The Directive on Antitrust Damages Actions 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 national courts for breach of the EU competition rules following the Directive. In France, Outremer Telecom was awarded €2.6 million in damages from Orange for abuse of dominant position in relation to services in the Caribbean. While the Paris Commercial Court had initially awarded €8 million, on 10 May 2017, the Paris Court of Appeal found that Outremer Telecom did not prove the direct and causal link between the anticompetitive practices and the damages and so decided to reduce the damages to €2.6 million. In relation to the same abuse of dominance case, on 18 December 2017, the Paris Commercial Court ordered Orange to pay rival operator Digicel €179.64 million in damages plus 10.4% interest per year for a total of €346 million. 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 totalling €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 on Antitrust Damages Actions 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.

As explained in question 3.1 above, the European Court of Justice has confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 (the non-contractual liability of the EU) of the TFEU and not to the European Court Justice in the context of an appeal (*see* Case C-40/12 P, *Gascogne Sack Deutschland GmbH v Commission*, Case C-58/12 P, *Groupe Gascogne SA v Commission*, and Case C-50/12 P, *Kendrion v Commission*, judgments of 26 November 2013). It is for the General Court to assess, in the light of the circumstances specific to each case, whether it has observed the reasonable time principle and whether the parties concerned have actually suffered harm because their right to effective legal protection was breached. In doing so, the General Court is to apply the criteria set out the *Gascogne Sack* judgment (C-40/12P, paras. 91 –95). Reparation must correspond to the loss or damage sustained.

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 that 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 General Court in its judgment in *GlaxoSmithKline v Commission* (Case T-168/01) 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 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 Courts, 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* (Case C-513/06 P), 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 101(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 on Antitrust Damages Actions 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 a small but significant portion of cartels (7%) do not lead to overcharging (*see*, for example, Oxera's study prepared for the Commission on quantifying antitrust damages of December 2009).

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 European Courts 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* Case T-180/15, *Icap and Others v Commission* and case-law cited). 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. It is important to note that in an appeal, the European Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Therefore, and provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it (*see* Case C-7/95 P, *John Deere v Commission*).

The introduction by the Commission of a leniency system has resulted in greater reliance also on non-contemporaneous statements (*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 European 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 its judgment of 8 September 2016 *Goldfish and Others v Commission* (Case 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 Statute of the European Court of Justice as well as the Rules of Procedure of each the General Court and the European Court of Justice allow the two courts to appoint an expert to provide an opinion or prepare a report (*see* Article 46.6 and Title III, Chapter 6, Section 2 of the Rules of Procedure of the General Court; Article 45.2 (d) and Title II, Chapter 7, Section 2 of the Rules of Procedure of the European Court of Justice; and Articles 20, 25, and 35 of the Statute of the European Court of Justice).

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 European 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 Statute of the European Court of Justice (*see* Articles 24 and 54 of the Statute of the European Court of Justice).

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 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. Regulation 773/2004 relating to the conduct of proceedings under Articles 101 and 102 TFEU by the Commission operates in parallel with Regulation 1049/2001, and grants addressees of a Statement of Objections a right to access the Commission's administrative file. In contrast, damages claimants are not granted access to file under Regulation 773/2004. Both Regulations contain limitations as to the types of documents to which undertakings may obtain access, including limitations relating to business secrets or commercially sensitive information.

There have been a number of judgments by the EU courts on the application of Regulation 1049/2001. The EU courts have also refined the rules applicable to undertakings seeking to obtain access to the administrative files of the Commission in relation to Articles 101 and 102 TFEU investigations.

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 European 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 European 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.

In its *Bundeswettbewerbsbehörde* judgment of 6 June 2013, the General Court 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 General Court ruled 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 General 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 on Antitrust Damages Actions, 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 the 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. Both the

General Court's and European Court of Justice's Rules of Procedure provide that if a witness who has been duly summoned fails to appear, refuses to give evidence or take the oath, a penalty may be imposed upon him by the Court (*see* Articles 26–30 of the Statute of the European Court of Justice; Article 95 of the General Court's Rules of Procedure; Article 69 of the European Court of Justice's Rules of Procedure). 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 European Commission or a national 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 on Antitrust Damages Actions 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 European 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 on Antitrust Damages Actions 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 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 national courts when required to ensure the consistent application of Articles 101 and 102 TFEU. These provisions are not used frequently. Available procedures before national 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 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 national courts. Available procedures before national courts are determined by national legislation.

The passing on defence is provided for in the Directive on Antitrust Damages Actions (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 of the European Union (*see* Article 263 TFEU). This time period is increased by 10 days on account of geographic 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 on Antitrust Damages Actions 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?

