters following judgment and costs given.	**Amount of damages initially requested:** N/A
Key Legal issues: • Stand-alone damages action under section 47A of the Competition Act. Alleged breach of the Chapter II prohibition • Fast-track procedure • Interim injunction application	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Socrates Training Limited, a provider of online training, claimed that both it and the Law Society of England and Wales offer online anti-money laundering (AML) training for law firms on a commercial basis and online training to property lawyers to avoid mortgage fraud and other financial crime. At some point, believed to be early in 2015, the Law Society started to require that, as a condition of a law firm maintaining its Conveyancing Quality Scheme (CQS) accreditation, such a firm must buy both AML online training and mortgage fraud training from it. Socrates Training brought a damages action against the Law Society of England and Wales. In particular, Socrates Training claimed that:

- The Law Society of England and Wales was dominant in the market for the provision of quality certification/accreditation services to conveyancing firms.
- The Law Society of England and Wales' insistence that firms must buy their AML, mortgage fraud or other financial crime training from itself rather than from Socrates Training or any other provider, was an abuse of its dominant position, restricting competition in the downstream market for the provision of AML and financial crime training and causing loss to the claimant. The inclusion of a tying clause of this kind is specifically prohibited as being anti-competitive.

Brief summary of judgment

On 26 May 2017, the CAT published its judgment on liability. The CAT found that the Law Society held a dominant position from the end of April 2015, when the CQS became a must-have product to which close to 60% of firms active in residential conveyancing subscribed. By reserving at least a significant part of the demand from such firms for AML/mortgage fraud training from at least a significant number of those firms at any one time, potential competition from other suppliers of such training was actually or potentially impaired, and that this could discourage entry by other suppliers into this segment of the market. The CAT concluded that, from the end of April 2015, by obliging CQS member firms to obtain the training in mortgage fraud and AML required for CQS accreditation exclusively from the Law Society, the latter abused its dominant position. It rejected the Law Society's case that there was no reasonable alternative to the mandatory training by the Law Society itself.

The CAT also found that the obligation to obtain the training required only from the Law Society breached the Chapter I prohibition as from the same date.

On 30 May 2017, CAT published an order on matters following its judgment. The CAT ordered that the Law Society must not oblige CQS accredited firms to purchase exclusively from the Law Society mandatory training in mortgage fraud, anti-money laundering and financial crime required for CQS accreditation. The order makes arrangements for costs and stays the proceedings for two months for the parties to seek agreement on the quantum of damages.

In its ruling on costs, the CAT rejected Socrates Training's argument that the costs should be assessed on an indemnity basis. Socrates Training should have its costs on the standard basis up to the capped maximum of GBP 230,000 (EUR 255,000). The CAT also rejected Socrates Training's argument that that it should be entitled to additional costs because of disclosure of particular documents by the Law Society after trial, which should have been disclosed earlier.

The action was discontinued after the parties agreed terms.

Country: United Kingdom

Case Name and Number: Peugeot Citroen Automobiles UK Ltd and others v Pilkington Group Limited and others (1244/5/7/15)

Date of judgment: Issued 22 December 2015—Limitation judgment 27 July 2016

Economic activity (NACE Code): C.29.32—Manufacture of other parts and accessories for motor vehicles

Court: UK Competition Appeal Tribunal High Court	**Was pass on raised (yes/no)?** Not yet known but likely
Claimants: Peugeot Citroen Automobiles UK Ltd, Peugeot Motor Company Plc, Peugeot Citroen Automobiles Sa, Societe Europeene De Vehicules Legers Du Nord Sevel Nord, Automoviles Citroen Espana Sa, Peugeot Citroen Automoviles Espana Sa, Peugeot Espana Sa, Pca Slovakia S.R.O., Saab Automobile Ab Konkursbo	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Pilkington Group Limited and Pilkington Automotive Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. Judgments given in preliminary hearings on Limitation. On 6 September 2016 the Ninth Claimant was withdrawn by consent. On 9 January 2017 the claim (including additional claim issued under Rule 39) was withdrawn by consent.	**Amount of damages initially requested:** N/A
Key Legal issues: • Follow on damages claim under section 47A of the Competition Act 1998 • Cartel decision of the European Commission finding breach of Article 101(1) of the TFEU • Precautionary action as parallel action in High Court • Limitation periods • Rule 39 additional claim	**Is the dispute likely to be settled privately?** N/A

Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/39125 Carglass	

Brief summary of facts

The action was based on the European Commission's November 2008 decision fining four companies a total of EUR1.384 billion for participation in an illegal market-sharing cartel in the car glass sector.

The claimants claimed that they made purchases of car glass from the defendants and others that were, by virtue of the infringement established by the European Commission, subject to an overcharge. The claimants, therefore, claimed that they suffered loss. They claimed damages, interest and such further or other relief as may be appropriate. The claimants stated that they had already brought an action against the defendants in the Chancery Division of the High Court. The claim was brought before the CAT only to protect the claimants' position as regards limitation, insofar as it affects the follow-on element of their existing claims.

The claim before the CAT was limited to those (follow-on) claims that could have been brought under section 47A of the Competition Act prior to its amendment by the Consumer Rights Act.

The claimants relied on the claim only and if and to the extent that their existing claims in the High Court were time-barred under any applicable law, which the claimants denied. Pilkington denied the main claim brought against it by Peugeot. However, to the extent that it might be held liable, it claimed that the defendants from whom it claimed a contribution to any damages (Asahi Glass and others) were jointly and severally liable for the loss and damage caused by the infringement.

The claimants claimed that the governing law was English law because the Competition Act 1998 and the (Competition Appeal) Tribunal Rules formed a "complete code" which did not admit the application of foreign law. Pilkington contended that the governing law was French law as regards the 1st to 8th claimants' claims and Swedish law as regards the 9th claimant's claim. On that basis, they alleged that all the claims are time-barred under the applicable foreign law.

Brief summary of judgment

Preliminary judgment on limitation

Finding for the defendants, the CAT ruled that where competition proceedings at the CAT are governed by foreign law, then the relevant foreign rules relating to limitation will apply. Under those rules the claims were time-barred in the CAT.

The CAT did not allow Peugeot's argument that foreign rules did not apply to the CAT and that the suits (in the CAT and the High Court) were filed in time to seek damages for the full infringement periods in the EU's cartel decision.

The CAT found that there were no overriding policy reasons which mean that the limitation rules under the Competition Act 1988 should "be given such extraterritorial effect and displace the limitation rules of the foreign law which would otherwise govern" the claim. The CAT denied Peugeot permission to appeal.

The claim was subsequently withdrawn following a confidential settlement.

Country: United Kingdom	
Case Name and Number: Microsoft Mobile OY (Ltd) v Sony Europe Ltd and others	
Date of judgment: 25 September 2015	
Economic activity (NACE Code): C.26.3—Manufacture of communication equipment	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: Microsoft Mobile OY Ltd	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Sony Europe Ltd and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The claim was stayed for arbitration.	**Amount of damages initially requested:** N/A
Key Legal issues: • Jurisdiction and venue for competition damages claims • Arbitration	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Microsoft brought proceedings in its own right and as assignee of the rights of Nokia Corp arising from its acquisition of Nokia's mobile phone business. In 2001, Nokia (as buyer) and Sony Corporation (as seller) concluded a Product Purchase Agreement (PPA) relation to the sale of lithium ion batteries. The PPA contained an English choice of law clause and further

provided for "any disputes related to this Agreement or its enforcement" to be referred to International Chamber of Commerce (ICC) arbitration in the UK. It was common ground that the arbitration clause bound both Sony Corporation (the Japanese parent company of the Sony group) and Sony Europe Ltd. (its English subsidiary).

Microsoft sought damages for losses caused by anti-competitive conduct in relation to the sale of the batteries. It advanced various factually complex allegations against four defendants:

- Sony Europe Ltd., a limited company established in England.
- Sony Corporation, a company established in Japan.
- LG Chem Limited and Samsung SDI Co Limited, companies established in South Korea.

The claims consisted of torts based on infringement of competition law, and economic torts.

Microsoft sought to establish jurisdiction against Sony Europe Ltd on the basis that it was domiciled within the jurisdiction. It obtained permission to serve the proceedings out of the jurisdiction against the remaining defendants on the basis that they were necessary or proper parties, or alternatively that the damage arising from the relevant tortious conduct had occurred within the jurisdiction.

Sony Europe Ltd and Sony Corporation applied to the court for a stay. Sony Corporation, LG Chem Limited and Samsung SDI Co Limited applied to set aside the permission to serve out of the jurisdiction.

Brief summary of judgment

The ruling is the first time the English Court has considered the proper interpretation of arbitration clauses in the context of claims in respect of an alleged price-fixing cartel.

The High Court concluded that the claims by Microsoft against Sony in respect of its participation in the cartel should be stayed pursuant to arbitration clauses contained in supply contracts between them; and that in consequence, the Court had no jurisdiction over other alleged participants who had been served outside the jurisdiction.

Claims against Sony Europe Ltd and Sony Corporation were stayed because they fell within the scope of an arbitration clause: although the claims were tortious in nature, they potentially gave rise to related claims for breach of contract and fell within the scope of the arbitration clause.

Although fairly fact-specific, the judgment contains an interesting discussion on the parameters between arbitration law and EU competition law. Companies that might potentially be parties to any cartel-related claims, whether as claimants or defendants, should pay careful attention to the dispute resolution clauses in their contracts. A widely drafted arbitration clause could have the consequence that competition law claims must be referred to arbitration.

Country: United Kingdom	
Case Name and Number: BritNed Development Ltd v ABB AB and ABB Ltd	
Date of judgment: 26 January 2015—Appeal Judgment 31 October 2019	
Economic activity (NACE Code): C.27.12—Manufacture of electricity distribution and control apparatus	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: BritNed Development Ltd	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: ABB Ltd	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—EUR 13,010,000 plus interest (later revised to EUR 11,700,000)
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: High Court judgment appealed by claimant and defendant. Court of Appeal refused claimant's bid to appeal to Supreme Court.	**Amount of damages initially requested:** EUR 180 million
Key Legal issues: • Article 101 TFEU • Follow-on damages action in respect of one direct supplier only • Quantification of damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** The High Court held that the Overcharge Claim succeeded and there was an overcharge of EUR 13,000,000. The Lost Profit Claim Failed. ABB's argument that BritNed's damages should be reduced in light of the Regulatory Cap issue similarly failed. The Court rejected BritNed's Compound interest claim, although it held BritNed could recover simple interest.

	The High Court calculated the total overcharge as EUR 13,000,000, which it said arose through the following: A "baked-in inefficiency" arising due to the excessive width of the cabling used by ABB for 1,000MW cables in the sum of EUR 7,516,640 A cartel saving in ABB's common costs due to the saving attributable to members of the cartel not needing to compete due to their membership, in the sum of EUR 5,492,930.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39610 Power cables	

Brief summary of facts

The dispute arose from an 'interconnector' submarine cable supplied by ABB, which connects the UK National Grid to the Dutch TenneT grid. It emerged in the European Commission's ruling of 2014 that a cartel (of which ABB was a member) had sold cable capacity during the period 1999 to 2009. BritNed brought the claim on the basis that the price it paid for the cable was higher than it otherwise would have been (absent the cartel), claiming EUR 180 million in damages. BritNed claimed three types of loss:

- **Overcharge:** that it had paid a higher price for the cable element as a result of the cartel
- **Lost profits:** absent the cartel, it would have acquired a higher capacity cable which would have generated additional revenues
- **Compound Interest** as a result of higher capital costs

ABB did not dispute the existence, or its participation in the cartel however it disputed each head of claim.

The case marks the first follow-on damages claim to reach the judgment stage in the UK, confirming that the operators of the British and Dutch national grids were overcharged by sellers of power cable capacity who had been found previously to have been operating a cartel.

Brief summary of judgment

High Court Judgment

Mr Justice Marcus Smith held that BritNed was overcharged by EUR 13 million, finding that:

- There was no overcharge as a result of direct influence of persons involved in the cartel: to keep the bid competitive, ABB's direct costs were honestly and competently compiled
- The claimant was, however, subject to an overcharge of EUR 7.5 million as a result of a "baked-in inefficiency" arising from the cartel. In addition, it was subject to an overcharge of EUR 5.5 million as a result of the "cartel saving" in ABB's current costs as a result of the cartelists not having to compete.

The claimant's claim for lost profits and compound interest on its losses failed. The judge found that there had been no loss of profit on the facts of the case. The interest claim was deemed to lack evidence, fail to take into account the risk of the project and to be too uncertain.

In a supplemental judgment, damages were reduced by 10% to reduce the risk of overcompensation as a result of the existence of a regulatory cap on returns for cooperation involved in electricity transmission.

Court of Appeal judgment

The Court of Appeal dismissed BritNed's appeal and set out its arguments further in a later written ruling.

On overcharge, the court said it had "no grounds" to "interfere" with Mr Justice Smith's approach on the matter, which sourced from his conclusion that was that there was "no demonstrable overcharge" suffered by BritNed.

