Private Antitrust Litigation 2022

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the nineteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Elizabeth Morony of Clifford Chance LLP, for her assistance with this volume.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust litigation is steadily gaining prominence in Europe. Most European countries report recent increases in case numbers. One of the key drivers is legislative change: the EU Damages Directive (EU Directive 2014/104/EU) was adopted in 2014 and has now been implemented in all member states. National legislators continue to foster the development through additional legislative reforms. For example, in Germany, an amendment passed in January 2021 further facilitated disclosure requests and introduced an additional evidentiary presumption that benefits plaintiffs.

Private antitrust litigation relates to a variety of contractual and non-contractual issues. However, it is cartel damages claims (ie, damages claims relating to violations of the cartel prohibition) that are growing exponentially. According to statistics, from 2014 to 2019 the number of European civil court judgments concerning cartel damages claims more than quadrupled from 50 to 239. In the majority of cases, plaintiffs are successful and courts either establish liability or award damages. Customers of cartelists now typically consider potential damages claims whenever the European Commission (EC) or a national competition authority imposes fines on a cartel. There may even be obligations under corporate law to enforce damages claims.

EC cartel decisions regularly lead to claims being made in the courts of several European countries. In almost all such cross-border cases, claims are filed in at least one of the three European jurisdictions that are traditionally preferred by claimants for cartel damages: the United Kingdom, Germany and the Netherlands. For instance, damages claims relating to the EC's *Air Cargo* and *TV/Computer Monitors* decisions are pending in all three countries. Damages claims relating to the EC's *Car Glass* decision have been filed in Germany and the United Kingdom. Damages claims relating to the *Gas Insulated Switchgear* cartel have been filed at courts in the United Kingdom and the Netherlands. Currently, the EC's 2016 *Trucks* decision dominates the antitrust litigation landscape in Europe. Truck manufacturers face claims in practically all European countries, with a focus on the three core jurisdictions as well as Spain.

Along with cartel-related damages claims, those relating to abuses of a dominant position are increasing. The trend has been triggered by a decade-long uptick in the number of both EU and national investigations into potential abuses of a dominant position, particularly in the tech sector and the pharmaceutical sector. For instance, in 2017, the EC fined Google in the *Shopping* case for abusing its dominant position. Although the decision has been appealed, four related civil damages claims against Google are already pending before national courts: one in Germany (filed in 2019, damages claimed of €500 million), one in the Czech Republic (filed in 2020) and two in the United Kingdom.

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are mandated by statute across Europe. Decisive for the development of private antitrust actions in Europe were two judgments by the European Court of Justice (ECJ) in *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006), in which the court held that the cartel and abuse of dominance prohibitions under European law are directly applicable and hence afford 'any individual' the right to claim damages. Following these judgments, the European and national legislators created or improved the legal frameworks for private antitrust actions.

Standing to bring a claim is extensive under European law and national laws must be construed accordingly. European law is based on the principle of full compensation, as the ECJ held in *Manfredi* (C-295/04; also see article 12(1) EU Damages Directive). Anyone who has suffered loss that has a causal connection with a competition law infringement may claim damages, irrespective of whether they are a direct or an indirect purchaser. Two ECJ judgments concerning the EC's *Elevators and Escalators* cartel decision confirm just how broad standing is. According to the ECJ's judgment in *Kone* (C-557/12 of 2014), compensation may be sought in relation to losses resulting from higher prices charged by non-cartelists who acted independently from the cartel and increased their prices under the 'umbrella' of the cartel ('umbrella damages'). In *Otis* (C-435/18 of 2019), the ECJ even granted persons the right to claim damages where they were neither active as suppliers nor customers on the market affected by the cartel. The plaintiff, a public body, had subsidised construction projects by granting loans. And it argued that the elevators and escalators cartel had increased construction costs and correspondingly the amount of loans required. Absent the cartel, the plaintiff would have been able to invest the additional amounts more profitably ('lost interest profits').

