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Trends and Developments

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Follow-on Damages Actions: Gradual Increase

Over the last few years, there has been a general increase across Europe in claims for damages for harm suffered due to an infringement of (European or national) competition law, the so-called private enforcement of competition law or private antitrust litigation. Although Belgium has an established track record in other types of proceedings relating to private enforcement of competition law (eg, actions for cease and desist of unfair market practices, or annulment of contractual obligations that violate competition law), it is not one of the key jurisdictions in Europe to bring such actions for damages, like the UK, the Netherlands, or Germany.

However, in recent years, significantly more damages' actions have been brought in Member States that do not necessarily have a history in private enforcement. This is due to the adoption of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Damages Directive). The exact intention of the Damages Directive was to introduce minimum standards to ensure that victims of competition infringements could effectively exercise their right to obtain compensation.

Belgium transposed the Damages Directive by a law of 6 June 2017 that added a new chapter to the Belgian Code of Economic Law (the Transposing Law), encouraging private antitrust litigation, in particular by providing new rules to ease the claimants' burden of proof and give broader access to evidence. At the same time, the scope of the Belgian "class action" regime was extended to include claims relating to infringements of European competition law.

As a consequence, there has been a steady increase in the number of private enforcement cases brought before Belgian courts. Some examples that will be referred to in this article are the lift cartel cases (ie, claims brought by the European Commission and certain Belgian governments/agencies against lift manufacturers following the Commission's finding of bid-rigging), the motorcycle abuse of dominance case (ie, a claim brought by independent motorcycle dealers against an importer of Honda motorcycles following the Belgian Competition Authority's finding of abuse of dominance) and, most recently, the truck cartel cases (ie, claims brought against truck manufacturers following the Commission's finding of an information exchange cartel).

Still, it is expected that there will be a further rise in such disputes in the coming years. This is not only due to the increasing "success" of follow-on damages' actions across Europe, fuelled by the initiatives of the European Commission to stimulate private enforcement (eg, the Damages Directive, the Practical Guide on Quantifying Antitrust Harm, the Passing-on Guidelines, the Communication on the Protection of Confidential Information). This also follows the characteristics of the Belgian legal system, having similar procedural and tort rules as, for example, the Netherlands, which has become one of the most "attractive" jurisdictions for claimants to bring damages' actions in over the last few years: the Belgian legal system is reliable (see, for example, a recent study of the World Justice Project ranking Belgium in the top 15 worldwide of its rule of law index), court fees and adverse costs are relatively low and fixed lump sums, evidence can be filed in foreign languages, etc. In addition, Belgium has introduced a framework for so-called class actions (actions for collective redress) that facilitates actions brought by multiple claimants.

Some might argue that Belgium would have seen more follow-on litigation cases if the Brussels International Business Court (BIBC) had been created. Proceedings before the BIBC would be conducted in English and the court would consist of professional and lay judges, would specialise in international commercial disputes and would decide in first and last instance, which should have led to shorter and more efficient proceedings. However, in 2019 this initiative was put on hold by the Belgian government until further notice.

Application of Damages Directive and Transposing Law

Although the Transposing Law came into force on 22 June 2017, there has not yet been any final Belgian judgment that applies these new rules, such as the presumption of harm. This is due to the temporal application rules provided in the Damages Directive and Transposing Law and the typically complex (and lengthy) nature of these proceedings.

As provided in the Damages Directive and Transposing Law, substantive provisions do not apply retroactively, while procedural provisions can apply retroactively, but not to actions brought prior to 26 December 2014. Belgian legislators have not clarified what provisions qualify as substantive or procedural.

Even before the transposition of the Damages Directive, Belgian courts considered the new rules, but decided not to apply

them (yet). In the lift cartel case, the Brussels Commercial Court concluded in 2015 that it could not apply the presumption of harm, as the claim was introduced before the adoption of the Damages Directive. In the motorcycle abuse of dominance case, the Commercial Court in Ghent even decided in early 2017 that, although Belgium had failed to transpose the Damages Directive by the imposed deadline, it would not interpret Belgian law in conformity with the Damages Directive, as that would go against the principle of legal certainty and the prohibition on retroactive effect.

Since the Transposing Law entered into force, various Belgian courts decided on the temporal application of these new rules in a number of recent (interim) judgments in the trucks cartel cases. None of the courts applied the new rules (in particular, the presumption of harm), as the infringement pre-dated the entry into force of the Transposing Law. Some courts also confirmed that there was no basis to interpret the current rules of Belgian tort law in conformity with the Damages Directive.

Statute of Limitation

Belgian tort rules (on which private damages' actions are generally based) provide that a claim must be initiated within five years from the moment the victim discovered it had suffered harm and the identity of the person that caused the harm (relative limitation period), or within 20 years from the moment that the event causing the harm occurred (absolute limitation period).

The Damages Directive and Transposing Law have changed the starting point of the limitation period for follow-on damages' actions and introduced new grounds for suspension and interruption.

However, even before that, the Belgian Constitutional Court decided that the Belgian tort rules should be applied differently to private damages' actions. In early 2016 – before the adoption of the Transposing Law – the Belgian Constitutional Court decided, upon a request for a preliminary ruling in the motorcycle abuse of dominance case, that the relative limitation period of five years conflicted with the constitutional principle of equality and non-discrimination, to the extent that it allowed a private damages' action to be time-barred before the final finding of an infringement of competition law. Following this decision, the five-year limitation period was to be extended until a final decision was made regarding the infringement by the competition authority or appeal court.

The Transposing Law goes one step further and provides that a new limitation period starts on the day following a final finding of an infringement of competition law. This means that an infringer can still face private damages' actions until the expiry of five years after (the appeal against) the decision of the competition authority.

Parental Liability and Subsidiary/Non-addressee Liability: Tension between Public and Private Enforcement

The increase in follow-on antitrust litigation triggered a debate on the use of different legal concepts in public enforcement (ie, in European and national competition rules) versus private enforcement (ie, national rules on liability for tort claims). In particular, following the Skanska decision of the CJEU (C-724/17), the question is raised as to whether the Member States are to apply their national rules on civil liability, or if actions for damages are integral parts of the same system of enforcement and should therefore be subject to the same legal concepts that are applied consistently across private and public enforcement.