On lost profits, the court said that as it dismissed the ground of appeal on overcharge, it flowed that it would also dismiss the ground over lost profits. There is "very little left in relation to the appeal under this head," the court said.

Thirdly, the Court of Appeal addressed the reduction in the award through the application of the regulatory cap. It said the High Court was "right to assess damages, taking into account the inherent uncertainties and the risk of overcompensation" and was "entitled to make the deduction he did."

But on cartel savings, the appeal judges said there was an "error of law" and the High Court's findings on this matter "should be set aside." It pointed to the High Court, made an "award of damages on the basis of savings made by the cartelist, rather than the loss to the victim of the cartel". There was "no evidence" to say that "cartel savings might correlate with price", said the Court of Appeal, which would "translate a benefit to ABB into a loss for BritNed, for which it should be compensated".

Country: United Kingdom	
Case Name and Number: Vodafone Group Services Limited v Infineon Technologies AG and others	
Date of judgment: Issued 19 December 2014	
Economic activity (NACE Code): C.26.11—Manufacture of electronic components	
Court: High Court	**Was pass on raised (yes/no)?** Not yet known but likely
Claimants: Vodafone Group Services Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Infineon Technologies AG and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Judgments on disclosure and trial date handed down by High Court. Parties have settled claim.	**Amount of damages initially requested:** N/A
Key Legal issues: • Follow on damages • Stand-alone damages action • Disclosure. • Case management where an EU judgment is pending	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39574 Smart card chips and stand-alone	

Brief summary of facts

Vodafone brought an action against Infineon and Renesas to claim damages allegedly suffered as a result of the smart card chips cartel. The action was partly a follow-on from the European Commission's smart card chips cartel decision, which was appealed and mainly confirmed by the EU Courts (see cases T-758/14 *Infineon Technologies v Commission*, C-99/17 P *Infineon Technologies AG v Commission* and T-758/14 RENV *Infineon Technologies AG v Commission*) and partly a stand-alone action, in that it alleges participation in the infringement form a date earlier than that established by the Commission.

Some disclosure had been agreed between the parties, but the scope of some disclosure was disputed.

Brief summary of judgment

High Court judgment on disclosure

The High Court ruled on the disclosure of certain categories of documents, particularly documents relating to the extent to which Vodafone may have passed-on the alleged overcharges for smart card chips used in SIM cards to customers and the extent of pass-on from SIM manufacturers to Vodafone. Disclosure of certain documents was ordered. In deciding on the extent of the disclosure, the High Court examined the proportionality of the costs involved in disclosure, and the value of the information to be obtained, with regards to the estimates of the size of the claim.

High Court judgment on timetable

The High Court also heard arguments about whether or not to set the trial timetable now, even though there are appeals against the European Commission's cartel decision pending before the Court of Justice. It decided to fix the trial for a first convenient date after 1 October 2019. It considered that this should give sufficient time for the consequences of the Court of Justice's judgment (expected by February 2019) to be taken into account.

Country: United Kingdom	
Case Name and Number: iiyama and Mouse Computer v Schott AG and others	
Date of judgment: Issued 19 December 2014—Court of Appeal judgment 16 February 2018	
Economic activity (NACE Code): C.26—Manufacture of computer, electronic and optical products	
Court: High Court	**Was pass on raised (yes/no)?** Merits stage not reached
Claimants: iiyama and Mouse Computer	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Schott AG and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Judgment on an interim strike-out interim application was appealed in relation to some of the defendants. Claim has been discontinued (presumed following settlement).	**Amount of damages initially requested:** N/A
Key Legal issues: • Follow-on damages • Service of out jurisdiction • Territorial restrictions on claims. (Leading case on jurisdiction and scope of EU Decisions)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct and indirect	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case AT. 39437 TV and computer monitor tubes	

Brief summary of facts

In 2011 and 2012, the European Commission delivered infringement decisions against several companies for participation in worldwide cathode ray tube and specialist glass cartels.[1] Most addressees of these decisions appealed, and these appeals were largely dismissed by the General Court of the EU (Cases T-82/13 *Panasonic Corp. and MT Picture Display Co. Ltd v Commission*, T-84/13 *Samsung SDI Co. Ltd and Others v Commission*, T-91/13 *LG Electronics, Inc. v Commission*, T-92/13 *Koninklijke Philips Electronics NV v Commission* and T-104/13 *Toshiba Corp. v Commission*).

Following the Commission decisions, a claim was brought in the High Court of England and Wales by Iiyama group companies and Mouse Computers Limited, sellers of computer monitors which incorporated cathode ray tubes ("CRTs") at the relevant time.

The claimants brought the action claiming damages for paying too much for their components as a result of the cartels. The claimants were given permission to serve several of the defendants out of jurisdiction. The defendants appealed this decision, on the basis the claimants did not have an arguable case. In particular, the defendants claimed the claimants were Asian companies, did not purchase the relevant CRT products in Europe, and therefore their claim went beyond a pure follow on damages action.

Brief summary of judgment

The High Court overturned the orders for service of claim out of jurisdiction and held that all defendants are entitled to summary judgment or the striking out of the claim.

The High Court reached this decision on the basis that iiyama and Mouse Computers had not purchased the relevant CRT products from Europe, and the incorporated products only arrived in Europe, if at all, much later in the supply chain.

The High Court held that the Commission infringement decision related only to the implementation of the cartel in Europe and that the relevant purchases made by the claimants were too remotely connected to the cartel in the EEA.

On that basis, the High Court reasoned that the claimants' action was not a pure follow on damages claim and based on the pleadings there was therefore insufficient factual and legal grounds for a claim.

The Court of Appeal upheld an appeal by the claimants and overturned the summary judgment/ striking out of the claims.

1 European Commission, Antitrust: Commission fines producers of TV and computer monitor tubes EUR 1.47 billion for two decade-long cartels, 5 December 2012, IP/12/1317

The key issue in the appeal related to whether the claimants had a real prospect of success in claiming that Article 101 TFEU had been infringed, and losses suffered by them as a result, following the purchase of products at inflated prices through the operation of worldwide cartel agreements, in circumstances where the products had first been supplied to entities outside the EU/EEA, then to a claimant holding company also outside the EU/EEA, which then supplied the products to claimant subsidiary companies within the EU/EEA for onward sale and distribution within the EU/EEA. The Court of Appeal held that issue of territorial jurisdiction cannot be determined adversely to the claimants on a summary basis.

The Court of Appeal held that the analysis of the territorial application of Article 101 TFEU (in accordance with the qualified effects doctrine) will depend on a full examination of the intended and actual operation of the cartels as a whole. Such an examination can only take place in light of the full facts as they emerge and are assessed at trial. The exercise is not one suitable for summary determination on the basis of assumed facts.

The Court of Appeal also held that it was reasonably arguable that the cases are governed by EU law and that the forum to hear the actions should be England and Wales. It also ruled on issues relating to service out of jurisdiction and non-disclosure.

Country: United Kingdom	
Case Name and Number: Streetmap.eu Limited v Google Inc, Google Ireland Limited and Google UK Limited	
Date of judgment: Issued 15 March 2013—Judgment 12 February 2016	
Economic activity (NACE Code): J.63.12—Web portals	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: Streetmap.eu Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Google Inc, Google Ireland Limited and Google UK Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Claim failed.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Court of Appeal refused the claimant permission to appeal.	**Amount of damages initially requested:** N/A
Key Legal issues: • Chapter II prohibition and Article 102 of the TFEU • Abuse of dominance • Bundling/discrimination • Foreclosure • Objective justification	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Streetmap alleged that Google abused its dominant position in the online search and/or online search advertising markets by bundling Google Search with Google Maps, thereby depriving users of an undistorted choice of online mapping services; giving Google Maps an unfair advantage over Streetmap and/or producing discriminatory effects; and by displaying a thumbnail map obtained from Google Maps at or near the top of search results pages whilst displaying results relating to other providers of online mapping services by way of blue links and/or lower down the rankings

By a consent order made on 28 July 2014, it was directed that the allegations raised by Streetmap of abuse should be tried as a preliminary issue, on the assumption that Google holds a dominant position in the market for general online search (which was denied by Google), and the question of dominance could be determined at a subsequent trial.

Brief summary of judgment

In judgment, the High Court found that the introduction of the new-style Maps OneBox in June 2007 did not in itself have an appreciable effect in taking customers away from Streetmap. Therefore, it was not reasonably likely to give rise to anti-competitive foreclosure. Further, if, contrary to his primary finding, it was likely to have such an effect, Google's conduct in that regard was objectively justified. Accordingly, on the assumption that Google held a dominant position, it did not commit an abuse.

Country: United Kingdom	
Case Name and Number: Sainsbury's Supermarkets Limited v Visa Europe Services LLC and others	
Date of judgment: Supreme Court judgment 17 June 2020	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: High Court	**Was pass on raised (yes/no)?** Yes
Claimants: Sainsbury's Supermarkets Ltd	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Visa Europe Services LLC and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Yes, the Supreme Court judgment was published in June 2020	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 101 of the TFEU and Chapter I prohibition • Pass-on • Stand-alone damages action. (Leading case on *prima facie* evidence of UK breach based on EU breach) • Restriction of competition and counterfactual	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

Sainsbury's brought an action before the High Court seeking a declaration that the multilateral interchange fees (MIFs) set by Visa for transactions in the UK (the UK MIFs) were, at the relevant times, unlawful as being contrary to Article 101(1) of the TFEU and/or the Chapter I prohibition of the Competition Act 1998.

Sainsbury's also claimed damages from 18 December 2007 (the date six years before the proceedings were issued) in the amount by which the total of the interchange fees paid by Sainsbury's since that date exceeds what Sainsbury's claimed it would have paid had there been no UK MIF (and it had agreed and paid bilateral interchange fees (BIFs)) or if the UK MIFs had been set at (what Sainsbury's claimed would be) a lawful level.

Brief summary of judgment

The High Court has dismissed the claim. The High Court concluded that Visa's UK MIFs do not restrict competition within the meaning of Article 101(1) (or the Chapter I prohibition) and have not done so at any time during the period covered by Sainsbury's claim. The High Court assessed the effect of the UK MIFs against a counterfactual situation in which there was no MIF and there would be default settlement of transactions at par.

The High Court concluded that a MIF does not restrict competition any more than the counterfactual situation. In particular, it found that no bilateral interchange fee agreements would be negotiated in the counterfactual. Further, the outcomes in the counterfactual situation would not be the result of a more competitive process. The High Court also held that a MIF does not infringe Article 101(1) TFEU by setting a floor for the fees charged to retailers by banks.

The High Court reached this conclusion regardless of whether the counterfactual for assessing the restrictive effect of the UK MIFs was taken to be symmetrical (where MasterCard was constrained from setting MIFs) or asymmetrical (where MasterCard continued to set MIFs), although it preferred the former approach. It also held that, had Visa's UK MIFs been found to be restrictive of competition within Article 101(1) TFEU, they would not have been found to be objectively necessary because it was not indispensable to the operation of the scheme and went beyond what was necessary to ensure that the scheme functioned properly.

Second High Court judgment

Despite the above judgment, the parties asked the High Court to determine what levels of UK MIFs (if any) would or could have qualified for exemption under Article 101(3) of the TFEU on the basis that (contrary to the High Court's conclusion) the UK MIFs did (and still do) restrict competition within the meaning of Article 101(1) TFEU and (as already found by the Court) are not objectively necessary.

The High Court concluded that if (contrary to its previous decision) Visa's UK MIFs have at any time restricted competition within the meaning of Article 101(1) TFEU, they were not exempt under Article 101(3) of the TFEU and would not have been exempt at any level. It found that that Visa had not established to the requisite standard that the UK MIFs contribute to net efficiencies, such as to satisfy the first condition of Article 101(3) of the TFEU (contribution to improving the production or distribution of goods or promoting technical or economic progress).

Court of Appeal judgment

The Court of Appeal ruled that the High Court had been wrong conclude that Visa's UK MIFs do not restrict competition within the meaning of Article 101(1) TFEU. It had also been wrong in the second judgment exemption issue, because it overlooked or ignored important factual and empirical evidence which was before it.

On the quantum issue, the Court of Appeal held, in agreement with the High Court, that the merchants do not bear the burden of proving the lawful level of MIF. The correct analysis is to apply Articles 101(1) and 101(3) TFEU to determine if the default MIF as charged, is in whole or in part unlawful, and then to assess damages on the unlawful amount.

The Court of Appeal, therefore, decided to allow Sainsbury's appeal on the Article 101(1) TFEU issue. It decided to remit the case for reconsideration of the Article 101(3) TFEU exemption issue and for the assessment of the quantum of the claims, to the CAT, as the specialist tribunal expert in competition matters.

Supreme Court judgment

The Supreme Court confirmed the Court of Appeal decision that the MIFs were unlawful. The claim has therefore been returned to the CAT for determination.