In practice, however, even with a relatively broad legal concept of standing to bring a claim, standing may not always actually be proven in individual cases. Thus, following the ECJ's *Otis* judgment, the Austrian courts must now determine whether there actually was a causal link between the cartel and the alleged lost opportunities to invest the money more profitably. Indirect purchasers often struggle to prove the causal link between a potential overcharge at the first market level and higher prices at 'their' downstream market level. Moreover, a generous approach to standing leads to practical issues. For instance, allowing indirect claims creates the risk of duplicative damages awards in all cases in which direct and indirect customers claim damages at the same time.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust claims are governed by the two general provisions under European law prohibiting cartels and abuses of a dominant position, article 101 and article 102 TFEU, as well as the Council Regulation (EC) No. 1/2003 implementing these provisions. In addition, the European legislator has issued a far-reaching directive concerning civil damages claims, the EU Damages Directive (EU Directive 2014/104/EU).

Some issues are not specifically addressed by European law and therefore regulated by national laws, namely procedural questions such as the provision of evidence and substantive questions such as the quantification of harm. However, European law has primacy over national laws (ECJ in *Costa/ENEL*, C-6/64 of 1964). According to the ECJ, national rules must respect two basic principles: the principle of equivalence and the principle of effectiveness. Applicable national laws governing cross-border cases must not be less favourable than those governing similar domestic cases (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise EU rights (principle of effectiveness).

The relevant courts and tribunals are primarily national civil courts. Claimants must file civil claims at national courts. The European institutions may, nevertheless, become involved in private antitrust litigation in two ways:

- National courts can refer questions on the interpretation of EU law that arise in the context of private antitrust litigation to the ECJ. Many rulings by the ECJ on crucial private antitrust litigation questions, such as the rulings in *Kone, Skanska* and *Otis*, derive from national court referrals. Preliminary rulings are binding on all courts in EU member states.
- The EC may become involved in national civil proceedings by way of so-called *amicus curiae* briefs. These are opinions on the interpretation of EU law (article 15 Council Regulation (EC) No. 1/2003). Usually, national courts take the initiative and consult the EC, but the EC may also proactively issue an opinion. In contrast to rulings from the ECJ, the EC's opinions are not binding. In *National Grid/ABB*, a follow-on damages claim relating to the gas insulated switchgear cartel, the English High Court consulted the EC on a question around the disclosure of leniency material, but ultimately decided not to follow the EC's arguments. While the EC had rejected disclosure to protect its leniency regime, the English court ordered the disclosure of extracts of certain documents containing leniency material. Another recent example concerns the trucks cartel. The German Regional Court of Hanover decided to ask the ECJ for a preliminary ruling on how to interpret the EC's decision in the *Trucks* case and explained that the court opted against approaching the EC because an amicus curiae brief would not be binding. Often, however, the EC's opinion has de facto authority.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in all types of antitrust infringements, according to the European Court of Justice (ECJ) (judgments *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006)).

A finding of infringement by a competition authority is – de jure – not required to initiate a private antitrust action, but – de facto – most claims follow decisions by the EC or a national competition authority ('follow-on' claims). Prominent examples are damages claims relating to the trucks and air cargo cartels. A finding of infringement by a competition authority has the following effect:

- decisions by the EC bind national courts and irrefutably establish proof of the infringement, according to article 16 Council Regulation (EC) No. 1/2003 and article 9 EU Damages Directive; and
- decisions by national competition authorities are generally only binding in the respective 'home jurisdiction' while, in other countries, they constitute prima facie evidence of an infringement, according to the EU Damages Directive. In two member states, Germany and Austria, infringement decisions by a competition authority of another member state are also binding.