In the context of public enforcement, a parent company can be held liable for the fines imposed on its subsidiary/infringer under the single economic entity doctrine: the anti-competitive behaviour of a subsidiary is attributed to the parent, in particular if it carried out in all material respects the instructions of the parent or the parent had a decisive influence.

By contrast, Belgian civil liability rules do not include such a factual presumption. Instead, the principle of personal liability in tort law requires the claimants to demonstrate that the parent company, as a separate legal person, also committed a wrongdoing that caused the damage. The only exceptions to this principle of personal liability are provided by law (eg, the owner of an animal is responsible for the harm caused by the animal). Similarly, Belgian courts accept no presumption that a subsidiary/non-addressee is liable for the conduct of its parent company.

It remains to be seen if the Skanska decision of the CJEU of 2019 changes anything with regard to these principles. The CJEU held that (i) the determination of the entity which is required to provide compensation for damage caused by an infringement of European competition law is directly governed by EU law, and (ii) the concept of "undertaking", ie, the single economic unit that can consist of various natural or legal persons, constitutes an autonomous concept of EU law and cannot have a different scope in a public and private enforcement context. Hence, the entity that can be held liable for private damages' claims would be determined by the decision of the competition authority.

This decision could have far-reaching implications for private enforcement, as it opens the door to an application of the single economic entity doctrine and the principle of economic continuity – concepts that are foreign to Belgian rules on civil liability. However, such an invasion of the national principle of personal liability is heavily disputed.

The majority opinion is convinced that it remains up to the national judge to determine which entities can be held liable.

In the context of one of the lift cartel cases, the Brussels Commercial Court requested a preliminary ruling from the CJEU on the possibility for the Commission to represent the EU in a civil action for damages. In its reasoning, the CJEU confirmed that national courts cannot take decisions running counter to the infringement decision adopted by the Commission, but that "[w]hilst the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court" (C-199/11, §65). The Brussels Commercial Court later concluded that a presumption of wrongdoing used in public enforcement cannot automatically be applied in private enforcement: Belgian tort rules have no factual presumption of wrongdoing, but require the claimant to demonstrate the personal wrongdoing of each defendant. In the absence of evidence of a personal wrongdoing, the claims against certain Belgian lift manufacturers that were subsidiaries of the infringers and non-addressees of the Commission's decision were dismissed.

Similarly, in the trucks cartel cases, courts have dismissed claims brought against local subsidiaries of truck manufacturers that were non-addressees of the Commission's decision, because they could not be held personally liable in the absence of any evidence that they would have been involved in, had knowledge of, or implemented instructions relating to the cartel.

Actions for Collective Redress

On 1 September 2014, the Belgian legal framework to bring actions for collective redress for infringements of Belgian competition law entered into force. Such actions must be brought by a group representative before the Brussels courts. The Belgian legislator provided for the option between an opt-in and an opt-out model and it is up to the court to decide on the applicable model, depending on the circumstances of the case.

In mid-2017, the Transposing Law extended the scope of the Belgian "class action" regime to include infringements of European competition law. In addition, in 2018 the scope of application was enlarged to include not only consumers, but also SMEs (which constitute about 99% of active undertakings registered in Belgium). Despite these legal reforms, there has been only a handful of such claims before Belgian courts, none of which was related to private enforcement of competition law.

Nevertheless, European and national legislators want to ensure the effective exercise of the right to compensation for harm resulting from infringements of competition law. This requires appropriate procedural tools to bundle or combine mass claims from direct or indirect customers to allow SMEs, customers or even larger companies that might be deterred from bringing a claim individually because of the (fear of) significant legal costs compared to the harm suffered, effectively to obtain compensation. This fits in with the most recent European initiative to vote a new directive on collective redress later this year that will allow EU consumers to act against domestic and cross-border cases of unlawful practices (ie, a Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers, and repealing Directive 2009/22/EC). Therefore, it seems to be only a matter of time before collective proceedings brought before Belgian courts for infringement of competition law are seen.

Harm caused by Infringements of Competition Law

Application of presumption of harm for cartels

Belgian tort law makes a clear distinction between the existence and the quantification of harm. Before the Damages Directive and Transposing Law, Belgian courts required that the claimants demonstrate that the harm suffered resulted from an infringement of competition law. If claimants fail to demonstrate the existence of "certain and personal" harm, the claim is dismissed as unfounded. This was the reason why the damages' claims in the lift cartel cases were dismissed by the Brussels Commercial Court: it could not be presumed that the specific harm in terms of an overcharge was the result of the cartel, as it is not necessarily the ordinary course of events that a bid-rigging cartel necessarily leads to higher prices, and the claimants' expert evidence was "not sufficiently representative, conclusive and robust".

However, this high threshold set by the Belgian courts will be significantly lowered (at least for damages' actions relating to cartels) once the presumption of harm, provided for in the Damages Directive and Transposing Law, is applied.

Quantification of harm

Even though the burden of proof for the existence of harm will be significantly reduced following the introduction of a rebuttable presumption, claimants still have to demonstrate the quantum of their claim. Claimants before Belgian courts do not escape the inherent difficulties in quantifying damage caused by an infringement of competition law. Under Belgian law, a claimant is to be placed back in the hypothetical situation that no infringement would have been committed: the harm suffered corresponds to the negative difference between the actual situation of the victim of the wrongdoing (ie, the infringement) and the "counterfactual" scenario (ie, no infringement). The claimants must demonstrate the harm suffered (eg, the overcharge paid for products or services purchased from a cartelist), while the defendants will attempt to prove no such harm was suffered

or that any price increase would have been passed on down the supply chain or otherwise compensated.

Quantifying these effects is by definition a complex, hypothetical and often data-intensive exercise that requires an advanced econometric analysis. In the lift cartel cases, the Brussels Commercial Court acknowledged that the hypothetical scenario is unavoidably based on assumptions, given the influence of different factors and the interactions between market players on the evolution of prices, volumes and margins. Although the Commission has provided guidance on this point (eg, the Practical Guide on Quantifying Antitrust Harm, or Passing-on Guidelines), it is in the national courts' discretion to determine the quantum of harm suffered.