Country: United Kingdom	
Case Name and Number: Case 1241/5/7/15 (T) Sainsbury's Supermarkets Ltd—v—Mastercard Incorporated (2) Mastercard International Incorporated (3) Mastercard Europe SA	
Date of judgment: Issued 18 December 2012	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** Yes
Claimants: Sainsbury's Supermarkets Ltd	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: MasterCard Incorporated, MasterCard International Incorporated, MasterCard Europe SA	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes—GBP 68,500,000 (EUR 75,350,000) plus interest on half the damages due to broad brush approach to pass on.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: MasterCard's Supreme Court judgment pending.	**Amount of damages initially requested:** N/A
Key Legal issues: • Prohibition on anti—competitive agreements • Interchange fees • Pass on (leading case on pass-on)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** In Sainsbury's v MasterCard [2016] CAT 11 (see question 35), the CAT found that Sainsbury's was entitled to recover the difference between what it had paid by way of the 0.9 per cent UK MIF during the claim period and the amount it would have paid had it agreed the interchange fees bilaterally (GBP 68,582,245) (EUR 75,445,000). Sainsbury's v MasterCard [2016] CAT 11, was the first time that compound interest has been awarded in a

judgment regarding competition law. Following *Sempra Metals*, it found that interest losses are in principle recoverable, but subject to proof of loss and any other relevant rules relating to the recovery of damages. A claim for interest is a loss like any other, recoverable according to the usual rules. Precisely what must be pleaded and proved in order for a claim for interest to succeed depends on the facts of the individual case. The CAT noted that Sainsbury's factual witnesses provided evidence as to what would have happened if the interchange fees applied by MasterCard had been lower. The CAT derived a great deal of assistance as to what would have happened had the overcharge not been demanded, from the detailed description Sainsbury's provided of its budget process and the way in which it monitored costs and adjusted prices. It found that had the overcharge not been made, Sainsbury's cash balances would have been higher, and Sainsbury's would have received interest on these sums. In addition, had the overcharge not been made, Sainsbury's borrowing needs would have been less, and it would not have incurred the costs of borrowing.

In its judgment, the CAT said that, although it had had to make assumptions, these losses had been sufficiently established by the evidence. Sainsbury's was entitled to interest on 50 per cent of the overcharge but not in relation to any of the overcharge that was passed on (described by the CAT as being pass-on 'in the non-legal sense'). Of this 50 per cent, the CAT awarded interest on 20 per cent of the overcharge at the rate that Sainsbury's would have earned on its cash balances and interest on 30 per cent of the overcharge at the rate that Sainsbury's would have saved by lower borrowing. This was despite the fact that, as set out below in response to question 35, the CAT found that MasterCard's 'pass on' defence had failed because no identifiable increase

	in retail price had been established, still less one that was causally connected with the overcharge. In parallel proceedings in the High Court, Mr Justice Popplewell found that the multilateral interchange fees charged by payment card issuers did not infringe article 101(1) of the TFEU (Asda Stores v MasterCard [2017] EWHC 93 (Comm) and would in any case have been exempt under Article 101(3) because of the benefits to retailers (contrary to the EU finding, which he noted related largely to a different time period). On appeal the Sainsbury's decision has been upheld in the key respects identified above. The Asda decision, however, was overturned, as the Court of Appeal found that there was an infringement and disagreed that there had been sufficient evidence to justify a finding of exemption. In July 2020 this judgment was confirmed by the Supreme Court. The CAT may also order that interest is payable on damages awarded by it for all or any part of the period between the date when the action arose and the date of decision of the award for damages, or, if the sum has been paid before the decision making the award, the date of payment (CAT Rule 105(3)). Unless the CAT directs otherwise, the rate of interest must not exceed the rate specified by any order made under section 44 of the Administration of Justice Act 1970.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone (albeit EC Decision COMP/123456 is persuasive upon the court)	

Brief summary of facts

In 2012 Sainsbury's filed an action against various MasterCard entities seeking damages for the amounts paid in interchange fees as part of merchant service charges for processing purchases made with MasterCard UK credit and debit cards since December 2006. Sainsbury's contended that, in the absence of the UK multilateral interchange fee, the merchant service charge charged to merchants by acquiring banks in the UK would be lower, because the level of the interchange fees would be lower.

Sainsbury's claimed overcharge damages, which it calculated based on the merchant service charge it paid to an Acquiring Bank when processing customers' payments and which it said incorporated the MIFs. Sainsbury's claimed that it had paid too much in merchant service charges as the MIFs were set at too high a level.

In its defence, MasterCard argued that:

- the setting of the MIFs did not infringe the competition rules;
- Sainsbury's claim should be barred for illegality (*ex turpi causa*), on the basis that Sainsbury's Bank participated in the allegedly unlawful MasterCard payment scheme as an Issuing Bank; and
- any increase in fees paid by Sainsbury's would have been passed on to customers and therefore Sainsbury's had not itself suffered any actual loss.

Brief summary of judgment

High Court judgment (application for preliminary hearing and disclosure)

The High Court rejected MasterCard's argument that a preliminary hearing should be held to consider the question of whether Sainsbury's is precluded from bringing the claim on the principle of *ex turpi causa* as Sainsbury's is part of the same undertaking as Sainsbury's Bank which applied the MIF. The Court doubted that even if MasterCard were successful, this would resolve the issue and the issues were too complex for a preliminary hearing. It held that it could not rule on disclosure of documents at this stage relating to documents prepared by MasterCard in relation to the European Commission's and the OFT's investigation, until it had seen a response to queries raised on this disclosure in the *Morrison v MasterCard* damages action. The Court transferred the case to the CAT to allow competition experts there to determine the matter (following changes to the regime for transfers between specialist courts in 2015).

Transfer to CAT and CAT judgment

The CAT concluded that MasterCard's UK MIF was a restriction of competition by effect, infringing Article 101(1) of the TFEU, and was not exempt under Article 101(3) of the TFEU. The CAT found that:

1) the setting of the MIFs constituted an agreement or agreements between undertakings (*i.e.* between MasterCard and the Acquiring Bank and Issuing Bank licensees within the MasterCard payment scheme), and a decision by an association of undertakings;

2) while the setting of the MIFs was not a restriction of competition by object, it was a restriction of competition by effect. The CAT found that, absent the MIFs, Issuing Banks and Acquiring Banks would have reached bilateral agreements as to the level of interchange fee payable on transactions, and these fees would likely have been set at a lower level than the MIFs;

3) MasterCard's *ex turpi causa* defence that Sainsbury's had been a party to the illegality failed. While the CAT found that the criteria for *ex turpi causa* were not met in any event (*i.e.* that Sainsbury's had not been engaged in intentional or negligent illegal conduct because it was "insufficiently wrongful or turpitudinous" to trigger the defence), the CAT also found that Sainsbury's Supermarkets and Sainsbury's Bank were not part of the same undertaking for competition law purposes; and

4) MasterCard's "pass on" defence also failed. In an important judgment the CAT found that, on the facts, Sainsbury's had not passed on the MIF through higher prices to consumers, on the basis that the Defendants had to show a clear causal link between the overcharge and an increased price to the Claimants' customers, and could not do so.

In calculating the damages to award, the CAT calculated the overcharge on the basis of the difference between what Sainsbury's (i) actually paid with the MIFs and (ii) would have paid had the infringement not been committed. However, these figures were subsequently adjusted to take into account that the wider Sainsbury's group had benefitted from the MIFs through Sainsbury's Bank receiving the MIFs as an issuing bank, reflecting the principle that a claimant should not be overcompensated. As such, the CAT awarded Sainsbury's a lower figure of GBP 68.6 million (EUR 75.5 million) plus interest.

Court of Appeal judgment

On appeal, it was held:

- The CAT was correct to find that the MasterCard scheme rules which provided for a default MIF in the absence of bilaterally agreed interchange fees breached Article 101(1) TFEU.

- The CAT was correct to find that the evidential burden was on the defendant to prove pass-on and confirmed that a defendant must "*show that there is a sufficiently close causal connection between an overcharge and an increase in the direct purchaser's price*" to success in its pass-on defence. However, it was a matter for individual judges to decide in each case how much evidence was actually required. The CAT was right not to reduce Sainsbury's damages for pass on.

- The CAT was wrong to decide that the validity of the default MIF restriction was to consider that, in its absence, issuers and acquirers would agree MIFs on a case by case basis; instead, the correct approach was to compare the default MIFs with a situation where there were no MIFs.

- The "broad axe" approach to quantifying damages where a precise calculation is not possible is the correct approach.

The Supreme Court judgment awaited (case heard January 2020).

Country: United Kingdom	
Case Name and Number: Arcadia Group Brands Ltd and others v Visa Inc and others	
Date of judgment: 5 August 2015	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: High Court	**Was pass on raised (yes/no)?** Yes
Claimants: Arcadia Group Brands Ltd and others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Visa Inc and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No. The claim did not progress to a merits hearing.	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 101 of the TFEU and Chapter I prohibition • Follow-on and stand-alone damages action • Limitation period: this is the leading case on the exception to the usual limitation rules for cases where the facts were concealed from the claimant (generally the case in cartel cases)	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC) and Stand-alone Case AT.39398 Visa MIF	

Brief summary of facts

The claimants are or were all well-known high street retailers. They sought damages for breaches of European and domestic competition law in relation to Visa' imposition of multilateral interchange fees (MIFs) in the course of operating the Visa payment-card system. The claims were founded on breaches of various provisions of European and domestic competition law for a period going back to 1977.

Visa applied to strike out those parts of the claimants' claims which alleged infringements of competition law in the period prior to 23 July 2007 (and, in the case of one of the claimants 4 October 2007). These dates (the Limitation Dates) were six years prior to the issue of the relevant proceedings. In the alternative, Visa applied for summary judgment under CPR Part 24 in relation to that issue.

The claimants relied on section 32(1)(b) of the Limitation Act 1980 on the basis that there were facts relevant to their actions that they did not know, or could not with reasonable diligence have discovered, before the Limitation Dates.

Brief summary of judgment

Limitation judgment—High Court

The High Court granted applications by Visa for strike out / summary judgment for those parts of the claims which related to the period prior to 23 July 2007. It rejected the claimant's arguments, finding that the facts which would have enabled them to plead a claim which established a *prima-facie* case were known, or discoverable by exercising reasonable due diligence.

Limitation judgment—Court of Appeal

The Court of Appeal dismissed the appeal by the claimants in part, finding that:

- the High Court had not erred in it application of "statement of claim"; the facts which are concealed must be essential for a claimant to establish a *prima facie* case. Facts which improve prospects of success and which may provide a defence do not satisfy the test,
- It rejected the claimant's claim that, in principle, competition claims should be treated differently to other claims because.
- There was no basis for the claimant's argument that the domestic law of limitation contravenes the EU principles of effectiveness and full compensation.
- The Judge had erred in awarding costs on an indemnity basis. Weakness of a legal argument was not justification for an indemnity basis, which was penal in nature. The appeal against the costs order was allowed.

Country: United Kingdom	
Case Name and Number: 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited	
Date of judgment: Claim issued 14 January 2011—Judgment 5 July 2012	
Economic activity (NACE Code): H49.3.1—Urban and suburban passenger land transport	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** No
Claimants: 2 Travel Group PLC (in liquidation)	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Cardiff City Transport Services Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, GBP 33,818.79 (EUR 37,200), plus interest.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Awarded damages	**Amount of damages initially requested:** N/A
Key Legal issues: • Damages claim under section 47(A) of the Competition Act 1998 • Predatory conduct • Exemplary damages (leading case on exemplary damages)	**Is the dispute likely to be settled privately?** N/A
	Method of calculation of damages: The CAT approached the compensatory damages assessment on the basis of what the market conditions would have been without the infringement. The CAT awarded damages to 2 Travel for loss of profits from the date the infringement commenced up to the date of 2 Travel's liquidation (the infringement ended shortly thereafter), finding that, 'but for' the infringement, 2 Travel would have made a further profit from its operations. However, the CAT declined to award damages in relation to loss of a capital asset, loss of a

Direct or indirect claims? Direct

commercial opportunity and the costs of 2 Travel's liquidation as these would have been incurred in any event absent the infringement owing to pre-existing and ongoing financial and management difficulties. Further, the CAT declined to award damages in relation to wasted management time in dealing with the abuse, as on the facts there was no abnormal waste of time.

