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The International Comparative Legal Guide to:

Competition Litigation 2018

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A practical cross-border insight into competition litigation work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Competition Litigation*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 29 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Euan Burrows of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

For the purposes of this discussion, we will refer to claims that can be brought before the General Court and the European Court of Justice (together the "European Courts") or the national courts of the EU Member States in general.

The scope of claims that may be brought before the national courts of the EU Member States for breach of EU competition law (*i.e.*, violation of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union (hereafter "TFEU")) includes: (i) actions for a declaration of nullity of contractual arrangements that are contrary to EU competition law; (ii) interim measures (including cease and desist orders in relation to conduct violating EU competition law); and (iii) actions for damages.

The scope of claims that may be brought before the EU General Court includes: (i) actions for the annulment of a Commission "act", defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (case 60/81 *IBM v Commission*); (ii) actions for failure to act; and (iii) interim measures. Appeals on points of law against the judgments of the General Court may be brought before the European Court of Justice. In October 2011, in joined cases C-463/10 and C-475/10 *Deutsche Post v Commission* and later in case T-421/07 *Deutsche Post v Commission* in connection with a Decision to initiate the procedure laid down in Article 88(2) EC (State Aid), the General Court found that "*according to settled case-law, only a measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 230 EC [263 TFEU]*". In its judgment of 24 October 2013 in case C-77/12 P *Deutsche Post v Commission*, the Court of Justice quashed the judgment of the General Court, finding that an act that alters the legal status of an individual or undertaking contains all the elements of an act within the meaning of Article 263 TFEU. In the judgment of 15 September 2016 *Italy v Commission* (T-353/14 and T-17/15, under appeal), the General Court had the opportunity to further clarify the concept of a measure against which an action for annulment may be brought, within the meaning of Article 263 TFEU. Something as limited in its legal effects as a competition notice establishing the normative framework of a specific examination was considered to entail compulsory legal effects by the Court and, thus, represented an act against which an action might be brought.

The Court of Justice may also be consulted for a preliminary ruling, whereby the Court of Justice, at the request of a national court of an EU Member State, renders an interpretative ruling on a point of EU law that has arisen in the context of litigation before the national court.

1.2 What is the legal basis for bringing an action for breach of competition law?

Articles 101 and 102 TFEU and Regulation 1/2003 on the implementation of Articles 101 and 102 TFEU, as interpreted by the European Courts, form the substantive basis for an action for breach of EU competition law.

According to the case law of the European Court of Justice, Articles 101/102 TFEU have 'direct effect', which means they create rights for individuals which the National Competition Authorities and the national courts of the EU must safeguard (case 127/73 *BRT v SABAM* , case 26/62 *Van Gend en Loos*). In addition, the TFEU, and in particular Articles 101 and 102, have primacy over the national laws of the EU Member States (case 6/64 *Costa v ENEL*).

The procedural grounds for bringing a claim before the European Courts include Article 263 TFEU, which permits the European Courts to annul a Commission decision on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or misuses of powers. Article 265 TFEU enables action to be taken against the Commission's failure to act, and Article 278 TFEU provides for interim relief.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Articles 101 and 102 TFEU are integrated into the national legal order of each EU Member State. National courts are required to set aside any national legislation and/or contractual arrangements that contravene Articles 101/102 TFEU (*see* question 1.2 above).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The European General Court and the European Court of Justice are not specialist competition law courts. In addition, they do not have jurisdiction to rule on matters between private litigants, except pursuant to the procedure of preliminary rulings, described above.

At the national level, there may be specialist courts to which competition law cases are assigned depending on the EU Member State in question. However, all national courts and authorities

in the EU are required to ensure the full effectiveness of the EU competition rules (*see* question 1.3 above).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

As discussed in questions 1.2 and 1.3 above, Articles 101 and 102 TFEU as well as Regulation 1/2003 have primacy over national law and are directly applicable. As a result, they can be invoked by any individual or undertaking in civil disputes before national courts, in accordance with the procedural rules of the Member State and court in question.

Any individual or undertaking with direct and individual concern may bring an action before the European Courts.

In addition, under the *Manfredi* judgment (joined cases C-295 to C-298/04), any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This was confirmed in case C-360/09 *Pfleiderer AG v Bundeskartellamt*, which found that "*it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition*" adding that "*actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union*".

Moreover, the Court of Justice, in case C-199/11 *Europese Gemeenschap v Otis NV and Others*, indicated that the European Commission was entitled to bring a damages claim before national courts. In that respect, the Court of Justice noted that "*the Charter [of Fundamental Rights of the European Union] does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU*".

The *Manfredi* judgment also stated that indirect purchasers who had no direct dealings with the infringer should have standing to sue. The exercise of the right to sue is governed by national law provisions, but the right to sue for damages pursuant to EU competition law may not be less favourable than the equivalent domestic law right. Indeed, as explained in case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, given that "Article 101(1) TFEU produces direct effects in relations between in*dividuals and creates rights for individuals, the practical effect of the prohibition laid down in that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*".