The Damages Directive and Transposing Law will not significantly affect the Belgian legal system when it comes to the quantification of harm.

Even before the Damages Directive expressly referred to the option for national courts to estimate the harm if it would be practically impossible or excessively difficult to quantify the harm precisely, Belgian courts had already done so and made use of their power to award damages based on an equitable estimate of the harm (ie, on an ex aeque et bono basis). For example, the Ghent Commercial Court estimated the harm in the motorcycle abuse of dominance case, because the court found it impossible to quantify exactly the harm suffered due to events that occurred 25 years earlier, as it would be too costly and time-consuming to collect the necessary data (provided these were still available).

The new rules also do not affect the possibility for Belgian courts to appoint an expert to advise the court on the specific harm suffered due to the infringement. Given the presumption of harm, it could be expected that courts appoint experts more easily, as parties no longer have to make it sufficiently plausible that harm is suffered (which was the reason why the Brussels Commercial Court denied the claimant's request in the lift cartel cases to appoint an expert).

In recent (interim) judgments in the trucks cartel cases, Belgian courts have taken diverging approaches to the quantification of harm. Even though claimants generally limited their evidence of the quantum of the harm suffered to an abstract percentage of overcharge on the basis of the Commission's Practical Guide, (i) one court decided to award damages on an ex aequo et bono basis as it would be impossible to quantify precisely the harm suffered by the victim due to the lapse of time since the infringement and because it would be too costly and time-consuming to appoint an expert and (ii) two other courts appointed an expert to assess if there was any causal link between the infringement and the harm and, if so, to advise on the quantum of the harm. One expert assessment is ongoing and the other two decisions have been appealed.

Conclusion

These examples highlight some areas of interest in Belgian private damages' actions. However, this case law will be further developed once the Damages Directive and Transposing Law has been applied. It will be interesting to see how Belgian courts will deal with some new principles from the Damages Directive and the Transposing Law, in particular the combination of the presumption of harm and the claimant's burden to prove the quantum of the damage suffered. The same holds true for the question of whether Belgian courts will consider that the public enforcement doctrine of "the single economic entity" is at odds, or is compatible, with the Belgian civil liability rules.

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Law and Practice

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Belgium has an established track record in other types of proceedings relating to private enforcement of competition law (eg, actions for cease and desist of unfair market practices, or annulment of contractual obligations that violate competition law). In addition, there has been a steady increase in the number of actions for damages for harm suffered due to an infringement of (European or national) competition law.

This increase can be explained by the growing awareness and the development of a legal framework governing these actions. Belgium transposed the Damages Directive by a law of 6 June 2017, encouraging private antitrust litigation, in particular by providing new rules to ease the claimants' burden of proof and give broader access to evidence. At the same time, the scope of the Belgian "class action" regime was extended to include claims relating to infringements of European competition law.

The most notable private damages cases before the Belgian courts of the last few years include the lift cartel case, the motorcycle abuse of dominance case and, most recently (and still pending), the trucks cartel cases. However, due to the temporal application rules provided in the Damages Directive and transposing law and the typically complex (and lengthy) nature of such proceedings, there has not yet been any final Belgian judgment that applies these new rules.

See the Belgian section on **Trends & Developments** for a more detailed overview.

1.2 Other Developments

There are no other developments in Belgium that are relevant to antitrust litigation.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Private damages actions are brought under the general rules on liability for tort claims, set out in Article 1382 of the Belgian Civil Code. Pursuant to this general provision of Belgian law, a claimant must demonstrate a wrongdoing (ie, the infringement of competition law), harm suffered and a causal link between the wrongdoing and the harm.

The law of 6 June 2017 transposed the Damages Directive in Belgian law (entry into force on 22 June 2017) by adding a new Title 3 "The action for damages for infringements of competition law" to Book XVII "Particular judicial proceedings" of the Belgian Code of Economic Law (the CEL). The CEL expressly confirms that any natural or legal person (including consumers, undertakings and public authorities) that has suffered harm as a result of an infringement of competition law is entitled to full compensation, in accordance with the general provisions of Belgian law (among which is Article 1382 of the Belgian Civil Code) (Article XVII.72 of the CEL).

Claimants can bring both standalone and follow-on private damages actions.

2.2 Specialist Courts

The new rules that were introduced by the transposing act of 6 June 2017 to govern private actions for damages apply as a lex specialis. This means that to the extent that no deviating rule is provided, general provisions of Belgian law are applicable (Article XVII.71, §2 of the CEL).

No specialist courts have been identified to have exclusive jurisdiction over private damages actions:

- private damages actions can thus be brought before the commercial court or court of first instance that is competent on the basis of the ordinary provisions of the Belgian Judicial Code;
- judgments of the commercial court or court of first instance can be appealed before the courts of appeal on both factual and legal grounds – again in accordance with the ordinary provisions of the Belgian Judicial Code;
- decisions of the courts of appeal can be further appealed, although only on points of law or formal requirements, before the Belgian Supreme Court;
- measures for interim relief can be obtained through summary proceedings from the president of the court that has jurisdiction over the main course of action.

An exception is made for private damages actions that are brought by multiple claimants within the framework of an action for collective redress. The Brussels courts have been designated as the specialised courts to hear these actions and have exclusive jurisdiction (Article XVII.35 of the CEL).

Individual private damages actions can be joined or consolidated by Belgian courts, if the claims are so interconnected that it is appropriate to assess them together in order to avoid solutions that may be irreconcilable if they were to be assessed separately (Article 30 of the Belgian Judicial Code).