In relation to exemplary damages, 2 Travel sought exemplary damages on two counts: 'oppressive, arbitrary or unconstitutional conduct by servants of the government' and 'conduct calculated to make a profit that may well exceed the compensation payable to the claimant'. While the CAT rejected a claim under the first ground on the basis that Cardiff City Transport Services did not exercise government functions, it did award damages under the second ground, finding that Cardiff City Transport Services had acted in knowing disregard of an appreciated and unacceptable risk that the Chapter II prohibition of CA 1998 was either probably or clearly being breached or it had deliberately closed its mind to that risk. The CAT distinguished this case from Devenish (see below) on the grounds that while there had been a previous OFT (as it then was) decision, like in Devenish, Cardiff City Transport Services had been granted immunity from fines by the OFT on the basis of it being conduct of minor significance, rather than pursuant to a leniency regime. As such, the CAT held that there was no policy reason why exemplary damages should not be imposed. Given this distinguishing feature, it appears that exemplary damages will still be unavailable in most follow-on damages cases where a fine has been imposed by the regulator (one that may of course have been reduced or waived in the case of leniency and immunity applicants). The CAT's approach to awarding exemplary damages was to take into account the following factors:

	• that the exemplary damages should bear some relation to the compensatory damages awarded; • the economic size of Cardiff City Transport Services; and • the fact that Cardiff City Transport Services would no doubt take very full account of the CAT's judgment even if the exemplary damages were quite low given its association with a local authority.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA (CA98/01/2008—Abuse of a dominant position by Cardiff Bus; Case CE/5281/04)	

Brief summary of facts

On 18 November 2008, the OFT announced that it had decided that, between 19 April 2004 and 18 February 2005, Cardiff Bus engaged in predatory conduct contrary to the Chapter II prohibition of the Competition Act 1998. The OFT found that Cardiff Bus's actions were intended to drive 2 Travel out of the market.

2 Travel claimed that it suffered loss and damage as a result of the infringement found by the OFT and sought damages, exemplary damages, interest and costs.

The CAT also published notices of damages claims under section 47A brought by the Company Secretary (D H Francis), Chief Executive Officer (D B Fowles) and a non-executive director (N V Short) of 2 Travel.

Brief summary of judgment

The CAT awarded damages to 2 Travel in respect of its claim for loss of profits (revenues that it would have achieved on its services in the absence of the infringement) of GBP 33,818.79 (EUR 37,205), plus interest. It rejected its other claims for compensatory damages on the basis that the losses suffered were not the result of the infringement (2 Travel would have been in financial difficulties and would have entered into liquidation even in the absence of the infringement).

The CAT also awarded 2 Travel exemplary damages of GBP 60,000 (EUR 66,000). It found that exemplary damages were appropriate as Cardiff Bus's conduct had been

outrageous. It had deliberately decided to disregard the law, and this conduct was done in cynical disregard of 2 Travel's rights. Therefore, the CAT concluded that, absent an award of exemplary damages, a compensatory award would be insufficient. The judgment sets out the CAT's views on the circumstances in which exemplary damages awards may be appropriate in actions involving breaches of competition law, particularly abuse of dominance cases.

Country: United Kingdom	
Case Name and Number: Albion Water v Dwr Cymru	
Date of judgment: Issued 18 June 2010—Judgment 28 March 2013	
Economic activity (NACE Code): E36—Water collection, treatment and supply	
Court: UK Competition Appeal Tribunal	**Was pass on raised (yes/no)?** Yes (regulatory context)
Claimants: Albion Water	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Dwr Cymru	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Yes, GBP 1,854,493.16 (EUR 2,040,000) (plus interest).
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Damages claim under section 47A of Competition Act • Breach of the Chapter II prohibition established by CAT • Loss caused by abusive pricing practices • Types of damages • Costs recovery	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Loss of profits and lost opportunity to supply.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on NCA 1046/2/4/04	

Brief summary of facts

Following an appeal against a non-infringement decision by the Water Services Regulation Authority ("Ofwat"), the CAT held that Dwr Cymru had abused its dominant position in relation to the supply of non-potable water to Albion Water by imposing a margin squeeze and quoting an access price which was both excessive and unfair in itself.

Albion Water brought an action for damages against Dwr Cymru under section 47A of the Competition Act, based on the CAT's findings.

Albion Water sought compensatory damages and/or restitution, aggravated damages, exemplary damages and interest.

Brief summary of judgment

The CAT concluded that Dŵr Cymru is liable for damages of GBP 1,694,343.5 (EUR 1,865,000) (plus interest) in relation to Albion's claim that, but for the abuse, it could have supplied water to a customer more profitably. The CAT also found that Dŵr Cymru was liable for damages of GBP 160,149.66 (EUR 180,000) (plus interest) for losses arising from Albion's lost opportunity to supply another customer. However, the CAT dismissed a claim for exemplary damages. It held that it was not possible to conclude that Dŵr Cymru must have intended to issue an unlawfully excessive price or that it was reckless as to whether the price was so excessive. Further, the factors that led to the price being abusive were not so obviously wrong and unlawful that it could be inferred that Dŵr Cymru must have realised that the price was indefensible. In addition, there was no evidence that Dŵr Cymru deliberately closed its eyes to the excessive nature of the price because it had calculated that the money it was likely to make from the abuse was likely to exceed any damages that it would be liable to pay to Albion.

On 31 July 2013, the CAT ruled that Albion was entitled to recover all of its costs in relation to the compensatory damages claims. In relation to the exemplary damages claim, Albion could recover some but not all of its costs. Dŵr Cymru was not entitled to any recovery of costs in relation to its successful defence of the exemplary damages claim due to the manner in which it presented parts of its case. The CAT ruled that Albion could recover 85% of its total costs from Dŵr Cymru, including a premium for after-the-event insurance. The CAT considered that it had been appropriate for Albion to seek such insurance. The CAT did not accept Dŵr Cymru's arguments that the premium was too high.

Country: United Kingdom	
Case Name and Number: Karen Murphy v Media Protection Services Ltd	
Date of judgment: 29 September 2008	
Economic activity (NACE Code): J.60.2—Television programming and broadcasting activities	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: Karen Murphy	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Media Protection Services Ltd	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 101 of the TFEU • Defence to claim of breach of copyright and broadcasting rights • Reference to the ECJ	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Loss of profits and lost opportunity to supply.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The UK's Premier League (PL) owns the intellectual property rights relating to the screening of Premier League football matches. The defendant, Ms Murphy, was the landlady of a public house in Southsea, Hampshire. On becoming the licensee, she cancelled its GBP

6,000 (EUR 6,600)-a-year subscription with the satellite broadcaster, BSkyB, which had the exclusive licence to screen live Premier League football matches in the UK. She paid for a satellite dish, decoder and decoder card which enabled her, for GBP 800 (EUR 880) a year, to receive broadcasts of live Premier League games from Nova, a Greek television-provider, which was PL's licensee for Greece.

BSkyB personnel had originally filmed the matches for onward transmission to viewers. The sequence of images, selected by the BSkyB film director, and accompanied by ambient sound from the grounds, was sent to BSkyB's premises and to PL. At BSkyB, additional material (including a commentary) and the BSkyB live logo were added in real time to the feed, which was uploaded to the Astra satellite from which it was transmitted to BSkyB's subscribers for live Premier League matches. PL added an English commentary to the feed, which was then encrypted and sent to Nova in Greece by a satellite link. Nova added material to the feed (including an optional Greek commentary and their "Live S7" logo). The material was then uplinked to the Nova satellite with a view to its ultimate reception by subscribers to the Nova satellite service, including Ms Murphy.

PL, through its agent Media Protection Services Limited, brought a private prosecution against Ms Murphy, alleging breach of section 297(1) of the Copyright, Designs and Patents Act 1988 (CDPA) in respect of two Premier League matches screened at Ms Murphy's public house. She was convicted of two offences before magistrates and her appeal was rejected by the Crown Court. Ms Murphy appealed against her conviction to the High Court.

On 21 December 2007, the High Court dismissed the appeal, holding that it would be wrong to determine whether a programme included in a broadcasting service was provided from a place in the UK by reference to the Satellite Broadcasting Directive 93/83 and the cases decided under that Directive.

The High Court noted that its ruling was dependent upon a number of EU competition law issues, in relation to which it agreed to hear further argument. That hearing began on 25 June 2008. However, in the meantime, on 24 June 2008, the High Court referred to the European Court of Justice (ECJ) for a preliminary ruling a number of issues raised in another case involving pubs that bought cheap foreign satellite-decoder equipment and cards for use in screening live football matches in UK pubs, so as to avoid the high fees charged by the satellite broadcast rights-holder in the UK (BSkyB) (Football Association Premier League Ltd & Ors v QC Leisure & Ors [2008] EWHC 1411 (Ch);

Ms Murphy, therefore, requested that the High Court make a parallel reference to the ECJ for consideration of the issues raised by her case.

Brief summary of judgment

The High Court considered that the Conditional Access Directive (Directive 98/84) was intended to provide for some limited derogations from the application of the free movement principle, in the case of "illicit devices" only, with the aim of removing the existing disparities between national measures which themselves create obstacles to the internal market. In the court's view, an "illicit device" is a device that is "pirated" in the sense that it has not been manufactured and marketed by or on behalf of the relevant service provider, and of which the inherent physical nature has been adapted or designed to bypass the charging arrangements put in place by the service provider.

In the Court's view, Article 3(2) of the Directive appeared to be doing no more than making clear what would otherwise be implicit, namely that, save as provided by Article 3(1), the Directive is not to be taken as requiring or authorising restrictions on cross-border trade in protected services and conditional-access devices, including (at least theoretically) illicit devices. In other words, the Directive was intended to provide for some limited derogations from the application of the free movement principle, in the case of "illicit devices" only.

As a result, any restriction imposed by a member State that goes beyond those specifically required by the Directive must be tested separately against the TFEU provisions on free movement of goods and services. In this case, assuming that the appellant's card was not an "illicit device", the Directive may not provide her with much more assistance than is already provided by the prohibitions contained in the TFEU provisions on free movement. The High Court decided to refer to the ECJ the question of whether the relief sought via the CDPA would be compatible with the Conditional Access Directive.

In addition, the appellant claimed that her prosecution under section 297(1) of the CDPA was both a measure having equivalent effect to a quantitative restriction on imports of decoder cards under Article 34 of the TFEU and a restriction on the freedom of foreign broadcasters to provide services contrary to Article 49 of the (then) EC Treaty. These arguments were also raised in the *Football Association Premier League Ltd & Ors v QC Leisure & Ors* case. In that case, the High Court decided that a reference was necessary to the ECJ on the question whether the relief sought via the CDPA would breach Articles 28 and 49 of the EC Treaty. The High Court proposed to do the same in this case.

Ms Murphy also claimed that the prohibition on the foreign broadcasters from supplying decoder cards for use in the UK is based on agreements or concerted practices, between the Premier League and its various licensees, that have as their object or effect the limitation or control of the markets to which the broadcasters are permitted to supply their broadcasting services and/or the decoder cards, contrary to Article 81(1) of the EC Treaty (now Article 101(1) TFEU). BSkyB's exclusive right to broadcast in the UK, and the prohibition on the Nova service, were based on a contractual export restriction relating to decoder cards.

Again, the High Court followed *Football Association Premier League Ltd & Ors v QC Leisure & Ors*. The High Court considered that it would be wrong for the appellant's conviction to stand if it was indeed based upon a misunderstanding of EU law and concluded that it was, therefore, appropriate to ask the ECJ to rule on what legal test a national court should apply and the circumstances it should take into consideration in deciding whether an export restriction engaged Article 101 TFEU.

The Court of Justice of the EU, ruled on this request for a preliminary ruling on 4 October 2011 (Case C-403/08, *Football Association Premier League and Others*).

Country: United Kingdom	
Case Name and Number: Emerald Supplies Ltd and others v British Airways Plc	
Date of judgment: Claim issued 18 September 2008; Strike-out judgment 18 November 2010	
Economic activity (NACE Code): H.51.21—Freight air transport	
Court: High Court	**Was pass on raised (yes/no)?** N/A
Claimants: Emerald Supplies and others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: British Airways PLC	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Settled
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Pending—all but one of the claimants have settled with BA	**Amount of damages initially requested:** N/A
Key Legal issues: • Representative actions CPR Rule 19.6 • Stand-alone and follow-on damages action • Confidentiality • Conspiracy claims • Strike out • Disclosure of the Confidential version of the Decision • Temporality of claims	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** Loss of profits and lost opportunity to supply.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/39258 Airfreight and Stand-alone	

Brief summary of facts

The named claimants (Emerald) are cut flower importers who use BA's air freight services. They initially claimed that BA had been party to agreements or concerted practices in breach of the Chapter I prohibition, Article 101 (1) TFEU and Article 53 of the EEA Agreement to fix prices or share markets in air freight services. Emerald brought its claim on behalf of itself and all direct or indirect purchasers of air freight services the prices of which were inflated due to BA's involvement in the alleged cartel.

Under Rule 19.6 of the Civil Procedure Rules, where more than one person has the same interest in a claim, the claim may be begun or the court may order that the claim is continued by one or more of the persons who have the same interest as representatives of other parties with the same interest.

BA applied to the court to have the representative element of the claim struck out.

Following the striking out the representative element of the claim, a large number of additional claimants joined the claim. There are now 565 claimants, located in numerous territories across the world. BA has brought claims for contribution under Part 20 of the Civil Procedure Rules against 23 other airlines, which are listed as third and fourth parties to the action (the Part 20 Defendants). The claims relate to alleged overcharges on air routes between large numbers of territories across the entire world during the period of at least 1999 to 2007 (both within and outside the EEA).