After a public consultation on collective redress based on a joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, the European Commission issued on 11 June 2013 a recommendation (along with a communication) setting out its views as to the appropriate mechanisms for enabling citizens to obtain effective redress through collective actions while limiting the potential for excessive and abusive litigation (*see* Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law). This recommendation applies not only to collective redress for infringements of competition law, but also for infringements of, *inter alia*, consumer protection, environmental, and financial services laws. The recommendation lays out a series of "principles" that all Member States should follow in devising and implementing collective redress regimes. In particular, two important aspects should be mentioned.

First, the recommendation sets out that the claimant party should be formed on the basis of the "opt-in" principle, any deviation from which should be justified by "reasons of sound administration of justice".

Second, the recommendation explains that representative actions should be brought only by public authorities or by representative entities that have been designated in advance or certified on an *ad hoc* basis by a national court for a particular case and that: (i) are non-profit entities; (ii) have a direct relationship between their main objectives and the rights claimed to have been violated; and (iii) have sufficient financial resources, human resources, and legal expertise to adequately represent multiple claimants.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Directive on antitrust damages actions does not cover this matter. There are no specific rules at the EU level governing jurisdictional matters for competition law claims. The jurisdiction of the European Courts is determined by the scope of its judicial review, as discussed below. In relation to actions for damages, the Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation (EC) 1215/2012) provides that a defendant who is domiciled in an EU Member State can be sued in that Member State, irrespective of where the contract was concluded or the damage was suffered.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State. With the Directive on antitrust damages actions, the Commission is seeking to remove a "*number of practical difficulties which victims frequently face when they try to obtain compensation for the harm they have suffered*" (IP/14/455).

As described in question 1.1, the European Courts have jurisdiction only over a limited number of claims, including: (i) actions for annulment of a Commission "act", defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position; (ii) actions for failure to act; and (iii) interim measures.

Claimants should consider a few factors when bringing actions before European Courts. For example, claimants, when seeking to annul a Commission "act", should bear in mind the level of discretion that the Commission enjoys when assessing purported infringements of competition law. For further details, please refer to question 4.1 below.

1.8 Is the judicial process adversarial or inquisitorial?

The process before the national court depends on the national procedures of each Member State, provided that, as stated above, the national procedures applicable to EU law rights are not less favourable than those applicable to equivalent domestic law rights, and do not deprive EU law rights of their full effectiveness (*see* case C-213/89 *Factortame I*).

The process before the European Courts is adversarial, and relies nearly exclusively on written pleadings.

In this respect, the *Menarini* judgment of the European Court of Human Rights of 27 September 2011, in its application of Article 6 of the European Convention on Human Rights ("ECHR") embodying the right to a fair trial, found that administrative authorities can impose criminal sanctions, provided their decisions are subject to review by a court having full jurisdiction. The Court of Justice in its *KME* and *Chalkor* judgments of 8 December 2011 (cases C-386/10 P *Chalkor v Commission*, C-389/10 P *KME v Commission*, and C-272/09 P *KME v Commission*), after carefully setting out the various standards of review, concluded that the EU courts provide effective judicial protection within the meaning of Article 47 of the Charter of Fundamental Rights (which implements Article 6 of the ECHR).

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The European Courts may grant interim relief in relation to an action pending before them.

Private parties can also seek interim measures before the national courts. Under the established case law of the European Court of Justice (*Factortame I*), national courts have jurisdiction to grant interim relief when a right derived directly from effective EU law (such as Articles 101 and 102 TFEU) is under judicial examination.

2.2 What interim remedies are available and under what conditions will a court grant them?

The European Courts can grant interim measures when (i) a *prima facie* case for a violation of EU competition law is established, and (ii) there is urgency, *i.e.*, there will be serious and irreparable damage absent interim measures before the judgment on the substance of the case. However, interim measures are without prejudice to the final decision on the substance (cases 60 & 190/81 R *IBM v Commission*).

Interim measures granted by the European Courts may consist of a decision to suspend a Commission decision entirely or in part. This may apply to Commission decisions ordering undertakings to modify their conduct, or to decisions ordering the payment of a fine. Interim relief may also take the form of an order to the Commission to take certain measures. The European Courts have generally been reluctant to grant a request for interim relief against strictly procedural decisions of the Commission.

The two main conditions set out at the EU level are also generally followed by national courts of the EU Member States. However, the specific application of these conditions and the related procedures for seeking and obtaining interim relief are a matter of national law (case C-430/93 *Van Schijndel*). The adoption of Regulation 1/2003 has prompted the introduction of a series of national legislative amendments to align the interim relief powers conferred to national competition authorities under EU law with those conferred by national law.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Final remedies granted by the European Courts consist of the annulment of the Commission decision under appeal, or the issuance of a judgment ordering the Commission to take certain measures.