2.3 Decisions of National Competition Authorities

To determine the binding effect of a decision of a national competition authority, a distinction is made between findings of (i) the Belgian Competition Authority (BCA) or the Belgian

review court and (ii) the competition authorities in other Member States of the European Union or its review courts:

- a final decision of the BCA or the Belgian review court establishing an infringement of competition law constitutes an irrebuttable presumption in the context of private damages actions that an infringement of competition law has been committed (Article XVII.82, §1 of the CEL);
- a final decision of a competition authority of another Member State of the EU (or its review court) establishing an infringement of competition law constitutes at least prima facie evidence that an infringement of competition law has been committed; the Belgian court can assess such evidence together with other evidence adduced by the parties (Article XVII.82, §2 of the CEL).

The CEL does not include a provision on the binding effect of decisions of the European Commission (or of the EU review courts). However, Article 16 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the Modernisation Regulation) already provides that an infringement decision of the European Commission has the same binding character as a decision of the BCA (or its review courts).

The BCA can submit (written or oral) observations regarding the application of competition law in private enforcement proceedings, either of its own motion (ex officio) or upon request of the court (Article IV.88, §1 of the CEL). Belgian courts can also request the BCA's assistance in determining the quantum of the harm (Article IV.88, §2 of the CEL).

2.4 Burden and Standard of Proof

As a general principle, each party must prove its own allegations (Article 870 of the Judicial Code).

According to the general rules on liability for tort claims, a claimant must demonstrate:

- a wrongdoing or fault, attributable to the infringer;
- the harm suffered; and
- the causal link between the infringer's wrongdoing and the harm suffered (Article 1382 of the Belgian Civil Code).

However, for private damages actions, the Belgian legislator has alleviated the (direct or indirect) claimant's burden of proof by introducing a number of legal presumptions.

Presumption of Fault or Wrongdoing

Where an infringement of competition law has already been finally established by a competition authority, the claimant's burden of proof that a fault or wrongdoing was committed is alleviated as follows:

- a final decision of the BCA or the Belgian review court constitutes an irrebuttable presumption that an infringement of competition law has been committed (Article XVII.82, §1 of the CEL);
- a final decision of a competition authority of another Member State of the EU (or its review court) constitutes at least prima facie evidence that an infringement of competition law has been committed (Article XVII.82, §2 of the CEL).

Presumption of Harm

Article XVII.73 of the CEL introduced a rebuttable presumption that cartel infringements cause harm. The burden of rebutting this presumption rests on the defendant.

The introduction of this presumption is expected to have a significant impact on private damages actions in the future, as Belgian courts have so far set the bar rather high for claimants to demonstrate they suffered harm due to a cartel.

However, the claimant still bears the burden of proof for the quantum of the harm. To determine the quantum of the harm, the national court can request the assistance of the BCA (Article IV.77, §2 of the CEL juncto Article 962 of the Judicial Code).

Presumption of Pass-on as a Sword (Indirect Purchaser)

The indirect purchasers of goods or services affected by an infringement must demonstrate they suffered harm (ie, in the form of an overcharge).

However, in order to alleviate the high burden of proof on indirect purchasers, Article XVII.84 of the CEL includes a rebuttable presumption that the direct purchaser has passed on the overcharge to the indirect purchaser. This presumption applies to the extent the indirect purchaser can demonstrate that:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge of the direct purchaser by the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

No Presumption of Pass-on as a Shield (Direct Purchaser)

As a defence against the direct purchaser's claim for damages, a defendant may argue that the direct purchaser has passed on all or part of the overcharge resulting from the infringement of

competition law to its own customers, thus having reduced its actual harm (Article XVII.83 of the CEL).

The burden of proof that the overcharge was passed on lies with the defendant.

Although the defendant does not benefit from any presumption, Article XVII.83 of the CEL provides that the defendant may reasonably require disclosure from the claimant or from third parties.

2.5 Direct and Indirect Purchasers

Article XVII.72 of the CEL provides that any natural or legal person who has suffered harm as a result of an infringement of competition law will be entitled to full compensation for that harm.

Accordingly, any claimant can seek compensatory damages, covering actual loss and lost profits plus interest, in accordance with Belgian tort rules, regardless of whether they would constitute a direct or indirect purchaser. Both direct and indirect purchasers can have standing to bring private damages actions.

Direct and indirect purchasers benefit from the rebuttable presumption that the cartel infringement caused harm (Article XVII.73 of the CEL) and indirect purchasers benefit from a rebuttable presumption that direct purchasers passed on their overcharge (Article XVII.84 of the CEL).

2.6 Timetable

Duration

Although the estimated duration of civil proceedings will vary according to the facts of each individual case and the court where such action is brought, the total duration, per instance, could broadly be estimated as follows:

- at first instance, before the commercial court or the court of first instance: approximately one and a half to two years;
- at appeal, before the court of appeal: approximately two to three years;
- at further appeal, before the Supreme Court: approximately two years.

It must be taken into account that private damages actions will typically be complex cases, often with multiple parties, with cross-jurisdictional elements and potential involvement of experts.

Suspension

During a parallel investigation by the BCA, private enforcement proceedings are not automatically suspended. Parties may nevertheless ask for a stay of proceedings (see below).

For the sake of completeness, it should be mentioned that (public) liability for infringing national or European competition law is administrative in nature. When finding an infringement of these provisions, the BCA may impose an administrative fine. Although it would thus be unlikely that the infringement of competition law is sanctioned by a criminal conviction (unless it had been combined with a general offence such as fraud or forgery), it would not preclude the possibility to bring private damages actions. However, in the event that criminal proceedings are initiated, civil proceedings are suspended until a decision in the criminal proceedings has been obtained, to avoid incompatible judgments (Article 4 of the Preliminary Title of the Code of Criminal Procedure).

Stay

A defendant can request a stay at any moment during the proceedings for reasons of procedural efficiency or to avoid a judgment that would run counter to a future decision of the European Commission, BCA or review court. According to the Masterfoods decision of the CJEU, a national judge must avoid taking a decision that would contradict a decision contemplated by the European Commission or pending an action for annulment against the European Commission's decision before the EU Courts (Masterfoods Ltd v HB Ice Cream Ltd, C-344-98, 14 December 2000; also Article 16 of the Modernisation Regulation).