The original claim was based on an alleged breach of EU and UK competition law. The claim is now based on three grounds:

- Interference with the claimants' businesses by unlawful means.
- Involvement in a conspiracy to injure the claimants by unlawful means.
- Breach of statutory duty and/or directly effective rights by BA's infringement of Article 101 (1) TFEU and Article 53 of the EEA Agreement.

Brief summary of judgment

Representative Claim: The High Court allowed BA's application to have the representative element of the claim struck out, on the basis that the identity of the class in this case depended on the result of the main action (that is, the alleged breach of Article 101(1) TFEU). In order to represent a class, it must be possible at the time the claim is made to identify the claimants belonging to the class. Additionally, as the right to damages for members of the class was dependent on their position in the distribution chain and whether they had passed on any loss to their customers, the court did not consider that the class members had the same interests. The High Court's judgment was upheld by the Court of Appeal, which also held that members of a class must all have the same interest at all stages of the proceedings, and in this case, the class members did not.

Disclosure of Commission Cartel Decision: the claimants applied to the High Court to review the redactions applied by BA to the Commission's air cargo cartel decision. The Court refused to do so on the basis that if the parties could not agree the extent of the redactions, it would not be a proportionate use of the Court's time to undertake the

exercise on their behalf. The Court instead ordered that the Commission decision should be disclosed into a confidentiality ring, which would provide sufficient protection. The claimants were also barred from using the decision for bringing any further proceedings.

Appeal of High Court Disclosure Decision: six of the addressees of the Commission's air cargo cartel decision and nine other airlines who were not addressees to it appealed the High Court decision to allow the unredacted Commission decision to be disclosed into a confidentiality ring. The appellants had sought redactions on the basis of the General Court judgment in *Pergan v Commission* (Case T-474/04 of 12 October 2007), which was that the presumption of innocence prevents the publication of any formal finding of or any allusion to liability in a Commission decision for infringement, unless that party has been permitted to exercise its rights of defence which resulted in a decision on the merits of the case. The Court of Appeal concluded that the national court was obliged to provide the same protection. The appeal was therefore upheld.

Strike Out: BA applied for the claims in the torts of unlawful means conspiracy and unlawful interference to be struck out. The claimants applied to have two elements of BA's defence struck out. The High Court adjourned both applications as being premature. The High Court's judgment was appealed, and the Court of Appeal upheld the appeal; there was sufficient material to conclude that those parts of the claims requiring that the defendant had an intention to injure the claimant was not demonstrated. These claims were struck out.

Jurisdiction *ratione temporis* of the High Court to apply Article 101 TFEU: The High Court accepted (and this was confirmed by the Court of Appeal) BA's arguments that the competition rules could only be applied to air transport between the EU and third countries in accordance with transitional implementing provisions of Regulation no. 1/2003 prior to 1 May 2004, and therefore there could be no claim for damages arising from the cartel prior to that date. The High Court therefore did not have jurisdiction to undertake an investigation into the compatibility of a practice with Article 101 TFEU—the European Commission was the only body able to do so. Additionally, the High Court held that it could not derive jurisdiction from the direct effect of Article 101 TFEU as before 1 May 2004, the doctrine of direct effect did not give a national court jurisdiction to rule on the compatibility of an agreement with Article 101(1) TFEU.

Country: United Kingdom	
Case Name and Number: Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others	
Date of judgment: Issued 14 May 2008—Judgment 15 October 2008	
Economic activity (NACE Code): C.21.2—Manufacture of pharmaceutical preparations	
Court: High Court	**Was pass on raised (yes/no)?** N/A
Claimants: Devenish Nutrition Ltd and others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Sanofi-Aventis SA (France) and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Not yet proceeded to merits trial.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Entitlement to exemplary or restitutionary damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct and indirect	**Method of calculation of damages:** Loss of profits and lost opportunity to supply.
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): Case COMP/37512 Vitamins	

Brief summary of facts

The claimants, are all purchasers (either direct or indirect) of vitamins from one or more of the defendants. The defendants, in particular, Sanofi-Aventis SA (Aventis), Hoffman-

La Roche (Roche) and BASF AG, are manufacturers of vitamins who were found by the European Commission to have participated in a worldwide cartel in relation to the supply of various vitamins (the vitamins cartel)

The claimants brought a "follow on" action for damages based on the Commission's Article 101 TFEU infringement decision. It was ordered that issues relating to the nature of damages to which the claimants would be entitled should be tried as a preliminary issue. In particular, it should be determined whether the claimants would be entitled to: an account of profits, restitution for unjust enrichment and exemplary damages. (In this judgment the court was not considering whether the claimants were entitled to an award of damages on the compensatory basis).

Brief summary of judgment

It was not disputed that the claimants would, in principle, be entitled to compensatory damages calculated by reference to the situation they would have been in "but for" the illegal cartel. However, the claimants claimed that, due to difficulty of proof of actual loss and of the position in the absence of the cartels, exemplary damages and a restitutionary award should be available for a claim under Article 101 TFEU.

The Court concluded that the claimants would not be entitled to an account of profits, restitution of unjust enrichment or exemplary damages.

The Court considered that the award of exemplary damages could be ruled out due to the application of the EU law principle of *non bis in idem* (double jeopardy). There was identity of facts, unity of offender and the unity of the legal interest protected between the fines imposed by the European Commission and exemplary damages. Both are intended to punish and deter.

This principle also applied in relation to a defendant that had received full immunity under the Commission's leniency policy. It was not for the national court to undermine the policy of granting leniency awarding exemplary damages against the beneficiary of leniency. Further, a decision by a national court to award exemplary damages would be made on the basis that the Commission's fines were insufficient to punish and deter. A national court is not in a position to reach such a conclusion.

Further, exemplary damages were not available under English law as there is no way of limiting the exemplary damages in order to avoid the risk of double counting. This is further complicated by the number of potential claimants and the scale of the fines imposed by the Commission.

The court also concluded that a restitutionary award is not yet generally available in all cases of tort. It is not an available remedy in antitrust cases. Further, even where a restitutionary award is available, this is generally only made where compensatory damages would be inadequate to compensate the claimant, which is not the case here. Further, an account of profits would not be appropriate.

Country: United Kingdom	
Case Name and Number: Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others [2009] EWHC 2609 (Comm)	
Date of judgment: Issued 22 February 2008—Judgment 23 July 2010	
Economic activity (NACE Code): C.20.17—Manufacture of synthetic rubber in primary forms	
Court: High Court	**Was pass on raised (yes/no)?** Merits stage not reached
Claimants: Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Shell Chemicals Limited and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Judgment on jurisdiction appealed to court of appeal and dismissed. Case settled.	**Amount of damages initially requested:** N/A
Key Legal issues: • Damages action following European Commission cartel decision • Jurisdiction under the Brussels Regulation • Establishing jurisdiction over claims against non-UK defendants when UK-based defendants were not addressees of cartel decision. (Leading case)	**Is the dispute likely to be settled privately?** N/A
• Application for a stay of proceedings pending the determination of proceedings in the Italian courts under the Brussels Regulation and Lugano Convention	
Direct or indirect claims? Direct	**Method of calculation of damages:** Loss of profits and lost opportunity to supply

Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on (EC): COMP/F/38.638—Butadiene Rubber and Emulsion Styrene Butadiene Rubber	

Brief summary of facts

The case followed on from the decision by the Commission of the European Communities dated 29 November 2006 in Case COMP/F/38.638—Butadiene Rubber and Emulsion Styrene Butadiene Rubber. The Commission Decision found 13 companies guilty of an infringement of art 81 of the EC Treaty in relation to the market for the supply of Butadiene Rubber and Emulsion Styrene Butadiene Rubber. The companies were based in various EU jurisdictions, none of which were in England.

The addressees of the Commission's decision, other than Bayer appealed against the decision to the General Court of the EU (Cases T-38/07, T-39/07, T-42/07, T-44/07, T-45/07, T-53/07 and T-59/07).

In July 2007 (before the appeals against the Commission Decision were decided), Enichem (companies in the Eni group) brought an action in the Italian courts against various tyre manufacturers, asking the court for a declaration that the cartel did not exist, that Eni was not involved in the cartel, and that the cartel did not cause any damage to the tyre manufacturer defendants in that case.

In December 2007, the tyre manufacturers (all of whom were defendants in the Italian proceedings or subsidiaries of those defendants) brought claims in the English courts against 23 defendants who were alleged to have participated in the cartel. Only two of the defendants to the claim were companies domiciled in England (neither of whom were addressees of the Commission Decision, but rather subsidiaries of those addressees). A claim was also commenced against a further English-domiciled company in July 2008 (Dow Chemical Company Limited).

The Italian court gave a first instance decision in April 2009, in which it, in effect, dismissed Enichem's case. The claimants appealed against the decision of the Italian Court.

Dow argued that the English Court should not take jurisdiction over the claim because the English domiciled defendants had only been selected as a tactical device to establish jurisdiction against the companies that were addressees of the European Commission's decision and were directly involved in the cartel.

The Court also dealt with applications to stay the proceedings under Articles 27 (mandatory stay where proceedings involving the same parties and the same cause of action are brought in courts of different member States) and 28 (discretionary stay in favour of the

court first seised when related actions are brought in different courts) of the Brussels I Regulation,[2] and the corresponding articles under the Lugano Convention, which applies in relation to the defendant companies which were domiciled in Switzerland.

Brief summary of judgment

The Court concluded that it had jurisdiction to hear the action, that it was not required to stay the English proceedings until the outcome of the Italian proceedings (other than some of the claims against Dow Europe pursuant to Article 21 of the Lugano Convention) and that it declined to exercise its discretion to grant a stay. Its reasoning was as follows:

- The Court decided that it did have jurisdiction to consider the claims even though the English domiciled defendants were not addressees of the European Commission's decision. In order to establish jurisdiction, the claimants had to show that there was a real issue between them and the English domiciled defendants that could not be struck out. The Court considered that it did have jurisdiction in the proceedings because, although the English domiciled defendants were not addressees of the Commission's decision, they had been involved in selling the cartelised products and they did form part of undertakings that were addressees of the European Commission decision. The Court therefore considered that it had jurisdiction to hear the claims against the defendants not domiciled in England under Article 6(1) of the Brussels I Regulation. Under Article 6(1), a person that is one of a number of defendants to a claim can be sued in the courts of the State where any one of them is domiciled as long as the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

- The Court considered whether it had to grant a stay under Article 27 of the Brussels I Regulation. Article 27 provides for a mandatory stay of proceedings in favour of the court first seised where the case involves the same cause of action and the same parties. It was not disputed in this case that the Italian and English proceedings were based on the same cause of action. There was a dispute about whether it involved the same parties. The claimants in the Italian proceedings were Eni, who were not party to the English proceedings. The Court considered that, broadly, the interests of Eni and the defendants to the English proceedings had a lot in common. However, the European Commission had found in the decision that Eni was a leader of the cartel and the Court considered that Eni might, as a result, be more exposed to claims that the other defendants, or claims brought by other cartel members against it. The Court, therefore considered that Eni should be able to put forward its own evidence and arguments. The Court concluded that it did not have to stay the proceeding under Article 27 of the Brussels Regulation.

- Having decided that it was not required to stay the proceedings under Article 27, the Court went on to consider whether it should exercise its discretion to do so under Article 28. Article 28 states that a court other than the court first seised may stay proceedings where related actions are pending in courts of different member States. The Court declined to stay the proceedings. It considered that staying the proceedings would not lessen the risk of inconsistent judgments, since only some of

2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

the defendants had applied for a stay. Even if the appeals in the Italian Court were successful and the Italian Court of Appeal gave a judgment on the merits of the case, the English court would still have to decide on the quantum of damages, since this was not an issue before the Italian courts.

- The Court also considered the stage of the Italian proceedings. There would not be a decision on the merits of the case in Italy before September 2013-2014. The Court considered that it was likely that a decision on the merits would be reached in the English proceedings before the Italian proceedings. The Court considered that the proximity of the case with Italy was not an important factor in its decision whether to stay proceedings, since the cartel participants were based in a number of different countries and the cartel meetings took place in different countries. The Court also considered the corresponding provisions of the Lugano Convention in relation to defendants domiciled in Switzerland. Article 21 of the Lugano Convention provides for a mandatory stay where proceedings are pending between the same parties. Dow Europe is a party to both of the proceedings, and the Italian court was first seised. The Court considered that it had to stay the proceedings against Dow Europe that had been brought by claimants who were party to the Italian proceedings when the Italian court was seised of the matter.

- Article 22 of the Convention only allows for a discretionary stay were proceedings are pending in another court at first instance. The Italian Court had given its judgment at first instance so no proceedings were pending and, therefore, the English Court had no discretion to stay the proceedings under Article 22.