Following Brexit, decisions by the EC issued after 1 January 2021 do not bind courts in the United Kingdom. This means that claimants cannot simply rely on a decision by the EC to prove an infringement but rather must prove it separately. However, even though an infringement decision by the EC is not binding, it could have significant evidential value. Moreover, if the EC's decision was rendered before 1 January 2021 or if the EC initiated its investigation before that date, decisions by the EC still have a binding effect in the United Kingdom.

'Standalone' civil claims, brought without any prior infringement decision, are rare. Prominent examples are the damages actions launched in the United Kingdom and Germany against MasterCard and Visa concerning inflated interchange fees charged in the context of their card payment systems. While no infringement decisions were ever issued against the defendants, the EC did close its investigation on the basis of commitments that removed its competition concerns. Such commitment decisions are not binding on civil courts, but they help plaintiffs to substantiate a competition law infringement. Another example is the recently filed bundled damages actions by over 100 sawmills against five German federal states, funded by an international litigation finance provider. The sawmills claim damages of over €850 million caused by a log wood cartel. The cartel was investigated but not sanctioned by the German Federal Cartel Office – the authority issued a prohibition order against one of the federal states in 2015, but it was later revoked by the German Federal Court of Justice on formal grounds. An example of a standalone claim without any prior enforcement measures by a competition authority is ValueLicensing's claim against Microsoft that was recently filed at the English High Court. ValueLicensing is claiming damages of over £270 million due to alleged anti-competitive contractual practices and an abuse of a dominant position.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

European law, namely Council Regulation (EU) No. 1215/2012 (Brussels I), provides a jurisdictional regime for all cases with links to more than one country in the EU. It is directly applicable in all member states. In private antitrust actions and, in particular, cartel damages actions, plaintiffs often have the option to choose between different venues.

First, under the general rule in article 4(1) Brussels I, a defendant may be sued in the courts of a member state in which the defendant is domiciled.

Secondly, under the special rule concerning tort claims in article 7(2) Brussels I, claimants may bring a claim in the courts of the member state 'where the harmful event occurred'. This notion covers both the place where the event giving rise to the damage took place and the place where the resulting damage occurred (ie, it can open up

two different venues). The claim can be brought in either of the available venues:

- The place where the event giving rise to the damage took place, the first alternative, is the place where the anticompetitive conduct was implemented (ie, where the cartel was concluded) (ECJ in *CDC/Hydrogen Peroxide*, C-352/13 of 2015) or where the abusive conduct occurred (eg, the predatory prices were offered (ECJ in *flyLAL Lithuania*, C-27/17 of 2018)).
- Three ECJ judgments deal with the second alternative, the place where the damage occurred. In *flyLAL Lithuania* (C-27/17 of 2018), an abuse of dominance case, the ECJ held that the damage occurs in the member state whose markets were affected by the abuse. According to the judgment in *CDC/Hydrogen Peroxide* (C-352/13 of 2015), the damage caused by a cartel in general occurs at the claimant's registered office. Finally, the *Tibor-Trans* (C-451/18 of 2019) case is another cartel damages case (related to the trucks cartel), but the claimant was an indirect purchaser of the cartelist. The ECJ, in its decision, did not refer to the claimant's registered office, but, in line with the principles previously established for abuse of dominance cases, considered the place where the damage occurred to be the member state whose markets were affected by the cartel and where the claimant had suffered damage due to distortion of market prices.

Third, under article 8(1) Brussels I, in cases in which there are multiple defendants (as often in cartel damages claims), claimants can use one of the defendants as an 'anchor' and bring a claim against several of the defendants in any jurisdiction where the anchor defendant is domiciled. The precondition is that the claims against all defendants are so closely connected that it is expedient to hear and determine them together. This typically is the case for cartel damages claims, as confirmed by the ECJ in *CDC/Hydrogen Peroxide* (C-352/13 of 2015). In this matter, the ECJ moreover held that, even if the defendant serving as the 'anchor defendant' reaches a settlement with the claimant, jurisdiction remains with the competent court unless the settling defendant colluded with the claimant to artificially establish jurisdiction.