Undertakings or individuals may also claim damages for harm caused as a result of competition law infringements before national courts. In the landmark 2001 European Court of Justice judgment, *Courage v Crehan* (C-453/99) (confirmed by the *Manfredi* judgment in 2006, cited in question 1.5 above), the Court held that any individual or undertaking who has suffered loss by a contract or by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU can claim damages from the undertaking that has committed the breach. This was confirmed in case C-360/09 *Pfleiderer AG v Bundeskartellamt* in which the court explained that "*it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition*". As noted in case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, the right of any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU, "*constitutes effective protection against the adverse effects that any infringement [...] is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation*".

The EU Directive on antitrust private actions brought about a harmonised body of rules across all Member States to guarantee the exercise of the right to full compensation against antitrust infringements for undertakings or individuals. A new directive on rules governing actions for damages under national law for infringements of the competition law rules of Member States and the European Union (the "Directive") was approved by the Strasbourg plenary chamber of the European Parliament on 17 April 2014. The Council formally adopted the Directive on 10 November 2014 and it was signed into law on 26 November 2014. The purpose of the Directive is to foster private enforcement in Europe while protecting the efficacy of the Commission's leniency programme. The Directive set forth measures to be implemented in Member States' legislation by no later than 27 December 2016. The Commission requested Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta, and Portugal to fully implement the Directive into national law on 13 July 2017. These Member States now have two months to inform the Commission of measures taken to implement the Directive. In the absence of a satisfactory reply, the Commission may decide to refer them to the Court of Justice. The provisions of the Directive do not affect damages actions for infringements of national competition law which do not relate to trade between Member States within the meaning of Article 101 or 102 TFEU.

Key principles include that: (i) claimants are able to rely on a final decision of a national competition authority or a review court finding an antitrust infringement as proof of the infringement (for

actions brought in other Member States, the decision of the national competition authority will be considered at least as *prima facie* evidence that an infringement of competition law has occurred); (ii) claimants with access to certain types of evidence and courts can order the defendant or other third parties to produce the relevant evidence; (iii) rules on limitation periods have been harmonised to provide for a limitation period of at least five years; and (iv) a rebuttable presumption applies that cartels cause harm. The Court confirmed in case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* that the procedural rules governing actions for damages "*must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law*". This is also confirmed by Recital 7 of Regulation 1/2003, which states that national courts within the EU, when dealing with disputes between private individuals, shall protect the subjective rights under EU law, for example, by awarding damages to the victims of infringements. *See* question 1.5 above regarding legislation at the EU level in relation to mechanisms of collective redress before the Member State courts.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under EU law, the damages that can be sought by private plaintiffs are compensatory (and not punitive). In *Manfredi*, the European Court of Justice held that victims of antitrust infringements should be able to obtain full compensation of the real value of the loss suffered. The entitlement to full compensation extends not only to the actual loss due to an anticompetitive conduct, but also to the loss of profit as a result of any reduction in sales and includes a right to interest.

While there is no guidance on the actual methodology to be used for the quantification for damages at EU level, the Commission issued a Communication and a Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules. The aim of the Guidance Paper is to "*offer assistance to national courts and parties involved in actions for damages by making more widely available information relevant for quantifying the harm caused by antitrust infringements*".

The Directive does not provide specific guidance on the quantification of harm, but establishes a rebuttable presumption of harm in the case of cartels. It is for the domestic legal system of each Member State to quantify harm and for the Member States and the national courts to determine the requirements the claimant has to meet when proving the amount of the harm suffered. However, these domestic requirements should not be less favourable than those governing similar domestic actions, nor should they render the exercise of the right to damages practically impossible or excessively difficult.

There have already been a number of successful follow-on damages claims in the EU following the Directive. Apart from judgments issued at an EU or national level focused on jurisdictional or procedural issues, some under appeal (*see, e.g.*, C-138/17 P and C-146/17 P *Gascogne*, C-150/17 P *Kendrion*, C-222/17 P *ASPLA and Armando Álvarez*, and T-673/15 *Guardian Europe* – all about damages for undue delays in their respective judicial proceedings), a few national courts have awarded damages related to antitrust violations. On 23 March 2015, the Paris Commercial Court ruled that Orange had to pay €8 million in damages to its competitor Outremer Telecom for abuse of dominance in French Caribbean markets. On 10 June 2015, a Dutch district court ordered Alstom to pay €14.1 million in damages to Dutch grid operator TenneT for charging inflated prices in relation to its participation in a switchgear cartel. The ruling is currently on appeal. In connection with the same cartel, ABB (who blew the whistle in the EU 2007 cartel proceeding and received full immunity to that effect) was also ordered to pay damages to TenneT by a Dutch court in the amount of €23.1 million on 3 April 2017. In three judgments on 6 April 2017, the French courts ordered the state-owned railway firm SNCF to pay the travel operator Switch €6.9 million in damages resulting from an illegal online booking agreement with Expedia, as found in 2009 by the French competition authority. Also, in France, a court ordered several road sign cartelists to pay damages totaling €5.54 million to two governmental departments. Participants in a German bid-rigging cartel that affected railway tracks, switches and sleepers, were also found liable for damages by the Dortmund Regional Court on 21 December 2016, following a claim by a public rail transportation company. Finally, on 19 July 2017, a Düsseldorf court ruled that state-owned broadcasters ARD and WDR breached antitrust rules by agreeing to cut contracts with an unnamed network operator in 2012, since they decided to end the contracts not because of individual economic motives, but based on an anticompetitive agreement. Consequently, the contract termination was void and the payment obligation to the cable network operator remained valid. As a compensation, the court awarded €3.5 million in damages to the cable network company.