Country: United Kingdom	
Case Name and Number: Safeway Stores Limited and others v Twigger and others	
Date of judgment: 21 December 2010	
Economic activity (NACE Code): G46.3—Wholesale of food, beverages and tobacco	
Court: High Court	**Was pass on raised (yes/no)?** N/A
Claimants: Safeway Stores Ltd and others	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Twigger and others	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** GBP 200,000 (EUR 220,000)
Key Legal issues: • Damages action against former employees/directors for damages arising from finding of competition law infringement • Principle of ex turpi causa • Compatibility of damages action with competition law	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Not a damages claim	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Follow-on—against directors of Safeway (OFT fine for collusion in dairy retail)	

Brief summary of facts

In December 2007, the OFT announced that it had concluded "early resolution agreements" with Safeway (in relation to conduct prior to its acquisition by Morrisons) and a number of other companies. Under these agreements, the companies admitted involvement in collusion in relation to the retail prices of certain dairy products in 2002 and/or 2003, contrary to the Chapter I prohibition of the Competition Act 1998 and accepted a liability in principle to pay penalties.

The claimants, companies in the Safeway Group, brought a claim for damages and/or equitable compensation against certain former employees, including directors (the defendants). The claimants sought indemnity against liability for the penalty to be imposed by the OFT. They also claimed as damages their costs, including legal costs, of the OFT investigation, amounting to about GBP 200,000 (EUR 220,000). The claimants alleged that the defendants had breached their employment contracts, had breached fiduciary duties owed to the claimants and had been negligent. They also claimed that the defendants had conspired to procure the claimant's participation in the anti-competitive practices, as a result of their participation initiatives in the industry to increase the price paid to farmers for dairy products.

The defendants applied for summary judgment against the claimants, or an order for the claim to be struck out. They argued that the claimants' claim was barred as a matter of public policy as:

- It infringed the principle of public policy expressed in the maxim *ex turpi causa non oritur actio* (*ex turpi causa*), and in particular the rule that a person who commits an illegal or unlawful act cannot maintain an action for an indemnity against the liability which results from the act.
- It was fundamentally inconsistent with the UK competition regime established by the Competition Act 1998 and other statutes because the Competition Act 1998 contained a prohibition against undertakings and enforcement against undertakings, but there was no provision in the Act for direct civil liability on directors or employees for conduct which led to the undertaking infringing the Act.

Brief summary of judgment

The defendants accepted that before the *ex turpi* causa rule could apply in this case the claimants must have committed an illegal or unlawful act and the illegal or unlawful act must be of sufficient seriousness to engage the *ex turpi* causa rule.

The High Court concluded both that an infringement of the Chapter I prohibition is a sufficiently serious wrongful act to engage the *ex turpi* causa rule in principle and also that a penalty imposed by the OFT under the Competition Act is akin to a fine. However, the High Court concluded that it seemed that the basis on which the claimants in this case are liable is that the relevant wrongful acts were committed in the name of the claimants by the defendants, who as directors and employees were acting in the course of their employment. The relevant anti-competitive acts and practices were carried out by employees of the claimants in the course of their employment and the claimants are liable for those acts and practices pursuant to the general principles of the law of agency. This is not sufficient to

give rise to primary or direct liability such that the *ex turpi* causa rule applies. The relevant wrongdoing was not personal to the claimants.

Therefore, the High Court concluded that the claimants have a real prospect of successfully defeating any defence based upon *ex turpi* causa at trial on the basis that their liability is not primary or direct such as to attract the necessary degree of turpitude.

Further, the High Court concluded that if the claimant companies were successful in establishing that they are only liable by virtue of the general rules of agency (and so are not directly or primarily liable) then they cannot be seen to be personally negligent or otherwise personally at fault. In those circumstances, the penalty should be recoverable.

In addition, the Court found that there was some authority for the proposition that the *ex turpi causa* rule should not apply to bar a claim by a company where the company has been the victim of the relevant illegality. If the claimants were able to make out their allegations that the defendants knew of the acts leading to the breach of the Chapter I prohibition, but in breach of contract and/or fiduciary duty failed to report them to their superiors and/or boards of directors, then this would also provide an exception to the application of the *ex turpi causa* rule.

Finally, the High Court ruled that the claimants' claims were not fundamentally inconsistent with the Competition Act and the UK competition regime. It held that the claim would not extend existing law. It merely involves applying the existing law to novel facts. Further, it would be surprising if the defendants could not be considered to owe duties as a matter of law not to put their employers in breach of competition law. The intent of the Competition Act and Enterprise Act was not to affect any common law remedies that an undertaking might have against its directors or employees that might arise wholly independent of the statute.

Country: United Kingdom	
Case Name and Number: Attheraces Ltd & Anor v The British Horseracing Board Ltd & Anor Rev 2 [2007] EWCA Civ 38	
Date of judgment: Court of Appeal Judgment—2 February 2007	
Economic activity (NACE Code): J.60.2—Television programming and broadcasting activities	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: Attheraces Limited	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: The British Horseracing Board	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Claim failed.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed to Court of Appeal—no anti-competitive behaviour found.	**Amount of damages initially requested:** N/A
Key Legal issues: • Chapter II/Article 82 • Application to strike out • Interim injunction • Refusal to supply • Excessive pricing • Discrimination	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

The British Horseracing Board (BHB) compiles data relating to horseracing which it licences to third parties through its trading arm BHB Enterprises Limited via a contract to supply data to an unrelated company, PA News Limited (PA). PA then licences authorised third parties to use the data.

Attheraces obtained exclusive rights to access certain racecourses in Great Britain and Ireland in order to produce audio visual coverage of horse races and entered into agreements to use BHB's pre-race data on its website, TV channel, and in a service provided to bookmakers.

In May 2004, Attheraces entered into negotiations with BHB for a licence for the use of pre-race data. Following the judgment of the Court of Justice of the EU in *British Horseracing Board Ltd and others v William Hill Organisation Ltd* (Case C-203/02 of 9 November 2004) in which the Court of Justice found that BHB had no database rights in the information, BHB threatened to stop the pre-race data being supplied to Attheraces unless Attheraces entered into a direct data licence with BHB and paid arrears allegedly due in relation to its use of such data.

Attheraces brought proceedings in April 2005 claiming that BHB's threat to stop pre-race data being supplied to it constituted the abuse of a dominant position contrary to the Chapter II prohibition of the Competition Act 1998 and Article 82 of the EC Treaty. It claimed that BHB had a dominant position in the market for the supply of pre-race data to those who require it for the services that they provide to their customers (such as bookmakers and producers of TV channels). According to Attheraces, BHB had abused that dominant position by an unjustified refusal (or threatened refusal) to supply the information, attempting to tie the provision of the pre-race data to the entry into a licence agreement directly with BHB that charged for intellectual property rights that did not exist, excessive pricing, and unilaterally imposing contract terms in order to put pressure on dependent customers to accept unfair, excessive and discriminatory terms.

Brief summary of judgment

Interim injunction

In an interim injunction, the High Court rejected an application by BHB to strike out the claim on the basis that the issue had already been decided in *BHB Enterprises plc v Victor Chandler International Limited* (in which the court found the defendant had failed to plead a sufficiently detailed case to prove a breach of Article 82). The Court distinguished the current case on the grounds that Attheraces had set out in its pleadings the reasons why it considered BHB's prices to be excessive and unfair. In addition, Attheraces was granted an injunction to prevent BHB from ceasing supply of its pre-race data pending the outcome of the case on the basis that (i) there was an arguable case for trial and (ii) if the supply of information ceased it would cause loss to Attheraces business which could not be compensated in damaged.

High Court judgment

In the substantive hearing, the High Court found that BHB's refusal to supply pre-race data on reasonable terms and its imposition of unfairly excessive and discriminatory prices on Attheraces. It took into account that Attheraces was an existing customer, the provision of pre-race data was an essential facility, and that if it were unable to obtain the information, Attheraces would be excluded from the market.

Court of Appeal judgment

BHB appealed the judgment to the Court of Appeal. The appeal was upheld. The Court of Appeal found that insisting that Attheraces sign a licence for use of information did not amount to a refusal to supply, although some terms in the licence were not enforceable due to the finding that BHB did not have the intellectual property rights. The Court of Appeal stated that this might have been different if Attheraces had objected during negotiations, but they did not.

The Court of Appeal also found that the prices were not excessive—it was an error to decide that prices above cost in addition to a reasonable rate of return were excessive. Other costs should have been taken into account, including BHB's expenses in promoting British racing. Additionally, there was no evidence that the competitiveness of Attheraces had been put at risk by BHB's pricing.

The Court of Appeal also rejected the finding of discriminatory pricing, finding that it had not been demonstrated that the pricing had put Attheraces at a competitive disadvantage compared to other competitors; price differences were not intrinsically arbitrary merely because not all customers were in the same position.

Country: United Kingdom	
Case Name and Number: Bernard Crehan v Inntrepreneur Pub Company Limited and Brewman Group Limited ([2006] UKHL 38)	
Date of judgment: House of Lords judgment 19 July 2006	
Economic activity (NACE Code): I.56.3—Beverage serving activities	
Court: High Court	**Was pass on raised (yes/no)?** No
Claimants: Bernard Crehan	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** No
Defendants: Inntrepreneur Pub Company Limited and Brewman Group Limited	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Appealed in Court of Appeal and House of Lords. House of Lords found that there was no conflict between national and EU Decisions where different parties were involved.	**Amount of damages initially requested:** N/A
Key Legal issues: • Article 81 • Exclusive purchasing obligations • Duty of sincere cooperation with the European Commission. (Key case on the ability of a UK court to make a finding on a matter allegedly decided by the EU court) • Entitlement to damages • Quantum of damages	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Penny Coombs, Associate Director, Osborne Clarke LLP, Penny.Coombs@osborneclarke.com

Follow-on (EC or NCA?) or stand-alone?
Stand-alone

Brief summary of facts

Mr Crehan had taken leases for two Inntrepreneur pubs in 1991. The agreements contained provisions requiring him to purchase most of his beer from Courage. Following the failure of his businesses, he was sued by Courage and Inntrepreneur for unpaid debts. In his defence, Mr Crehan argued that the purchasing arrangements constituted a beer-tie that was unlawful as it infringed Article 81 of the EC Treaty. He also counterclaimed for damages, alleging that independent pub tenants were able to purchase beer at significantly lower prices than tied tenants and that he had, therefore, suffered loss as a result of his agreement with Inntrepreneur.

During the course of the case, questions were referred to the Court of Justice of the EU about the ability of a party to an agreement that infringes Article 81 EC to claim damages. The Court of Justice held that a party to a contract that is in breach of Article 81 EC can sue his co-contractor for damages in circumstances where he is in a markedly weaker position than the other party so that his ability to negotiate has been compromised. However, EU law does not preclude national law from denying a party who is found to bear "significant responsibility" for the distortion of competition the right to obtain damages from his co-contractor (Case C-453/99, *Courage and Crehan*, 20 September 2001).

Brief summary of judgment

The High Court found that the beer-tie did not infringe Article 81 EC on the basis that it did not consider that the beer-tie arrangements made it more difficult for competitors to enter the market. In doing so, the Judge refused to be bound by the European Commission's contrary decision in a similar case where it found that beer-tie arrangements operated by *Whitbread* did infringe Article 81 EC.[3] However, it also noted that, if it had been an infringement of Article 81 EC, Mr Crehan would have been entitled to claim damages as he would not have been found to have borne significant responsibility for the network effects of the Inntrepreneur agreements.

The High Court's judgment was overturned by the Court of Appeal which found in favour of Mr Crehan. It considered that the High Court should have followed the European Commission's decision in the *Whitbread* case, rather than apply its own assessment of the agreement's foreclosure effects. The Court of Appeal considered that damages should be awarded to Mr Crehan on the basis of loss assessed as at the date of the failure of the business.

The House of Lords overturned the Court of Appeal's decision and found in favour of Inntrepreneur. It found that the High Court's decision did not breach the duty on national courts to avoid making a decision in conflict with a decision of the European Commission (as the Court of Appeal had suggested), as a conflict would only exist where agreements

3 Commission Decision of 24 February 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.079/F3—Whitbread)

ruled on by the national court have been, or are about to be the subject of a European Commission decision. A conflict does not arise where—as in this case—the Commission has made a decision in relation to the same market but involving different parties.

UNITED STATES OF AMERICA

INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

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Private antitrust litigation is well-established in the United States where federal law has included a private right of action to enforce the antitrust laws for over 100 years. Case law explicitly recognizes the role of private lawsuits in effective antitrust enforcement. Today, hundreds of cases are filed each year seeking damages or other relief as a result of alleged antitrust violations. While many of these cases follow government enforcement actions, substantial numbers are based on alleged conduct that has not been the subject of a government inquiry. The sections below provide more detail on the procedures and key issues related to private antitrust claims in the United States.

1. Jurisdiction

At the federal level, the Antitrust Division of the United States Department of Justice ("**Antitrust Division**") and the Federal Trade Commission ("**FTC**") share responsibility for enforcing the antitrust laws. In addition, state attorneys general enforce state antitrust laws within their respective states. This memorandum focuses largely on federal antitrust law and notes differences with state law where applicable.