A defendant could also seek to stay the private enforcement action, if a related action had first been brought before the court of another EU Member State: if related actions (ie, proceedings involving the same cause of action and the same parties, or so closely related that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments) are brought before the courts of different Member States, any court other than the first court seized may stay its proceedings (Articles 29 and 30 of the Brussels Recast Regulation).

3. Class/Collective Actions

3.1 Availability

Types of Collective Proceedings Available

The Belgian legal system provides three types of collective proceedings: (i) actions for collective redress (class actions), (ii) actions of collective interest and (iii) collective (related) actions.

Actions for collective redress (class actions)

On 28 March 2014, the Belgian legislator introduced the possibility to bring an action for collective redress for violation of a list of Belgian and European rules (entry into force on 1 September 2014).

The law of 6 June 2017, which transposed the Damages Directive into Belgian law, also extended the grounds for bringing an action for collective redress to infringements of European competition law (Article XVII.36.1° juncto XV.II.37.33° of the CEL).

This type of proceedings can be brought by groups of consumers and (since 1 June 2018) also by small- and medium-sized enterprises (SMEs) represented by non-profit organisations or public bodies that comply with all legal conditions to act as a group representative (Article XVII.36, 2° juncto XVII.39 of the CEL). Such actions can be brought on behalf of both direct and indirect purchasers.

Such actions for collective redress are governed by the same provisions of Book XVII, Title 3 of the CEL as individual private damages actions, with three exceptions:

- defendants cannot invoke a passing-on defence in an action for collective redress (Article XVII.70 juncto XVII.83 of the CEL);
- Belgian courts cannot suspend the proceedings for up to two years, when the parties engage in consensual dispute resolution relating to their private damages' actions (Article XVII.70 of the CEL juncto XVII.89 of the CEL); and
- Brussels courts have exclusive jurisdiction for actions for collective redress (Article XVII.35 of the CEL).

Actions of collective interest

Specific legislation may provide a legal basis for some form of representative action, where consumer or professional organisations may seek injunctive relief against practices that harm the interests of consumers or of the members of the organisation.

These organisations cannot recover damages for their members. However, they may seek damages for themselves, to the extent that the practice in question harms their own personal interests.

Collective (related) actions

Belgian courts can join or consolidate individual private damages' actions arising from a similar event in the same proceedings by different claimants.

The court handles the related actions jointly, even though they remain, from a legal perspective, individual actions (Articles 30 and 701 of the Judicial Code).

Opt-in or Opt-out Model of Actions for Collective Redress

The group of consumers or SMEs that personally suffered harm as a consequence of a common cause and that may benefit from the compensation that would be awarded by the court, can be composed by means of an "opt-in" or "opt-out" model:

- opt-in model: only consumers or SMEs that have suffered the collective harm and have expressly notified the registry of their intention to belong to the group are part of the class; or
- opt-out model: all consumers or SMEs that have suffered the collective harm and have not expressly notified the registry of their intention not to belong to the group are part of the class.

The group representative must express its choice for the opt-in or opt-out system and the reasons supporting that choice in the request for collective redress (Article XVII.42, §1, 3° of the CEL).

The court will decide on the admissibility of the action for collective redress within two months from the filing of the request (Article XVII.43, §1 of the CEL). In that decision, the court will indicate the applicable system of opt-in or opt-out (Article XVII.43, §2, 3° of the CEL) and the term provided for consumers or SMEs to exercise their option rights (between 30 days and three months as of the moment of publication in the Belgian Official Gazette) (Article XVII.43, §2, 7° juncto §4 of the CEL).

The opt-in model is mandatory in two instances:

- for consumers or SMEs who have no habitual residence in Belgium (Article XVII.38, §1, 2° and XVII.38, §1/1, 2° of the CEL); and
- for actions for collective redress of physical or moral collective damage (Article XVII.43, §2, 3° of the CEL).

In the event of an opt-out system, individual claimants who have not opted out (and were thus part of the group) can still opt out of a settlement for collective redress if they can demonstrate that they were not reasonably aware of the court's decision on the admissibility of the action for collective redress as introduced by the group representative (Article XVII.49, §4 of the CEL).

3.2 Procedure

Under Belgian law, an action for collective redress does not require formal certification.

However, the first stage of an action for collective redress is the admissibility phase (Articles XVII.42 to 44 of the CEL). During the admissibility phase, the court verifies if:

- the alleged infringement that caused harm to the claimants is a ground for an action for collective redress as provided in Title 2 of Book XVII of the CEL;
- the group representative complies with all legal requirements; and

- an action for collective redress would be more appropriate than a claim under the ordinary legal system.

3.3 Settlement

The CEL provides a compulsory negotiation phase that starts immediately after the decision of the court on the admissibility of the action for collective redress. In its decision on admissibility, the court determines a term for the parties to negotiate a collective settlement: between three and six months after the expiry of the term for claimants to exercise their option rights (Article XVII.43, §2, 8° of the CEL). Upon a joint request by the parties, this term can be extended once by a maximum of six months (Article XVII.45, §1 of the CEL).

If a settlement agreement is reached, a party can ask the court for judicial approval (Article XVII.47 of the CEL). The court will refuse approval of the settlement agreement if:

- the redress for the group or a subcategory is manifestly unreasonable;
- the term for opting out of the agreement is manifestly unreasonable;
- the additional measures of publicity are manifestly unreasonable; or
- the compensation paid by the defendant to the group representative exceeds the costs actually incurred (Article XVII.49, §2 of the CEL).

The judicial approval of the settlement agreement is binding on all members of the group, with the exception of those who can show that they were not aware of the court's decision declaring the collective action admissible (Article XVII.49, §4 of the CEL).

Alternatively, an out-of-court settlement is allowed. If the parties reach an amicable settlement of the case "out of court" before the decision on the merits, they are entitled to file an application with the court to make the amicable settlement binding on all group members (Article XVII.56 of the CEL).

Where there is more than one defendant, they can settle separately. The judicial approval will in such an event only apply with respect to the settling parties. The judge will remain seized of the action for collective redress with regard to the remaining defendants in order to rule on the merits.