Fourth, the parties can agree on a forum under article 25 Brussels I. The ECJ provided guidance on the enforceability of jurisdiction clauses (eg, contained in supply agreements) in the context of private antitrust litigation in two cases. In the judgment *CDC/Hydrogen Peroxide* (C-352/13 of 2015), which concerned a cartel damages claim, the ECJ held that jurisdiction clauses only apply to cartel damages claims if the clauses specifically refer to them; generic jurisdiction clauses that refer merely to disputes arising from a contractual relationship do not suffice. In *Apple Sales International* (C-595/17 of 2018), the ECJ came to a different conclusion for abuses of a dominant position. In this case, the ECJ considered the generic jurisdiction clause to also cover claims based on the abuse. The ECJ explained that the abuse might already have occurred when the contract was entered into so that it had the required direct link with the contractual relationship.

In practice, based on this legal framework, European law often gives claimants the option to choose between different jurisdictions for their claim. Which jurisdiction a claim is filed in often has a significant impact on the course and the outcome of proceedings. Despite the EU Damages Directive defining a common standard on many aspects, differences in national regimes remain and practical approaches by national courts differ on questions such as disclosure, provision of evidence, damages estimation or scope of the 'passing on' defence. Other factors such as the admissibility of litigation funding, the duration of proceedings or the availability of collective proceedings also play a role. 'Forum shopping' is, therefore, a frequent occurrence. For instance, in the *Trucks* case, a large number of Spanish freight forwarders decided to bring their claims in Germany. Another example is a German car manufacturer that decided to file its damages action relating to the roll-on roll-off vehicle shipping cartel in England.

Restrictions

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Articles 101 and 102 TFEU prohibit anticompetitive behaviour by corporations, not by individuals. Individual liability is therefore determined by national laws. As regards for instance Germany, the Netherlands, Spain and the United Kingdom, private antitrust actions may also be brought against individuals, including those domiciled in other jurisdictions (provided national courts have jurisdiction).

The ECJ dealt with the question of the liable entity in *Skanska* (C-724/17, 2019). The case concerned a damages claim filed against a defendant who had acquired and subsequently dissolved a company involved in a cartel. The defendant claimed it was not liable for damages since it was not involved in the cartel, but the ECJ held that a defendant cannot escape liability through restructuring. The ECJ relied on the concept of 'undertaking' under EU law, which is not limited to the respective legal entity, but rather refers to the economic entity with all legal entities belonging to it (ie, usually the whole group of affiliated entities). However, it remains to be seen whether the ECJ will also apply this concept to other constellations. The Amsterdam District Court recently held in a damages action related to the *Power Cable* case that the scope of the ECJ's *Skanska* ruling is limited to situations where a company would escape liability through restructuring. As, in the case at hand, none of the addressees of the EC's decision had ceased to exist, the *Skanska* ruling did not apply and thus could not provide a basis for a claim against their subsidiaries according to the Dutch court.

A new case is already pending at the ECJ that concerns the question of whether a subsidiary can be held liable for the participation of its parent company in a cartel (*Sumal*, C-882/19).

PRIVATE ACTION PROCEDURE

Third-party funding

7 May litigation be funded by third parties? Are contingency fees available?

At a European level, there are no binding rules on litigation funding or contingency fees. The EC has, however, established a series of non-binding principles in its 2013 Recommendation on collective redress mechanisms and, more recently, in its 2018 report on progress made in the practical implementation of that Recommendation. Overall, the EC has urged member states to impose restrictions to avoid abusive litigation and conflicts of interest.