Given the difficulty of the quantification exercise and in order to safeguard effective claims for compensation, the Directive provides that Member States should ensure that, where requested, and if they deem it appropriate, national competition authorities provide guidance on the determination of the quantum of damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No. The fines imposed by competition authorities are aimed at punishing and deterring individuals and/or undertakings from breaching EU competition law, whereas damages are compensatory and aim to compensate the harm done to victims of a competition law infringement. (*See* MEMO/14/310: Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violation which addresses this specific question.) However, competition authority decisions finding an infringement increasingly also quantify the harm caused by the competition law infringement. References to the value of harm caused by the infringement are a basis for follow-on actions for damages before the national courts.

4 Evidence

4.1 What is the standard of proof?

In the following discussion, we will be referring to the procedure before the European Courts. There is a great diversity of procedural rules of the courts in the different Member States that will be assessed in other chapters of this publication.

It is important to underline that the European Courts are judicial review courts, and they do not have full appellate jurisdiction with the power to adopt decisions on the merits of the case. Article 263 TFEU permits the European Courts to annul a Commission decision where it is based on a manifest error of assessment, which includes factual error, a material error in the assessment of the relevant facts, the drawing of incorrect legal conclusions from the facts, or violations of procedural rules and due process principles.

The European General Court in its judgment in *GlaxoSmithKline v Commission* (C-513/06) has specified that where the Court's review requires a complex economic assessment, "*the review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts*".

The European Courts have generally referred to the standard for judicial review as one requiring the Commission to produce sufficiently precise, consistent, and convincing evidence for the existence of an infringement. (*See* joined cases 29/83 and 30/83 *CRAM & Rheinzink v Commission*.) This standard is reflected in Article 2 of Regulation 1/2003. Furthermore, this was confirmed in case T-439/07 *Coats Holdings v Commission*, which held that "*[the Commission] must produce sufficiently precise and coherent proof to establish that the alleged infringement took place*". In addition, the European Courts have held that in proceedings which may result in severe fines for the defendants, the Commission, in assessing the evidence, should apply the principle of presumption of innocence under Article 6(2) of the ECHR, which the European Court of Justice has recognised as a general principle of the European Union's legal order (*see* case T-442/08 *CISAC v Commission*). In this respect, the European Courts will generally accept the existence of an infringement if the Commission has been able to establish certain key facts. For example, the European Courts have accepted the existence of an infringement on the basis of the single statement "*where its evidential value is undoubted*". (*See* case T-25/95 *Cimenteries CBR v Commission*.) The European Commission also applies presumptions that have been confirmed by the courts, such as the presumption of participation in an identified cartel when certain facts have been established, the presumption of the continuous nature of the infringement (again, when certain facts have been proved) and, the most controversial, the presumption of parental liability.

4.2 Who bears the evidential burden of proof?

In proceedings brought before the European General Court and the European Court of Justice, the Commission bears the burden of proving that Articles 101 or 102 TFEU were infringed. Conversely, an undertaking relying on Article 101(3) TFEU must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied. The burden of proof thus falls on the undertaking requesting the exemption.

In its judgment in *Commission v GlaxoSmithKline*, the European Court of Justice confirmed that restrictions by object within the meaning of Article 101(1) TFEU do not constitute violations *per se* but are, in theory, capable of exemption and are entitled to a serious and exhaustive analysis under Article 81(3) if the company provides relevant and credible arguments in favour of an exemption. The Court also specified that Article 101(3) requires a prospective analysis on whether the claimed efficiencies in the form of objective advantages are "*sufficiently likely*", and that this analysis must be undertaken in the light of the factual arguments and evidence provided by the company seeking an exemption.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Yes. The Directive includes two rebuttable presumptions that will make it easier to prove damages claims.

First, in order to "*remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages*", the Directive introduces a presumption that cartel infringements cause harm. As explained in the Directive, "*it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm*". Such presumption results from the Commission's reliance on studies indicating that only ~7% of cartels do not lead to overcharging.

Second, the Directive puts in place a presumption that cartel overcharges are at least in part passed on to indirect purchasers. As explained in the Directive, "*taking into account the commercial practice that price increases are passed on down the supply chain*", it is "*appropriate to provide that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringer has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show prima facie that such passing-on has occurred, unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser*". This rebuttable presumption gives indirect purchasers much higher chances to obtain compensation as compared to the previous systems in most EU countries. Under those, in fact, indirect purchasers had the burdensome task of proving that the harm has been passed on down the supply chain.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The value of the evidence brought before the Court is assessed based on "*the credibility of the account it contains*", in particular on "*the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face, the document appears sound and reliable*". (*See* the Opinion of Advocate General Vesterdorf in case T-1/89 *Rhone-Poulenc v Commission*.) In this respect, the European Courts attach more importance to contemporaneous documents, because they are written in *tempore non suspecto*, *i.e.*, before any infringement was alleged to have taken place.