Private antitrust claims may be brought in state or federal courts. Generally speaking, a claimant has the choice of filing a claim in any forum that has jurisdiction over the antitrust claim and the defendant. Antitrust claims that allege a violation of any federal antitrust law may be filed in any federal district court where either (i) the defendant resides, (ii) substantial parts of the events arose, or (iii) the defendant can be served (if there is no other appropriate forum). A defendant must live in or have sufficient minimum contact with the state in which the federal district court sits for that court to have jurisdiction over the defendant.

Most state courts have jurisdiction to adjudicate the federal antitrust claims if the federal court in that state would also have jurisdiction. Through a process called "removal", a defendant can transfer a case initially filed in state court to a federal court if the case otherwise meets the federal jurisdiction requirements.[1]

Both follow-on and stand-alone claims are available: private antitrust claims can (and often do) proceed in parallel to criminal investigations or adjudicatory proceedings. Additionally,

1 A federal court has jurisdiction when (i) the case arises under the US Constitution or a federal statute, or (ii) the plaintiff(s) and defendant(s) are citizens of different states and/or countries and the amount in controversy is at least US$75,000. 28 U.S.C. §§ 1331-1332.

a private claimant need not wait for a civil or criminal government enforcement action to sue for damages. Although there is no general rule staying civil proceedings while a criminal case is pending, courts will sometimes stay or defer discovery in civil proceedings based on requests from the Antitrust Division related to ongoing criminal investigations or proceedings.

2. Relevant legislation and legal grounds

Section 4 of the Clayton Act (15 U.S.C. § 15(a)) provides a private cause of action for suits brought pursuant to "the antitrust laws", which are set out in more detail below.

A claimant has standing to seek damages if (i) there is an actual case or controversy, the resolution of which directly impacts the claimant, (ii) the claimant is not too removed from the violation, and (iii) the claimant can demonstrate that it suffered an "antitrust injury" to have standing in federal court. Antitrust injury is "injury of the type the antitrust laws were intended to prevent." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990). Claimants who purchased products or services indirectly from the defendant(s) are not permitted to bring antitrust damages claims under federal law but can do so under many state laws.

The Clayton Act provides that final judgments entered against a defendant in a civil or criminal antitrust proceeding brought by the government may be used in a later private suit arising out of the same facts as *prima facie* evidence against the defendant. 15 U.S.C. § 16(a).

3. What types of anti-competitive conduct are damages actions available for?

The "antitrust laws" include sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), section 7 of the Clayton Act (15 U.S.C. § 18), and section 2 of the Robinson Patman Act (15 U.S.C. § 13). Broadly speaking:

- Section 1 of the Sherman Act prohibits agreements in restraint of trade, including price-fixing agreements, group boycotts, market allocation, bid-rigging, and tying.
- Section 2 of the Sherman Act prohibits unlawful monopolisation.
- Section 7 of the Clayton Act prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly.
- The Robinson Patman Act prohibits price discrimination in the sale of products to similarly situated buyers.

Many states' antitrust laws also provide for private rights of action.

4. What forms of relief may a private claimant seek?

Under section 4 of the Clayton Act (15 U.S.C. § 15(a)), claimants can obtain treble damages, *i.e.* three times the amount of damages sustained due to the claimant's antitrust violation, plus costs of suit, reasonable attorney's fees, and post-judgment interest.

Under section 16 of the Clayton Act (15 U.S.C. § 26), private claimants may obtain injunctive relief to prevent or terminate unlawful conduct or, in rare cases, divestiture. A claimant must establish that irreparable harm is likely unless injunctive relief is granted.

5. Passing-on defence

The passing-on defence, or the avoidance of antitrust liability through proof that a claimant passed on any antitrust injury to a third party, is not available in the US at the federal level, although some states do recognize it.[2] For example, the pass-on defence is available in California when "multiple levels of purchasers have sued, or where a risk remains they may sue."[3]

Further, under Illinois Brick Co. v. Illinois, indirect purchasers do not have standing to sue for damages under the federal antitrust laws; only direct purchasers may bring such claims.[4] However, 34 US states—including California and New York—as well as the District of Columbia permit indirect purchasers to sue under state antitrust laws.

6. Pre-trial discovery and disclosure, treatment of confidential information

Discovery in US antitrust cases is extensive and may include the production of documents, depositions, interrogatories, and requests for admissions. Discovery must be of non-privileged matters that are relevant to any party's claim or defence and proportional to the needs of the case, and is usually limited to a period of time before the earliest date of alleged wrongdoing through a date after the alleged wrongdoing ended. The number of depositions, interrogatories, and admissions is limited by the Federal Rules of Civil Procedure and state procedures (although such limitations are sometimes altered by agreement or court order).

Discovery of non-parties is also allowed; however, courts regularly narrow the scope of discovery when it is sought from non-parties.

Confidential information, if not otherwise subject to a legal privilege preventing disclosure, must be produced in response to appropriate discovery requests. Parties may protect such information from public disclosure through the use of protective orders that are either stipulated to by the parties or ordered by the court when the need for confidentiality of the information is shown "for good cause." Evidence introduced at trial is generally subject to the public's right of access to the courtroom and will not be blocked absent a compelling need.

If a criminal investigation is pending, investigators can seek a discovery stay in any pending damages actions sharing common questions of fact or law (e.g. follow-on actions). The judge presiding over the damages action has discretion as to whether to grant the stay. The files of a competition authority are often deemed protected by various exceptions to the discovery rules and as a result, are typically not accessible in private lawsuits. Additionally,

2 Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

3 Clayworth v. Pfizer, Inc., 233 P.3d 1066, 1086 (Cal. 2010).

4 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

documents submitted to the Antitrust Division in response to a Grand Jury subpoena are protected from disclosure by federal law.

7. Statute of Limitation

The statute of limitations for federal private antitrust claims is four years from the date the cause of action accrued, which is defined as the date the claimant suffered injury. How to define the date the cause of action accrued and whether the injury is ongoing or not is regularly the subject of dispute within antitrust litigation matters. Individual US states may have statutes of limitations that differ from the federal rule; these statutes apply to any claims brought under the law of the particular state.

The statute of limitations period is considered procedural law. If the statute of limitations expires before a claimant files a case and no basis for suspension of the period exists, the claim will be dismissed with prejudice.

A statute of limitations may be suspended in the event of any one or more of the following situations: a pending government investigation or class action derived from the same facts as the claimant's case; fraudulent concealment; duress; or estoppel. A statute of limitations period may also be modified by contract between the parties, in what is often referred to as a "tolling" agreement.

8. Appeal

Unsuccessful claimants and defendants in private federal antitrust suits have the right to appeal a final decision of a federal district court.

In a private action, either side may appeal a final, unfavourable decision on the grounds of legal error that prejudiced the losing party. Appellate courts do not re-weigh the evidence; rather, they examine whether the trier of fact correctly applied the law to the facts as it (the trier of fact) found them.

For most competition cases, appeals from a federal district court are heard by the court of appeals in the circuit in which the district court is located. Further appeal to the United States Supreme Court—the country's highest court—is allowed, but the Supreme Court has discretion as to whether it will hear such an appeal.

State cases are appealed to the state appellate court in the state where the case was heard. Many states have two layers of appellate courts like the federal system. Under certain circumstances, a decision by the highest court in a state can be appealed to the United States Supreme Court.

9. Class actions and collective representation

Most U.S. antitrust class actions are filed in federal courts whether the claims arise under federal or state law. Rule 23 of the Federal Rules of Civil Procedure sets out the requirements for class actions, including antitrust class actions.

Rule 23(a) of the Federal Rules of Civil Procedure requires the class representative to establish (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy.

- Numerosity ensures that the size of the putative class is such that joining all members is impractical making class action a useful way to bring claims.
- Commonality requires that the class members have at least one question of law or fact in common.
- Typicality means that the claims or defences of the class representative are typical of those of the other class members.
- Finally, the adequacy requirement ensures that the class representative is capable of fairly and adequately protecting the interests of the class.

A class representative also must satisfy one of three criteria set forth in Rule 23(b) of the Federal Rules of Civil Procedure:

- Trying individual actions would expose the defendant to the risk of inconsistent and incompatible judgments or would dispose of or harm the interests of non-parties;
- The defendant's conduct is such that injunctive or declaratory relief on behalf of the whole class is appropriate; or
- For damages actions, questions of law or fact common to the class predominate over questions affecting individual members.

10. Key issues

Standing of Direct and Indirect Purchasers

The US Supreme Court recently ruled that iPhone users who purchased apps through Apple's App Store are considered direct purchasers of Apple's products, and therefore had standing to bring claims against Apple for alleged monopolisation of the market for iPhone apps. In *Apple v. Pepper* (2019), the Court rejected Apple's argument that longstanding Supreme Court precedent established in the *Illinois Brick* case—holding that indirect purchasers do not have standing to sue under federal antitrust law—should apply because iPhone users purchase apps from third-party developers, not from Apple. In rejecting this argument, the Court found that iPhone users should be considered direct purchasers with standing to bring claims for private damages under the antitrust laws because "the iPhone owners bought the apps directly from Apple and therefore are direct purchasers under Illinois Brick." The Court's decision in this case may expose other companies offering platform services for third-party vendors to antitrust claims brought by consumers of goods and services purchased from third parties through those platforms.

Evolving Class Action Certification Standards

US courts have been providing evolving standards with respect to certification of antitrust class actions. For example, there is a split among the circuit courts as to whether a

class containing uninjured members may be certified. Six circuits hold that Rule 23(b)(3)'s predominance requirement forbids certification where the proposed class contains uninjured members that cannot be identified and removed without individualised inquiries. One court, however, takes a different approach, allowing certification as long as the class does not contain "a great many" uninjured members. This issue is consistently litigated in antitrust class action cases and will likely continue to be addressed by the courts.

Growth of Consumer Class Actions Unrelated to Government Enforcement Investigations

There has been an increase in antitrust class actions brought by consumers across a number of different industries that are particularly noteworthy for the fact that they were not preceded by government enforcement investigations or enforcement actions against the defendants. This increased activity by the antitrust claimant's bar should serve as notice that, even in the absence of prior scrutiny from the FTC and DOJ antitrust authorities, companies may still be vulnerable to costly and time-consuming private antitrust litigation from consumers. Below are some examples of recent private antitrust class action cases brought against companies that were not previously subject to government scrutiny.

Agriculture

A number of antitrust class actions have been filed in the food industry, including cases against major producers of broiler chickens alleging a conspiracy to fix prices, and a case against pork producers alleging collusion to limit production with the intent to increase prices. These cases pre-dated the beginning of an investigation by the government with respect to antitrust violations in these industries. This pattern of private litigation preceding government action was also evident in the salmon industry, where a private antitrust class action alleging collusion to fix prices was filed in May 2019 against salmon producers in the United States, preceding by six months issuance of subpoenas by the US Department of Justice.

Financial Services

Claimants' lawyers have followed the government's lead in pursuing private actions alleging antitrust violations in the financial services sector. However, these cases are not limited to the financial products, instruments and markets that have been the focus of government inquiry (including LIBOR and foreign currency exchange). In August 2017, public pension funds filed a class action against six large banks alleging that the banks illegally colluded with each other to overcharge investors and maintain their control over the stock loan market. In June 2017, a small trading exchange filed an antitrust suit against a number of banks alleging that the banks conspired to exclude the firm from the credit default swap market. These cases demonstrate the willingness of the claimants' bar to pursue antitrust cases related to lines of business in the financial services sector that have not previously been subject to government inquiry.

Wage Fixing and No-Poach Litigation

A series of class actions cases have followed the increased interest from the Department of Justice and state attorneys general in reviewing "no-poach" agreements—agreements

between competitors not to compete for employees—for antitrust violations. A key issue in these private actions is whether the alleged "no-poach" agreement should be analysed under the *per se* or rule of reason standard. The *per se* standard would allow claimants to argue that a "no-poach" agreement is *per se* illegal under the antitrust laws, while applying the rule of reason would require a court to evaluate the pro-competitive features of the "no-poach" agreement against its anti-competitive effects. The Department of Justice has filed Statements of Interest in a number of these private actions, citing its "strong interest in the "correct application" of the antitrust laws. The Department takes the position that because the agreeing parties are in a vertical relationship, these agreements should be analysed under the rule of reason.

Multi-sided Platforms

In a 2018 Supreme Court case, **Ohio v. American Express**, the Court held that the anti-steering provisions in American Express's merchant contracts do not violate federal antitrust law. The anti-steering provisions prohibit merchants who accept American Express credit card payments from offering customers an incentive to use another credit card—such as Visa or MasterCard—at the point of sale to avoid American Express's comparatively higher merchant fees. In its decision, the Court found that the credit-card market should be considered a single market—rather than two separate markets for merchants and cardholders—because "credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant." The court found that in this single market context, the claimants had not adequately met their burden of proving that the anti-steering provisions had anti-competitive effects because they focused their argument on just one side of the market. The court found that "evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anti-competitive exercise of market power." In order for their claim to be successful, claimants would have had to prove that the anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of transactions, or otherwise stifled competition in the two-sided credit card market.