4. Challenging a Claim at an Early Stage

4.1 Strikeout/Summary Judgment

Although the court can decide on certain preliminary issues or requests for preliminary measures (eg, access to evidence or the appointment of experts) in interim judgments, there are no strike-out or summary judgments available in Belgium.

4.2 Jurisdiction/Applicable Law

Jurisdiction

The relevant jurisdiction is determined pursuant to the relevant rules of international, European or Belgian international private law, depending on the foreign state or states involved. According to the European rules on international private law, Belgian courts have jurisdiction when the defendant has its domicile or usual residence in Belgium at the time proceedings are initiated (Article 4(1) of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast Regulation)).

Where there are multiple defendants, it is sufficient for one of the defendants to have its domicile or usual residence in Belgium (Article 8(1) of the Brussels Recast Regulation). In such instances, claimants can choose between various EU Member States in which defendants are domiciled and can choose to bring an action before the courts of the place where any one of the defendants is domiciled, provided that the claims against the various defendants are closely connected. Hence, claimants can attempt to ensure Belgian courts have jurisdiction by including a Belgian "anchor defendant".

As this is a tort claim, the claimant can also bring private damages' actions before the Belgian courts if the event giving rise to the harm or the harm itself occurred or may occur in Belgium (Article 7(2) of the Brussels Recast Regulation).

In any event, a defendant can agree to appear before a Belgian court, even if this court is not competent (Article 26 of the Brussels Recast Regulation).

Applicable Law

In principle, the law of the country where the market is (likely to be) affected applies (Article 6, par. 3 (a) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)).

When the market is (likely to be) affected in more than one country, claimants may also apply the law of the court seized, provided that the market in that country is directly and substantially affected by the restriction of competition (Article 6, par. 3 (b) of the Rome II Regulation).

4.3 Limitation Periods

The Belgian Civil Code provides that a tort claim is time-barred (Article 2262bis, §1 (2) of the Civil Code):

- five years after the day on which the claimant became (or should reasonably have become) aware of the harm and of the identity of the person liable for this harm (the relative limitation period); and
- in any event, 20 years after the occurrence of the event giving rise to the harm (the absolute limitation period).

Article XVII.90, §1 of the CEL refers to the ordinary limitation periods provided in the Belgian Civil Code and specifies that the limitation period starts to run after the infringement of competition law has ceased and the claimant knows (or should reasonably have known) of the infringement, the harm that was suffered and the identity of the infringer.

The limitation period will be interrupted during the investigations or proceedings of the competition authority into the infringement giving rise to the action for damages until a final infringement decision is taken or until the investigations or proceedings before the competition authority have otherwise been terminated (after which a new limitation period will start to run) (Article XVII.90, §2 of the CEL).

The limitation period will be suspended for the duration of any proceedings of consensual dispute resolution (excluding arbitration) (Article XVII.91 of the CEL). This suspension only applies to those parties that were involved or represented in the consensual dispute resolution.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Belgian procedural law does not provide for a separate discovery procedure. Hence, there is also no pre-trial discovery procedure.

However, upon request of one of the parties (at any stage of the proceedings), Belgian courts can allow certain preliminary measures, such as the production of documents (Articles 877-882 of the Judicial Code). If a party can persuade the court that another party to the proceedings or a third party has possession of one or more documents that could demonstrate a fact that is relevant to the dispute, the court can order that (third) party to disclose the document(s). Generally, courts tend to apply the conditions for such document production in a strict way to avoid any "fishing expedition".

In the context of private damages actions, the Belgian legislator has adopted a new set of rules in the CEL to facilitate access to evidence. As a general rule, the requesting party must describe the (categories of) documents as narrowly as possible and the court will balance the legitimate interests of the parties (including the relevance of the documentation, the costs of disclosure, or the existence of confidential information in the requested documents) (Article XVII.74 of the CEL).

5.2 Legal Professional Privilege

Belgian procedural law does not provide a general principle of protection of confidential information in civil proceedings.

However, there are specific categories of information that are covered by a particular protection, such as legal professional privilege, or confidentiality in the framework of mediation (Article 1728 of the Judicial Code).

In particular, correspondence between a lawyer and a client, internal documents prepared exclusively for the purpose of obtaining external legal advice and internal documents disseminating or summarising external legal advice are covered by legal privilege. Similarly, correspondence between in-house lawyers and their employers is also covered by legal privilege, provided they are members of the Belgian institute for in-house counsels (Article 5 of the act of 1 March 2000 establishing an institute of in-house lawyers; Supreme Court decision dated 22 January 2015, C.13.0532.F).

A party can also refuse to produce confidential documents when they contain business secrets, on the basis of its right to respect for its private life (Article 8 of the European Convention on Human Rights).

Belgian courts have a wide discretion to determine whether the reason given for a refusal of production of documents is legitimate.

The Belgian law transposing the Damages Directive expressly provides that courts must consider the possibility that certain evidence contains confidential information before ordering disclosure (Article XVII.74, §2, 3° of the CEL). Courts can take additional measures to ensure the confidential treatment of such information (eg, through redaction, confidentiality rings or non-confidential summaries prepared by independent experts) (Article XVII.75 of the CEL).

5.3 Leniency Materials/Settlement Agreements

General Principle of Access to Evidence in the Competition File

The law of 6 June 2017 transposing the Damages Directive has significantly facilitated the possibility to obtain (and disclose) evidence in the file of the competition authorities. Before the implementation, access to such documents was excluded and it was even considered an infringement of professional secrecy for members of the competition authority and its staff to provide such access.

Now, Belgian courts can order the disclosure of evidence in the file of the competition authority, but only under the following conditions:

- courts must verify that no (third) party is reasonably able to provide the requested evidence (principle of subsidiarity) (Article XVII.77, §2 of the CEL);
- courts must also assess the proportionality of an order to disclose such evidence and consider in particular (Article XVII.78, §1 of the CEL):
  - (a) whether the request to disclose evidence specifically identifies the nature, subject-matter or contents of the documents submitted to a competition authority or held in the file thereof;
  - (b) whether the party requesting disclosure of evidence is doing so in relation to an action for damages; and
  - (c) the need to safeguard the effectiveness of the public enforcement of competition law;
- specific restrictions apply, depending on the nature of the evidence from the file of the competition authorities (see below).