National regimes differ and courts regularly deal with the admissibility of litigation funding structures. The topic is particularly controversial in Germany. Here, the most common approach is the 'assignment model': claimants assign their claims to a claims vehicle, which then files the action, bears all costs and fees of the proceedings and disburses a certain percentage of any awarded damages to the claimants. On the one hand, the German Federal Court of Justice adopted a relatively liberal approach in *LexFox*. On the other hand, there have been several decisions by German courts declaring claims vehicles inadmissible. In 2015, the Higher Regional Court of Düsseldorf dismissed a damages claim by Cartel Damages Claims (CDC) relating to the cement cartel after a 10-year court battle and ruled that the assignment of claims to CDC was void because the vehicle was not sufficiently funded. This issue was corrected by CDC in a subsequent claim filed at a different court, which has been settled in the meantime. In February 2020, the Regional Court of Munich rejected a large claim seeking more

than €600 million in damages from truck manufacturers. It identified several potential conflicts of interest in the funding structure, similar to the EC in its 2018 report. For instance, the court considered that profitability considerations by the litigation funder could ultimately risk early settlements that might not be in the claimants' best interests. Finally, in May 2020 and February 2021, the Regional Court of Hanover dismissed two damages claims concerning the sugar cartel because it considered the assignments to be invalid. All three decisions by both regional courts have been appealed. Claimants are at the same time exploring new funding structures. In December 2020, the claims vehicle TransAtlantis, a joint venture between two US investment funds, filed a mass damages claim at the Regional Court of Munich and offered claimants that assign their claims to the vehicle an upfront cash payment instead of a participation in any damages ultimately awarded by the court. The vehicle filed a parallel claim in the Netherlands. On 20 January 2021, the German government published a draft bill to amend the Legal Services Act, which might further facilitate the bundling of damages claims using assignment models.

In the Netherlands, collective actions have succeeded in two recent cases. Both claims, one brought by CDC relating to the sodium chlorate cartel and one brought by Stichting Cartel Compensation relating to the air cargo cartel, were considered as admissible by the Amsterdam Court of Appeal (decisions of February and March 2020, respectively).

In the UK, finally, third-party litigation funding is quite common and the Competition Appeal Tribunal has, for instance, recently approved the funding of two applications for collective proceedings following the trucks cartel – one by UK Truck Claims Limited (in 2019) and the other by Road Haulage Association Limited (in 2020). Both decisions have been appealed.

Jury trials

8 | Are jury trials available?

Jury trials are not available at the two European courts nor do any rules at European level exist on the availability of jury trials in the member states.

Discovery procedures

9 | What pretrial discovery procedures are available?

The EU Damages Directive harmonised the rules on discovery in Europe and lowered the threshold for disclosure requests, by both plaintiffs and defendants. Upon the plaintiff's request, national courts may order the defendant or third parties to disclose evidence that plausibly supports the claim for damages (eg, allows plaintiffs to quantify damages). Defendants can counter this by requesting that plaintiffs or third parties provide evidence that supports defence arguments such as the pass-on of potential damages to the plaintiff's customers (article 5(1)). Moreover, in contrast to previous discovery regimes in most jurisdictions that limited requests to items specified by the applicant, article 5(2) EU Damages Directive allows requests for the disclosure of 'relevant categories of evidence', as long as these categories are described as precisely as possible on the basis of reasonably available facts.

Despite these broad basic principles, to avoid excessive disclosure (in particular, 'fishing expeditions'), article 5(3) EU Damages Directive requires courts to conduct a proportionality assessment before ordering the disclosure of evidence. The EU Damages Directive (article 6(6)) further expressly excludes leniency statements and acknowledgements in connection with settlement discussions from disclosure, which includes verbatim quotations of such statements in other documents. However, once a competition authority has closed its investigation, certain parts of the competition authority's file are no longer out of reach for courts (article 6(5)).