The introduction by the European Commission of a leniency system has resulted in greater reliance also on non-contemporaneous statements, however. (*See* joined cases T-67/00 *et al.*, *JFE Engineering v Commission*.) In its *ICI* judgment of 5 June 2012 (case T-214/06, *Imperial Chemical Industries Ltd. v European Commission*), the General Court confirmed that statements made by companies in support of leniency could not be regarded as devoid of probative value, as any attempt by the company applying for leniency to deceive the EU Commission could endanger its potential favourable position under the Leniency Notice. The General Court stated that corporate statements made in the context of an immunity application could not be disregarded, in particular when their content was confirmed by subsequent leniency applications submitted by other companies.

In the judgment of 8 September 2016 *Goldfish and Others v Commission* (T-54/14), the General Court had the opportunity to rule on the use of secret telephone conversations as evidence in an investigation relating to an infringement of competition law. The

Court stated that it followed from the case law of the European Court of Human Rights that the use of an illegal recording as evidence (in that case by the Commission while assessing an infringement of Article 101 TFEU) did not in itself conflict with the principles of fairness laid down in Article 6(1) of the ECHR, even where that evidence had been obtained in breach of the requirements of Article 8 of the same Convention, where the applicant in question had not been deprived of a fair proceeding or of his rights of defence, and also where that had not been the only item of evidence relied on in support of the decision.

The European Courts accept the submission of expert evidence. The EC Statute and the Rules of Procedure of the Court of Justice allow the European Court of Justice to appoint an expert to provide an opinion or prepare a report. (*See* Article 45.2 (d) and Chapter 2, Section 2 of the Rules of Procedure; *see* also Articles 20, 25, and 35 of the EC Statute.)

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Both the Court of Justice and the General Court can require parties to the proceeding or third parties to produce relevant documents and information, including "*Member States and institutions, bodies, offices and agencies not being parties to the case*". The procedures pursuant to which access is provided are in those cases governed by the EC Statute and the Rules of Procedure. (*See* Article 45.2 (b) of the Rules of Procedure, and Articles 24 and 53 of the EC Statute.)

Access to the documents of the European Institutions is governed by Regulation 1049/2001, which aims to ensure the greatest possible transparency of the decision-making process of the EU institutions, such as the European Commission. The Regulation is used increasingly by damages claimants as a basis to request access to leniency material and other documents in the Commission's file relevant to findings of infringement of Articles 101 and 102 TFEU. There have been a number of judgments of the EU General Court as well as the Court of Justice on the implementation of Regulation 1049/2001. In its judgments of 28 June 2012 (case C-404/10 *European Commission v Éditions Odile Jacob SAS* and case C-477/10 P *European Commission v Agrofert Holding a.s.*), the Court of Justice found that the Commission is entitled to refuse access to all documents relating to the merger control proceedings exchanged between the Commission and notifying parties and third parties, without carrying out a concrete, individual examination of those documents.

In relation to leniency documents, the Court of Justice held in its *Pfleiderer* judgment of 14 June 2011 that, absent legislation, the scope of access to leniency documents was for national courts to decide on a case-by-case basis, according to national law. According to *Pfleiderer*, it is for national courts to conduct a "*weighing exercise*", *i.e.*, 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*". The judgment left a number of questions unresolved, including the application of this weighing exercise to the different types of leniency materials included in a Member State competition authority's file, such as corporate statements and pre-existing documents, and the application of the weighing exercise to materials in the EU Commission's file. The Court in *Pfleiderer* also gave little guidance as to the determining factors for conducting the balancing of interests, arguably leaving substantial discretion to the national courts of EU Member States. The EU Commission has subsequently confirmed that it considers the principles of *Pfleiderer* to apply equally to leniency materials in the EU Commission's file. *See* also question 10.2 below.

The *Bundeswettbewerbsbehörde* judgment confirmed the "*weighing exercise*" set forth in *Pfleiderer*, clearly stating that, pursuant to the principle of effectiveness, national courts must have the possibility to conduct such an exercise. The Court noted that "*EU law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved*".

In addition, although the Court admitted that leniency programmes are "*useful tools*", which as such may justify a refusal to grant access to certain documents, these programmes "*do not necessarily mean that [such an] access may be systematically refused*". As the Court noted, "*any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case*". Accordingly, "*[i]t is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency program that non-disclosure of that document may be justified*". However, similarly to the *Pfleiderer* judgment, the *Bundeswettbewerbsbehörde* judgment left a number of questions unresolved, *e.g.*, the application of this weighing exercise to different types of leniency materials.