Evidence on the Black List
Belgian courts can never order a party or a third party to disclose (Article XVII.79, §2 of the CEL):

- leniency statements; and
- settlement submissions.

Evidence on the black list, obtained solely through access to the file of a competition authority, may not be submitted to the procedural file in an action for damages. If any such evidence is nevertheless submitted, it will be deemed to be inadmissible and removed from proceedings (Article XVII.80, §1 of the CEL).

Evidence on the Grey List
Belgian courts may only order the disclosure of the following information after a competition authority has closed its proceedings by adopting a decision or otherwise (Article XVII.79, §1 of the CEL):

- information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- settlement submissions that have been withdrawn.

Evidence on the grey list, obtained solely through access to the file of a competition authority, may not be submitted to the procedural file in an action for damages until the moment the competition authority has closed its proceedings. If any such evidence is nevertheless submitted, it will be deemed to be inadmissible and removed from proceedings (Article XVII.80, §2 of the CEL).

Other Evidence in the Competition File
Any other evidence (not listed on the black or grey list) that is obtained by a natural or legal person, solely through access to the file of a competition authority, can be used in an action for damages solely by that person (or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim) (Article XVII.80, §3 of the CEL).

6. Witness and Expert Evidence

6.1 Witnesses of Fact
In principle, each party advancing claims has the burden to prove any facts it relies upon (Article 870 of the Judicial Code). Belgian courts have a wide discretion as to how much weight they give to a produced piece of evidence.

Parties will mostly rely on written evidence; oral evidence is rather uncommon in Belgian civil proceedings.

Factual witness evidence is admissible. A party can request the court to summon a witness to appear, or the court can do so of its own motion (ex officio) (Articles 915 to 961/3 of the Judicial Code).

Cross-examination of witnesses is prohibited. Parties are not allowed to ask direct questions of the witnesses, but can request the court to ask witnesses certain questions (Article 936 of the Judicial Code).

Witnesses who do not wish to appear at the hearing, for which they have been summoned, and have no lawful excuse, can be compelled to appear by means of a writ of summons (Article 925 of the Judicial Code). In the event of a persistent refusal to appear without any lawful excuse (eg, legal privilege), witnesses could be ordered to pay a fine or costs and damages (Articles 926 and 930 of the Judicial Code).

6.2 Expert Evidence
Expert evidence is admissible.

In private damages cases, it is even common practice that experts are appointed, either by the parties or by the court, to determine the extent of the harm suffered due to an infringement of competition law, as such an assessment often requires a complex econometric analysis.

Parties can appoint experts without intervention or approval of the court. There is no procedure in place for cross-examination

of a party-appointed expert. As party-appointed experts have no duty to the court, their evidence could sometimes be given less weight.

The court can also appoint experts, upon request of the parties or of its own motion (ex officio) (ie, a judicial expert, in accordance with Article 962 of the Judicial Code and following). The following rules apply:

- the judgment appointing the judicial expert will clearly set out the expert's investigative tasks (Article 972 of the Judicial Code);
- parties have the obligation to co-operate with the judicial expert (Article 972 bis of the Judicial Code);
- the judicial expert will adduce its findings in a written report to the court (Article 976 of the Judicial Code);
- parties are granted a reasonable period of at least 15 days to formulate comments on the judicial expert's report (Article 976 of the Judicial Code);
- the judicial expert's report is not binding on the court and the court may freely assess its probative value.

7. Damages

7.1 Assessment of Damages

Title 3 of Book XVII of the CEL expressly provides for the principle of full compensation that was already a general principle in Belgian tort law. Any natural or legal person who has suffered harm due to an infringement of competition law is entitled to full compensation (Article XVII.72 of the CEL).

The claimants can seek compensatory damages, covering the actual loss and lost profits plus interest. The Belgian system does not provide for treble or punitive damages.

Courts do not take into account the payment by the defendants of fines in the context of public enforcement. However, the Belgian legislator has introduced the possibility for the BCA to consider compensation paid as a result of consensual settlement of private damages actions as a mitigating factor if this occurred prior to the BCA's decision to impose a fine (Article IV.70, §1 of the CEL).

7.2 "Passing-on" Defences

A defendant may argue that the direct purchaser has passed on the whole or part of the overcharge resulting from the infringement of competition law to its own customers, thus having reduced its actual harm (Article XVII.83 of the CEL).

The burden of proof that the overcharge was passed on lies with the defendant. No presumption in favour of the defendant applies.

However, in order to alleviate the high burden of proof, Article XVII.83 of the CEL provides that the defendant may reasonably require disclosure from the claimant and/or from third parties.

7.3 Interest

In accordance with the principle of full compensation (Article XVII.72 of the CEL), a claimant is entitled to interest on the damages that are awarded in court.

Interest includes both pre-judgment interest (compensatory interest) and post-judgment interest (judicial interest):

- compensatory interest accrues from the date the damages were incurred;
- from the moment a claimant files a claim for damages in court, judicial interest accrues, until the moment of final payment.

Belgian courts will usually apply the legal interest rate. That legal interest rate (currently at 1.75%) is determined by governmental decree and published from time to time in the Belgian Official Gazette.

Although interests granted do not automatically produce compound interest, the claimant can make such a request.

8. Liability and Contribution

8.1 Joint and Several Liability

Belgian ordinary tort law provides that persons that contributed to the wrongdoing and the harm caused by that wrongdoing are jointly and severally liable.

Article XVII.86, §1 of the CEL confirms this principle: companies that have infringed competition law by means of a joint action are jointly and severally liable for the harm caused.

However, there are two exceptions to the principles of joint and several liability:

- SMEs, if the following (cumulative) conditions are fulfilled (Article XVII.86, §2 of the CEL):
  - (a) the SME had a market share below 5% (during the whole duration of the infringement);
  - (b) the application of the normal rules of joint and several liability would irretrievably jeopardise the economic viability of the SME and cause its assets to lose all their

value; and
(c) the SME was not a leader or coercer of the infringement and is not a repeat offender;
- undertakings that have received full immunity for being the first party that requested leniency (Article XVII.86, §3 of the CEL).