The majority of the member states have implemented the new rules literally or almost literally. However, for legal systems unfamiliar with disclosure, this new framework brings about fundamental changes and national courts might need time to acclimatise:

- Spanish courts, for instance, have already applied the new rules and ordered the disclosure of documents in the *Trucks* case. The Commercial Court of Barcelona, however, had doubts in relation to a disclosure request relating to the *Trucks* case and referred certain questions to the ECJ for a preliminary ruling.
- In Germany, courts appear reluctant to make use of the new rules. The Higher Regional Court of Düsseldorf in 2016 ruled that the new rules do not apply retroactively and therefore rejected a disclosure request related to documents from the EC's file in the *Trucks* case. To eliminate this 'hurdle', the German legislator amended the law in January 2021.
- The English courts, finally, continue to grant extensive disclosure. Thus, in its first judgment applying the EU Damages Directive related to a follow-on claim relating to the *Trucks* case, the English High Court ordered the disclosure of the entirety of the EC's file and only excluded leniency and privileged documents.

Admissible evidence

10 | What evidence is admissible?

European law does not provide binding rules on the admissibility of evidence in national civil litigation proceedings. The EC has, however, issued non-binding guidelines for national courts covering two topics: the quantification of damages (Communication on quantifying harm in antitrust damages actions and accompanying 'Practical Guide', 2013) and the quantification of a potential pass-on of damages to indirect purchasers of the cartelist (Passing-on Guidelines, 2019).

If national courts involve the ECJ by way of a request for a preliminary ruling, the ECJ usually relies on the facts established by the national court. Notwithstanding this, the ECJ has indicated that the taking of evidence (eg, hearing a witness) is in theory possible in a preliminary ruling procedure (*Bosman*, C-415/93 of 1995). To date, this has not become relevant. As an alternative to taking evidence itself, the ECJ can request clarification from the referring court (article 101(1) Rules of Procedure of the Court of Justice).

Legal privilege protection

11 | What evidence is protected by legal privilege?

According to article 5(6) EU Damages Directive, member states must ensure that national courts give full effect to applicable legal professional privilege under EU or national law when ordering the disclosure of evidence. The rules regarding legal privilege differ considerably in Europe.

- In common law jurisdictions with extensive disclosure procedures, such as the UK, Ireland and Cyprus, legal privilege is typically more relevant. The more documents that are potentially subject to disclosure, the greater the practical relevance for protection of privileged content. Legal privilege in these countries protects documents that have been created for the purpose of giving or obtaining legal advice or in preparation for litigation.
- In comparison, in civil law jurisdictions such as Germany, disclosure requirements have traditionally been much narrower, which is why the protection of legal advice is of less practical relevance or does not exist at all. It remains to be seen whether jurisdictions with narrower or no existing concepts of legal privilege will introduce additional protection for defendants now that a practical need has arisen following the introduction of broad disclosure possibilities.

- With regard to trade secrets, the EU Damages Directive establishes that they need to be protected appropriately. National courts should have at their disposal a range of measures to protect confidential information from being disclosed during proceedings (Recital 18). According to the EC, measures could include the redaction of confidential information, confidentiality rings, the appointment of experts to review confidential information or *in camera* (ie, closed) hearings (Guidance for national courts on how to protect confidential information when handling disclosure requests, 2020).

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available regardless of whether there has been a criminal conviction or not.

Contrary to the approach in the United States, criminal sanctions for antitrust infringements (imprisonment or financial penalties) do not play a major role in Europe. European law does not provide for criminal sanctions (article 23(5) Council Regulation (EC) No. 1/2003). While most European jurisdictions have criminal sanctions for at least some types of antitrust infringements (eg, in Germany, bid-rigging is a criminal offence), in practice they focus on administrative sanctions such as fines.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence or findings in criminal proceedings are typically of no or only limited relevance in private actions because criminal sanctions are rare in Europe. Where criminal sanctions have been imposed, whether evidence and findings from the criminal case are admissible in civil actions depends on the national regime.