Pursuant to the Directive, the legislation of the Member States must provide for access to evidence once the plaintiff "*has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*" (Article 5 of the Directive). Member States must ensure the disclosure of evidence by order of the courts relevant to their claim without it being necessary for claimants to specify individual items of evidence.

Disclosure will extend to third parties, *i.e.*, including public authorities. The Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.

National courts must limit the disclosure of evidence to what is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts will have to consider the legitimate interests of all parties concerned.

The Directive provides that national courts cannot, at any time, order the disclosure or permit the use of leniency corporate statements or settlement submissions. It also notes that information prepared specifically for the proceedings of a competition authority, as well as information drawn up by a competition authority in the course of its proceedings, can only be disclosed or used by national courts after a competition authority has closed its proceedings.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses can be summoned by the European Court of Justice or the General Court at their own motion, on application by a party, on the initiative of the Advocate General or at the suggestion of an expert appointed by the Court. The President of the Court can put questions to the witness, as can the other judges and the Advocate General. The representatives of the parties can also put questions

to the witness, under the control of the President of the Court. The General Court's Rules of Procedure provide that if a witness who has been summoned fails to appear, refuses to give evidence or take the oath, a penalty may be imposed by the Court. (*See* Chapter 2, Section 2 and Article 124 of the Rules of Procedure, and Articles 26–30 of the EC Statute.) Available procedures before Member State courts are determined by national legislation.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A finding by the EU Commission or a Member State competition authority that a violation of Article 101 or 102 TFEU has occurred has probative value as to the existence of an infringement and can be the basis for a follow-on action for damages in a Member State court.

The Directive provides that a claimant can rely on a final decision of a national competition authority (or a review court) finding an infringement. Such decision or judgment will be considered as proof of the infringement (Article 9(1) of the Directive). A decision of a national competition authority will be considered at least as *prima facie* evidence that an infringement of competition law has occurred in a different Member State (Article 9(2) of the Directive).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Parties are allowed to submit non-confidential versions of their written pleadings within a time frame imposed by the Courts, providing a description of the redacted information and a justification for confidential treatment. The Courts will grant confidential treatment if it can be demonstrated that the disclosure of the information could result in serious harm to the undertaking. (*See* case T-353/94 *Postbank N.V. v Commission*.) Available procedures before Member State courts are determined by national legislation.

The Directive provides that even if relevant evidence contains business secrets or any other confidential information, such evidence should in principle be made available to claimants. However, the Directive also considers that such confidential information needs to be adequately protected. Disclosure of evidence must be appropriate.

Within the framework of the rules on disclosure in the Directive, a range of measures to protect confidential information from being disclosed during the proceedings is envisaged, such as redaction, hearings *in camera*, limitation of the individuals entitled to access the evidence, and production of expert summaries.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Pursuant to Article 15(1) of Regulation 1/2003, national courts can request the opinion of the European Commission on economic, factual, and legal matters. Opinions generally relate to the relevant case law or the Commission's guidelines and regulations. Pursuant to Article 15(3) of Regulation 1/2003, the Commission can also submit observations to Member State courts when required to ensure the consistent application of Articles 101 and 102 TFEU. These provisions are not used frequently. Available procedures before Member State courts are determined by national legislation.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

An undertaking may appeal a Commission decision finding a violation of Article 101 TFEU on the basis of a public interest justification, provided that it can show that the conduct referred to in the decision had procompetitive benefits that were necessary and proportional to its anticompetitive effects pursuant to Article 101(3) TFEU. (*See* also question 4.2 above.)

While the European Courts have not recognised a similar "efficiencies" defence to be available in relation to conduct allegedly infringing Article 102 TFEU, the European Commission's Guidance Paper on its enforcement priorities in applying Article 82 EC [now Article 102 TFEU] also discusses the conditions for an efficiency defence.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The passing on defence is specific to actions for damages, which are brought before Member State courts. Available procedures before Member State courts are determined by national legislation.

The passing on defence is provided for in the Directive (Article 13), which allows antitrust infringers to demonstrate that the price increase was, at least partially, passed on by the claimant to his own customers. When applying this defence, the defendant must prove the existence and extent of the pass-on of the overcharge.

The Directive also addresses the situation of indirect purchasers (Article 14) and makes it easier for them to prove that passing on occurred further in the supply chain. For that purpose, the indirect purchaser must merely establish that (i) the defendant has committed an infringement of competition law, (ii) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant, and (iii) he purchased the goods or services that were the subject of the infringement of competition law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

An appeal before the General Court must be brought within two months of the notification of the decision appealed against or, in case the appeal is brought by an undertaking who is not the addressee of the decision, within two months from the date of the publication of the decision in the Official Journal. (*See* Article 263 TFEU.) This time period is increased by 10 days on account of distance.

Similarly, appeals against judgments of the General Court must be brought within two months of the notification of the final judgment of the General Court. (*See* Article 56 of the EC Statute.) Limitation periods for claims to be brought before national courts are based on the legislative provisions of each Member State.