Methodology for the selection of cases

The cases included in the compilation below consist of both follow-on and stand-alone actions and represent some of the most important and recent decisions shaping antitrust litigation in the United States. The compilation is not exhaustive. Instead, the focus was on decisions from the US Supreme Court or federal courts of appeal addressing important issues that regularly arise in US antitrust litigation.

Country: United States of America	
Case Name and Number: Valspar Corp. v. E.I. Du Pont, 873 F.3d 185 (3d Cir. 2017)	
Date of judgment: 2 October 2017	
Economic activity (NACE Code): C.20—Manufacture of chemicals and chemical products	
Court: Court of Appeals for the Third Circuit	**Was pass on raised (yes/no)?** No
Claimants: Valspar Corporation	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: E. I. du Pont de Nemours and Company	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** No—claimant was unable to prove conspiracy.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: On 5 December 2017 the Third Circuit denied Valspar's petition for a rehearing en banc.	**Amount of damages initially requested:** N/A
Key Legal issues: • Standard for inferring an agreement from circumstantial evidence • "Plus factor" evidence of conspiracy	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct	**Method of calculation of damages:** N/A
Individual or collective claims? Individual	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Valspar sued DuPont for conspiring to fix prices for titanium dioxide in violation of the Sherman Act. Valspar—a purchaser of titanium dioxide—alleged that the conspiracy resulted in supracompetitive prices and sued to recover US$176 million that Valspar claimed it was overcharged between 2002 and 2013. The claim relied primarily on 31 instances of parallel price increase announcements. Valspar also supplied "plus factor" evidence of a conspiracy, which included: (i) participation in a trade association data sharing programme, (ii) participation in trade association meetings, (iii) shared use of industry consultants, iv) internal emails indicating awareness of competitor price increases; and v) inter-competitor sales at below market prices. DuPont filed a motion for summary judgment, which was granted by the US District Court for the District of Delaware on grounds that there was insufficient evidence of an actual agreement.

Brief summary of judgment

The Third Circuit affirmed the District Court's grant of the motion for summary judgment, determining that Valspar's evidence of parallel price increases was consistent with conscious parallelism and that the "plus factor" evidence was insufficient to support an inference of conspiracy.

Country: United States of America	
Case Name and Number: Ohio v. American Express Co., 138 S.Ct. 2274 (2018)	
Date of judgment: 25 June 2018	
Economic activity (NACE Code): K.64.9—Other financial service activities, except insurance and pension funding	
Court: Supreme Court of the United States	**Was pass on raised (yes/no)?** N/A—enforcement action
Claimants: United States, Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah, Vermont	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: American Express Company	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Appropriate analysis of two-sided markets in antitrust matters • Anti-steering provisions	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? N/A—enforcement action	**Method of calculation of damages:** N/A
Individual or collective claims? N/A—enforcement action	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? N/A—enforcement action	

Brief summary of facts

After merchant plaintiffs brought a private enforcement action against American Express in 2008,[1] the United States and several individual states similarly brought suit in 2010, alleging that American Express's use of anti-steering provisions in its contracts with merchants violate the Sherman Act; such provisions seek to prevent merchants—who pay higher fees for accepting American Express payments than they do for other credit cards—from encouraging cardholders to use American Express's competitors at the point of sale. The District Court for the Eastern District of New York ruled that the anti-steering provisions violated the Sherman Act. On appeal, the Court of Appeals for the Second Circuit reversed, finding that the two-sided nature of the credit card market renders the provisions not anti-competitive.

Brief summary of judgment

The Supreme Court affirmed the Second Circuit's ruling that, in light of the two-sided nature of the credit card market, the anti-steering provisions were not anti-competitive. The court highlighted how two-sided platforms differ from traditional markets, offering indirect network benefits that depend on the number of participants on each side of the platform. The court ruled that the anti-steering provisions do not have an anti-competitive effect because both sides of the platform must be considered when defining the market; the argument that American Express's conduct merely increased merchant fees—but did not have an anti-competitive effect on the overall market—was unpersuasive. Following the Supreme Court's affirmance of the dismissal of the Government Action, matters resumed in the private merchant plaintiff's actions.

1 In re Am. Express Anti-Steering R. Antitrust Litig., 361 F. Supp. 3d 324, 333 (E.D.N.Y. 2019)

Country: United States of America	
Case Name and Number: In re Apple iPhone Antitrust Litigation, 846 F.3d 313 (9th Cir. 2017)	
Date of judgment: 12 January 2017	
Economic activity (NACE Code): J.58.2—Software publishing	
Court: Court of Appeals for the Ninth Circuit	**Was pass on raised (yes/no)?** Indirectly—the case raises questions of who is an indirect purchaser.
Claimants: Class action; Named plaintiffs: Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, Eric Terrell	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Apple, Inc.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Case is still going through appeals process.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: The Supreme Court of the United States heard oral arguments on 26 November 2018.	**Amount of damages initially requested:** N/A
Key Legal issues: • Standing to bring private damages action • Distinguishing direct and indirect purchasers	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct (as determined by the Ninth Circuit).	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Claimants—purchasers of iPhones and iPhone apps—brought suit alleging that Apple had monopolised the market for iPhone apps. In the iPhone "closed system," Apple controls which apps will run on the iPhone software and, through its App Store, Apple earns a 30% commission on all consumer payments for apps. Apple prohibits app developers from selling apps through any channel besides the App store and discourages iPhone owners from downloading any such apps. The District Court for the Northern District of California granted Apple's motion to dismiss, finding that the claimants lacked standing to sue under the Supreme Court of the United States' *Illinois Brick* precedent, which limits standing to only direct purchasers.

Brief summary of judgment

The Ninth Circuit reversed the District Court's grant of Apple's motion to dismiss. The court found that consumers are direct purchasers of apps and that Apple is a distributor of apps, and was unconvinced by Apple's argument that it merely sells software distribution services to developers.

Country: United States of America

Case Name and Number: In re Processed Egg Products Antitrust Litigation, 881 F.3d 262 (3d Cir. 2018)

Date of judgment: 22 January 2018

Economic activity (NACE Code): A1.4.7—Raising of poultry and G46.3.3—Wholesale of dairy products, eggs and edible oils and fats

Court: Court of Appeals for the Third Circuit	**Was pass on raised (yes/no)?** Indirectly—the case raises questions of who is an indirect purchaser.
Claimants: Class action; Named plaintiffs: Kraft Foods Global, Inc., Kellogg Company, General Mills, Inc., Nestle USA, Inc.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: United Egg Producers, Inc., Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC, Michael Foods, Inc., R.W. Sauder, Inc., Cal-Maine Foods, Inc.	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Case is still going through appeals process.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No appeal pending.	**Amount of damages initially requested:** N/A
Key Legal issues: • Standing to bring private damages action • Distinguishing direct and indirect purchasers	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct (as determined by the Third Circuit).	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Claimant food manufacturers alleged that defendant egg producers conspired to reduce the population of egg-laying hens, resulting in supracompetitive pricing in the market for shell eggs and egg products. Defendants argued that a portion of the total amount of egg products purchased by claimants was indirectly supplied by non-conspirator egg producers, from whom the defendant suppliers purchase a portion of the total supply later sold. According to defendants, the claimants' damages calculation—which included the non-conspirator eggs—violated a prohibition in the case law on "umbrella damages." The District Court for the Eastern District of Pennsylvania granted the defendants' motion for summary judgment, finding that the claimants lacked standing because they impressibly tried to incorporate the prices of non-conspirators into their argument and, further, violated the bar against an indirect purchasers' recovery of "pass through overcharges."

Brief summary of judgment

The Third Circuit reversed the District Court's grant of the defendants' motion for summary judgment. The court highlighted how the purchasers have brought claims against suppliers who participated in a price-fixing conspiracy and who sold a product that incorporated a price-fixed component; that purchasers were undisputably injured by the wrongful conduct of their direct suppliers. On that determination, the court further found that the Supreme Court of the United States' *Illinois Brick* precedent, which limits standing to only direct purchasers, was inapplicable in this case—the claimants are in a direct purchaser relationship with the defendants.

Country: United States of America	
Case Name and Number: Gelboim v. Bank of America Corp., 823 F.3d 759 (2d Cir. 2016)	
Date of judgment: 23 May 2016	
Economic activity (NACE Code): K64.3—Trusts, funds and similar financial entities	
Court: Court of Appeals for the Second Circuit	**Was pass on raised (yes/no)?** No
Claimants: Class action; Named plaintiff: Ellen Gelboim	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: 16 of the world's largest banks, including Bank of America Corporation, Citigroup, JPMorgan Chase, Barclays PLC, Credit Suisse AG, UBS AG, Royal Bank of Scotland PLC	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** N/A
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: Petition for a writ of certiorari to the Supreme Court of the United States was denied on 17 January 2017.	**Amount of damages initially requested:** N/A
Key Legal issues: • Antitrust injury • Standing to sue	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct (as determined by the Third Circuit).	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Follow-on to global investigations into allegations of misconduct with respect to LIBOR submissions, including a US Department of Justice investigation.	

Brief summary of facts

Claimants were purchasers of financial instruments whose rate of return was indexed to the London Interbank Offered Rate, and the defendants were members of the panel that determined the LIBOR each day. Claimants alleged that the defendant banks colluded to artificially depress the LIBOR, creating artificially depressed payouts associated with the financial instruments. The District Court for the Southern District of New York granted the defendants' motion to dismiss, determining that manipulation of the LIBOR did not produce anti-competitive harm.

Brief summary of judgment

The Second Circuit vacated the District Court's grant of the defendants' motion to dismiss. The court ruled that horizontal price-fixing constitutes a *per se* antitrust violation, that a claimant alleging a *per se* antitrust violation does not need to plead harm to competition, and a consumer who pays a price that is elevated because of horizontal price-fixing suffers antitrust injury. The court's decision referred to evidence uncovered in the course of the related Department of Justice investigation but the existence and results of the investigation did not factor into the court's holding. Additionally, the court discussed the possibility that ongoing government investigations globally could result in duplicative discovery, which would impact whether the plaintiffs have antitrust standing. The court did not reach a decision on that issue and remanded the case to the District Court for further proceedings.

Country: United States of America	
Case Name and Number: Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., 138 S.Ct. 1865 (2018)	
Date of judgment: 14 June 2018	
Economic activity (NACE Code): C21—Manufacture of basic pharmaceutical products and pharmaceutical preparations	
Court: Supreme Court of the United States	**Was pass on raised (yes/no)?** No
Claimants: Class action; Named plaintiff: Animal Science Products, Inc.	**(If in EU) Was the EU Damages Directive referred to/relied upon (and if so, for procedural or substantive provisions)?** N/A
Defendants: Hebei Welcome Pharmaceutical, North China Pharmaceutical Group Corporation, China Pharmaceutical Group, Weisheng Pharmaceutical Company, Aland Jiangsu Nutraceutical Company, Northeast Pharmaceutical Company	**Were damages awarded (if so, how much and to whom)? If not, why not (e.g. lack of standing, causal link)? Was there another outcome or remedy?** Case is still ongoing.
Is/was the case subject to appeal (yes/pending/no)? If yes, briefly describe current status/outcome: No	**Amount of damages initially requested:** N/A
Key Legal issues: • Role of international comity in conspiracy cases	**Is the dispute likely to be settled privately?** N/A
Direct or indirect claims? Direct (as determined by the Third Circuit).	**Method of calculation of damages:** N/A
Individual or collective claims? Collective	**Name and contact details of lawyer who has drafted summary:** Benjamin Holt, Partner,Hogan Lovells US LLP, benjamin.holt@hoganlovells.com
Follow-on (EC or NCA?) or stand-alone? Stand-alone	

Brief summary of facts

Claimants were purchasers of vitamin C, and brought suit alleging that a group of Chinese manufacturers/exporters of the vitamin had illegally fixed prices. In denying the Chinese companies' motion to dismiss, the District Court for the Eastern District of New York determined that statements made by The Ministry of Commerce of the People's Republic of China, which argued that the alleged conspiracy was a pricing regime mandated by that government, were not conclusive. After a jury trial, a verdict was returned for the claimant-purchasers. On appeal, the Court of Appeals for the Second Circuit reversed, ruling that US federal courts are "bound to defer" to a foreign government's construction of its own law provided that such construction is reasonable.

Brief summary of judgment

The Supreme Court vacated and remanded the decision of the lower court, finding that, while US federal courts must give respectful consideration to the views of a foreign government, they are not bound to give those statements conclusive effect. Under US law, a federal court can consider any relevant material when ascertaining foreign law, and the weight that should be given to a foreign state's views about the meaning of its own laws will depend on the circumstances of the case.

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ICC Publication: KS101E