The European Court of Justice's 2017 Annual Report on Judicial Activity reports that the average duration of court proceedings before the General Court was estimated at 21.6 months for competition cases (judgments and orders) for the year 2017 (*see* p. 215 of the Report). The average duration of court proceedings before the European Court of Justice, across all areas of EU law, was estimated at 15.7 months for references for a preliminary ruling and 17.1 months for appeals for the year 2017 (*see* p. 114 of the Report).

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 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 (*see* Article 136 of the Rules of Procedure of the General Court and Article 141 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Directive on Antitrust Damages Actions 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?

Collective damages actions are especially important for consumers harmed by antitrust violations. Collective settlements are in principle allowed, but specific rules are set out or will be determined at the national level. Please refer to question 1.5 above for further details.

8 Costs

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

The European 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 134 and 135 of the Rules of Procedure of the General Court and Articles 138 and 139 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Commission's 2013 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 national courts are determined by national legislation.

The Commission's 2013 Recommendation on 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 national courts are determined by national legislation.

As explained at question 1.5 above, in its 2013 Recommendation on collective redress, the Commission set out a series of common, non-

binding principles that all Member States should follow in devising and implementing collective redress mechanisms, including, *inter alia*, third party funding.

As a general principle, the Commission's 2013 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 2013 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 before the European Court of Justice. Available appeal procedures before national 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 Commission for cartel infringements. Applicants for leniency with the Commission are not granted immunity from civil claims.

However, pursuant to the Directive on Antitrust Damages Actions, 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 Commission in a follow-on court proceeding has not yet been decided by the European Courts, although there have been some national 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 at 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. Department of Justice'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 on Antitrust Damages Actions 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 implement all measures set forth by the Directive on Antitrust Damages Actions. All Member States have now transposed the measures into their national system. Portugal was last to implement the rules. Whilst

Portugal sought the views of the European Court of Justice on the interpretation of the Directive and its compatibility with its national legislation (*see* Case C-637/17, *Cogeco Communications*), on 20 April 2018, Portugal's Parliament eventually voted in favour of a transposition of the Directive into national law.

The transposition of the Directive had a limited impact for some Member States that already had a set of rules that provide for compensation for victims of antitrust violations. For other jurisdictions, the impact was significant.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

On 3 August 2015, the Commission adopted certain amendments to its procedural rules (*i.e.*, 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 Commission proceedings to national courts, so long as these 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.

Aspects of the transposition in EU Member States of the Directive on Antitrust Damages Actions will be assessed in other chapters of this publication.

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

As explained at question 1.5 above, in January 2018, the Commission published a report looking at the progress made by Member States on the implementation of collective redress measures and principles following the 2013 Recommendation (*see* Commission Communication of 25 January 2018 COM(2018) 40 final). In particular, the report shows that the availability of collective redress mechanisms and the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU and that a number of Member States still do not provide for collective compensatory redress mechanisms for "mass harm" situations where a large number of consumers are effected by EU law breaches. In light of these findings, the Commission intends to further promote the principles set out in the 2013 Recommendation and to strengthen the consumer redress and enforcement aspects of the Injunctions Directive 2009/22/EC. For that purpose, on 11 April 2018, the Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers which will repeal the Injunctions Directive (*see* COM(2018) 184 final). The proposal was presented together with amendments to four EU consumer law Directives as part of a "New Deal for Consumers" designed, *inter alia*, to improve the effectiveness of the injunction procedure and collective redress. In particular, the Commission proposes to improve the rules on representative actions by qualified entities and the rules on injunctive and compensatory redress. The proposal concerns not only collective redress for infringements of competition law but also infringements of EU law across all policy fields.

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With approximately 1,700 attorneys in 22 offices on five continents, Skadden serves clients in every major financial centre. For 70 years, Skadden has provided legal services to the corporate, industrial, financial and governmental communities around the world in a wide range of high-profile transactions, regulatory matters, and litigation and controversy issues. Our clients range from small, entrepreneurial companies to the largest global corporations. Skadden's Antitrust and Competition Group is a global leader in its field. *Chambers Global: The World's Leading Lawyers for Business* recognises Skadden as one of the top-tier firms in the area of antitrust and competition. Skadden's European competition law practice advises and represents clients on a wide variety of cutting-edge EU competition law issues, including both conduct cases (abuse of dominance proceedings under Article 102 TFEU and cartel proceedings under Article 101 TFEU) as well as mergers and acquisitions. Our attorneys work closely with in-house counsel to advise on compliance and defend against enforcement actions brought by the Commission or Member State authorities and, where necessary, represent clients in appeals before the European courts.

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