The Directive requires Member States to clarify their national rules regarding limitation periods applicable to damage claims. The limitation period for bringing damages actions must be at least five years (Article 10(3) of the Directive) and shall begin when the infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) the behaviour; (ii) the fact that the behaviour constitutes an infringement of competition law; (iii) the fact that the infringement of competition law caused harm to him; and (iv) the identity of the infringing undertaking (Article 10(2) of the Directive).

In addition, the Directive sets out that the limitation period will be suspended (or interrupted, depending on the national legislation) from the moment a competition authority starts investigating an alleged infringement. The suspension will end, at the earliest, one year after the infringement decision has become final. In practice, this means that claimants will have at least one full year to bring a civil action for damages following the competition authority's final decision.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Although it is difficult to provide a general indication, a procedure before the General Court has been estimated to have an average duration of about 38.2 months, according to the 2016 Annual Report of the Court, for competition cases. The average time frame for a procedure before the European Court of Justice is approximately 12.9 months, according to the same report, for appeals. On application of one of the parties, and having heard the other parties and the Advocate General, the General Court may apply an expedited procedure, in which case the Court will impose conditions limiting the volume and the presentation of the pleadings. In 2016, the European Court of Justice adopted a simplified method for dealing with appeals brought in the area of access to documents (as well as relating to public procurement and intellectual and industrial property). Available procedures before Member State courts are determined by national legislation.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Parties may withdraw their appeal before the General Court or the European Court of Justice. Upon request from the other parties to the proceedings, the party withdrawing its appeal may be ordered to pay the costs of the proceedings. (Article 69.5 of the Rules of Procedure of the Court of Justice.) Available procedures before Member State courts are determined by national legislation.

The Directive requires Member States to introduce, if not already applicable, rules to facilitate out-of-court resolution of private claims. The limitation periods and court proceedings must be suspended during the settlement discussions for a period not exceeding two years but only for the parties to the negotiations (Article 18(1) of the Directive). The Directive also addresses the effect of partial consensual settlement on any subsequent private actions (Article 19 of the Directive).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

The Commission's 2013 Recommendation on collective redress invited Member States to introduce, by July 2016, collective redress mechanisms, including actions for damages. Most Member States already have collective redress mechanisms in place (*see* p.18 at http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf). Collective damages actions are extremely important for consumers harmed by antitrust violations. Since the Directive applies to any damages actions in the antitrust field, it also applies to collective damages actions in those EU countries where they are – or will be – available. Collective settlements are in principle allowed, but specific rules are set out or will be determined at the national level. Belgium, the Netherlands, and the United Kingdom, for instance, already has collective settlements procedures in place.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The Courts will generally order payment at a party's specific request. Moreover, the Courts have discretion to order a party, even if successful, to pay for some or all of the legal costs incurred by the other party or parties in case they consider that the successful party unreasonably caused these costs to be incurred. (*See* Articles 138 and 139 of the Rules of Procedure of the Court of Justice.) Available procedures before Member State courts are determined by national legislation.

The Commission's recommendation on collective redress provides that the legal costs of the winning party should be borne by the losing party.

8.2 Are lawyers permitted to act on a contingency fee basis?

There are no rules under EU competition law prohibiting contingency fee arrangements for appeals before the European Courts. Available procedures before Member State courts are determined by national legislation.

The Commission's recommendation regarding collective redress provides that Member States should not allow methods of attorney compensation, such as contingency fees, that risk creating an incentive to unnecessary litigation. If a Member State decides to allow contingency fees, appropriate national regulation of those fees in collective redress cases should be implemented.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no rules under EU competition law regulating or prohibiting third party funding of appeals before the European Courts. Available procedures before Member State courts are determined by national legislation.

As indicated above, the European Commission, in its recommendation regarding collective redress, set out a series of common, non-binding principles for collective redress mechanisms in the Member States, including, *inter alia*, third party funding.

As a general principle, the Commission's recommendation states that third party funding should be allowed, but only under certain conditions. In particular, the third party should be prohibited from: (i) seeking to influence procedural decisions of the claimant party, including on settlements; (ii) providing financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent; and (iii) charging excessive interest on the funds provided.

Additionally, the Commission's recommendation sets out that the court should be allowed to stay the proceedings if: (i) there is a conflict of interest between the third party and the claimant and its members; (ii) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; and (iii) the claimant has insufficient resources to meet any adverse costs should the collective redress procedure fail.

Lastly, compensation to third party funders may not be based on the amount of the settlement reached or compensation awarded to the claimant unless this funding arrangement is regulated by a public authority.

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments of the General Court are subject to appeal with the European Court of Justice. Available procedures before Member State courts are determined by national legislation.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Full or partial immunity from fines can be offered by the European Commission for cartel infringements. Applicants for leniency with the European Commission are not granted immunity from civil claims.