The above two categories of infringers can only be held liable for the harm caused to their own (direct or indirect) customers. Other claimants cannot claim damages from these two categories of infringers, unless those claimants would be unable to obtain full compensation from the other infringers (eg, for insolvency reasons) (Article XVII.86, §§2-3 of the CEL).

8.2 Contribution

An infringer who has paid damages to a claimant may recover a contribution from any co-infringer by means of a recourse action.

The amount of such a contribution shall be in proportion to the relative responsibility for the harm caused by the infringement (Article XVII.87, §1 of the CEL).

Defendants can bring contribution claims against co-infringers in separate contribution proceedings, or can join them in the principal private damages' actions brought against them by the claimant (forced intervention).

Article XVII.87, §2 of the CEL provides for two exceptions for full immunity recipients:

- the contribution of the full immunity recipient can never be higher than the amount of the harm it caused to its own direct or indirect customers;
- in the event that the infringement has caused harm to parties other than the customers of the infringing parties (eg, umbrella pricing), the contribution of the full immunity recipient can never be higher than its relative responsibility for the infringement.

Finally, Article XVII.88, §1 (2) of the CEL provides for an exception for settling infringers: non-settling infringers shall not be permitted to recover contributions for the remaining claim from the settling co-infringer.

9. Other Remedies

9.1 Injunctions

A party may bring a claim before the president of the competent court to obtain urgent relief in summary proceedings by submitting a request (in unilateral or adversarial proceedings). The claim for urgent relief is heard in summary proceedings (Article 735 of the Judicial Code). The claimant must demonstrate the urgency, that it holds a prima facie claim and that the balance of interest weighs in favour of granting the relief sought (Articles 19, §3 and 584 of the Judicial Code).

When granted, relief is temporary and does not bind the court that will hear the full case on its merits.

Injunctive relief could be obtained within one month after filing the request for injunctive relief, but timing is heavily dependent upon the workload of the court.

Besides actions for damages (which will be the most preferred remedy sought in private damages' actions) and injunctive relief, claimants could also seek the following remedies:

- actions for a cease-and-desist order (Articles XVII.1 to XVII.13 and XVII.27 of the CEL);
- nullity of contractual clauses A1108 of the Civil Code);
- declaratory judgment (Article 18, paragraph 2 of the Judicial Code).

9.2 Alternative Dispute Resolution

The law of 6 June 2017 transposing the Damages Directive introduced a new definition in the CEL of alternative dispute resolution, which refers to any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages, such as out-of-court settlements (including those where a judge can declare a settlement binding), mediation, or arbitration (Article I.22, 18° of the CEL).

Alternative dispute resolution is encouraged by the new law:

- the limitation period is suspended during any proceedings of consensual dispute resolution (excluding arbitration) (Article XVII.91 of the CEL);
- Belgian courts can suspend the proceedings for up to two years, when the parties engage in consensual dispute resolution relating to their private damages' actions (Article XVII.89 of the CEL); and
- the settling infringers shall (to some extent) be protected against contribution claims from a non-settling co-infringer (Article XVII.88, §1 (2) of the CEL).

10. Funding and Costs

10.1 Litigation Funding

Third-party funding is permitted under Belgian law. The third party and the claimant may agree on sharing the proceeds of the dispute.

However, for actions for collective redress, the CEL limits this possibility: a court-appointed administrator must pay compensation to members of the group under the court's supervision (Article XVII.59, §2 of the CEL). A third-party funder, therefore, cannot take a share of any proceeds of the action, unless an agreement is concluded between the third-party funder and the group members in advance of the distribution of the compensation.

To the extent that a third-party funding arrangement would be provided in the assignment of a claim, funders should take into account that, under Belgian law, a debtor can buy back the assigned claim by paying to the creditor the price which was offered by the funder for the claim, unless the assignment was concluded before the start of the proceedings (Article 1699 of the Civil Code).

10.2 Costs

Under Belgian law, the losing party will in principle be ordered to pay the costs of the proceedings. These costs include the winning party's (i) costs of service, filing and registration with the court registry and (ii) legal representation costs.

The costs of filing and registration with the court registry are fixed and depend on the nature of the writ that is filed with the court registry and on the amount of the claim.

The legal representation costs do not correspond to the actual lawyers' fees paid. Instead, the costs take the form of a fixed indemnity, determined by law, on the basis of the value of the claim, ranging from EUR90 to EUR36,000. The losing party must pay these amounts to each adverse (winning) party for each instance. However, the procedural indemnity that the losing party will be ordered to pay cannot exceed twice the maximum indemnity.

There is no specific procedure in place for a party to apply to court for an order granting security for its costs.

11. Appeals

11.1 Basis of Appeal

The judgment of the commercial court or court of first instance in private damages actions is subject to a right of appeal before the court of appeal, on both factual and legal grounds. Unless the law provides otherwise or the judge expressly decides differently, judgments rendered in first instance are immediately enforceable. Consequently, an appeal, in principle, has no suspensory effect.

The judgment of the court of appeal can be further appealed before the Supreme Court for questions of law and formal requirements only. This appeal has no suspensory effect.

Allen & Overy LLP is one of the leading global law firms, with around 5,500 people working in over 40 offices worldwide. In Belgium, the firm offers a full legal service to the country's leading corporations, financial institutions and government authorities. The cross-practice private enforcement team offers an integrated competition and litigation service, with few other firms being able to combine the quality of individuals, specialist knowledge and depth of resources and coverage. The firm's reputable litigation team is one of the largest contentious teams in Belgium, covering all aspects of dispute resolution, including civil liability rules and procedural aspects. Allen & Overy's competition practice, moreover, has been involved in some of the most high-profile antitrust cases in recent years, demonstrating a deep knowledge of competition law and interpretation of competition decisions. Together, these teams have been closely involved in some of Europe's largest and most complex antitrust litigation matters.

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