However, pursuant to the Directive, immunity recipients are not jointly and severally liable to all claimants. Indeed, immunity recipients would only be liable to claimants who are their own direct or indirect purchasers or providers, except when other claimants show that they are unable to obtain full compensation from other defendants (*see* Article 11(3) of the Directive).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The question of whether a leniency applicant can be forced to submit or make available leniency materials and related documents provided to the European Commission in a follow-on court proceeding has not yet been decided by the European Courts, although there have been some Member State court judgments on this subject (*e.g.*, in Germany). Leniency applicants will generally refer to the fact that their applications and related documents form part of the competition authority's file and it is up to the authority to decide on disclosure.

As explained under question 4.5 above, in its *Pfleiderer* judgment of 14 June 2011, the European Court of Justice concluded on a matter involving access to information submitted pursuant to a Member State leniency programme, that it is for the Member States to establish and apply national rules on the right of access to documents relating to leniency procedures by persons adversely affected by a cartel. The Court noted that the application of these rules entailed a "*balancing act*" between protecting the effectiveness of the leniency programmes, and the right of individuals to claim damages for losses caused by an infringement of the competition laws. Advocate General Mazak had, in his Opinion in the same case, distinguished between voluntary self-incriminating statements, which should not be made available, and other pre-existing documents submitted by a leniency applicant. (*See* case C-360/09 *Pfleiderer AG v Bundeskartellamt*.) This "*balancing act*" was confirmed in the *Bundeswettbewerbsbehörde* judgment, although this judgment also made no distinction between different leniency materials forming part of the Commission's file. The Court simply noted that the "*weighing exercise*" should be undertaken for all the documents in the Commission's file, including the documents made available under the leniency programme.

In July 2011, in the *National Grid* litigation before the English High Court, Mr. Justice Roth invited the EU Commission to give its views on a number of issues relating to the application and implications of *Pfleiderer* for national discovery rules and its application to materials on the EU Commission's file. In response, the Commission stated in an open letter to the Court in November 2011 that it considers the *Pfleiderer* judgment, which related to access to documents in the German *Bundeskartellamt's* file, to apply equally to documents on the Commission's file. The Commission further noted that the national court should assess whether the disclosure is proportionate in light of the information that is contained in the documents and the other information available to the parties and that it should ensure that the leniency applicant is not worse off than the other defendants.

In May 2012, the heads of the national competition authorities in EU Member States issued a joint resolution in which they promised to protect evidence voluntarily submitted by leniency applicants "*without unduly restricting the right to civil damages*". This pledge came only months after the U.S. Justice Department's announcement in November 2011 that it would "*aggressively protect from disclosure in U.S. federal courts*" not only its own leniency materials but also those of other jurisdictions, including the EU.

The Directive requires the Member States to introduce certain restrictions on the disclosure of certain types of evidence. For instance, oral statements of immunity or leniency applicants will remain protected. The same applies for settlement submissions (Article 6(6) of the Directive). Other documents including documents originating from the defendants prepared specifically for the proceedings of a competition authority or related to the authority's investigation (*e.g.*, information requests) are not protected from disclosure, which can be ordered after the competition authority concerned has closed its proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Member States had until 27 December 2016 to bring into force

the laws, regulations, and administrative provisions necessary to comply with the Directive. On 13 July 2017, the Commission requested Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta, and Portugal to fully implement the Directive into national law. These Member States have two months to inform the Commission of measures taken to implement the Directive. In the absence of a satisfactory reply, the Commission may decide to refer them to the Court of Justice.

The transposition of the Directive has a limited impact for some Member States that already have a set of laws that provide for compensation for victims of antitrust violations. However, for other jurisdictions, the impact was/will be significant.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in your jurisdiction?

On 3 August 2015, the Commission adopted certain amendments to its procedural rules (Regulation 773/2004) and to four related notices, namely the Notice on Access to File, Notice on Leniency, Notice on Settlements, and Notice on Cooperation with National Courts. These amendments to Regulation 773/2004 and to the notices strive to reflect the provisions of the Directive in ensuring that documents used during EC investigations are effectively protected.

The Notice on Access to file provides that documents that prove to be unrelated to the subject matter of an investigation shall be returned to the parties. Upon return, these documents will no longer constitute part of the file.

The Notice on Leniency now states that the Commission shall not transmit company leniency statements to national courts for use in damages actions.

The amended Notice on Settlements provides that companies may not withdraw a settlement request unilaterally. If the Commission adopted a statement of objections, without reflecting companies' settlement requests, those requests will be disregarded and may not be used as evidence against any of the parties to the case. New settlement rules also provide that the Commission will not transmit settlement submissions to national courts for use in damages proceedings.

As far as the Notice on Cooperation with National Courts is concerned, the Commission will not send documents specifically created for the EC probe to national courts, so long as EU proceedings are ongoing. Furthermore, the Commission will not hand over information it has sent to third party firms it has involved as part of the proceedings.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The transitional provisions in EU Member States' legislation implementing the Directive will be assessed in other chapters of this publication.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Other than the ongoing implementation of the Directive at national level, no further European legislation is envisaged at the current time relating to competition litigation.

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