Leniency applicants are (only) partially protected from follow-on litigation. They are not immune to civil damages claims, unlike in the United States, but are exempt from joint and several liability for damages caused by the other cartelists (article 11(4)-(6) EU Damages Directive). Leniency applicants are thus only liable to their own direct and indirect purchasers. Two exceptions exist to this basic principle:

- where purchasers cannot obtain full compensation from the other cartelists (eg because they are insolvent), leniency applicants are jointly and severally liable for harm caused by the cartel;
- vis-à-vis other cartelists, leniency applicants may be required to pay contribution for claims related to damages caused by cartel outsiders, namely umbrella effects.

Private claimants usually rely on the (administrative) decision by the EC or a national competition authority, which establishes irrefutable proof of the infringement. The EC publishes its decisions on its website. Since certain passages must be redacted before publication, the publication of these EC decisions can, in some cases, take a long time, and in rare instances (*Air cargo*) up to five years. In *Evonik Degussa* (C-162/15P of 2017), the ECJ dealt with the question of which parts of an EC decision must remain confidential. The ECJ ruled that the following parts cannot be considered as confidential: quotations from leniency statements; and quotations from documents provided by the defendant in support of its leniency statement unless the defendant or a third party can claim legitimate interests of confidentiality such as business and trade secrets.

In practice, plaintiffs in addition often request access to a version of the EC's decision with fewer redactions, the full confidential version of the EC's decision or documents from the EC's file. Obtaining access to these documents is difficult. To protect the effectiveness of their leniency programmes, the EC and national competition authorities are reluctant to disclose documents and evidence obtained in their investigations to private claimants. European courts have established high hurdles for national courts. Thus, in its controversial decisions *Pfleiderer* (C-360/09 of 2011) and *Donau Chemie* (C-536/11 of 2013), the ECJ held that European law does not *per se* preclude private damages claimants from obtaining access to leniency statements. However, the ECJ stressed that, before ordering the disclosure of documents, national courts must carefully weigh the goal of compensating potential damages against the effectiveness of leniency programmes. Following the *Pfleiderer* judgment, the German national court that had referred the question to the ECJ rejected the plaintiff's request to access the defendant's leniency statements.

The EU Damages Directive (article 6(6)) expressly excludes leniency statements and settlement submissions from disclosure ('blacklist') so that a case-by-case assessment is no longer required for these documents.

Defendants threatened with the publication of details they consider to be confidential can seek interim relief with the ECJ pending a decision on the merits (ECJ's orders in the matters *AGC Glass Europe* (C-517/15P) and *Evonik Degussa* (C-162/15P)).

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The ECJ dealt with the question of a stay of private antitrust actions in its *Masterfoods* judgment (C-344/98 of 2000), which was the basis for article 16(1) Regulation 1/2003. The judgment concerned a follow-on damages claim filed at a national court that was based on a decision by the EC that was, at the same time, being appealed to the General Court. Such situations arise regularly in follow-on damages claims. An example is the *Trucks* case where one manufacturer has appealed the EC's decision to the European courts, while claimants have already filed civil damages claims involving trucks sold by this manufacturer at national courts. Another example – an abuse of dominance case – is the civil damages claims filed against Google in Germany, the Czech Republic and the United Kingdom based on the EC's decision in the *Shopping* case, which Google has appealed.

In *Masterfoods*, the ECJ held that any national civil action should not proceed to trial if the outcome of the civil dispute depends on the validity of the EC's decision. The ECJ stated that rulings by national courts must be consistent with decisions from European institutions. Thus, in follow-on damages claims that rely on an appealed infringement decision, the ECJ ruled that national courts should stay the private proceedings pending a final judgment in the appeal proceedings. In compliance with this ruling, many German courts have stayed proceedings relating to the *Trucks* case where they involve the manufacturer that has appealed the EC's decision.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

European law defines requirements that national regimes must meet with regard to the standard and burden of proof. For the core prerequisites of a damages claim, namely competition law infringement, causation, damages amount and pass-on, the requirements are as follows:

- To prove a competition law infringement, the plaintiff can, in follow-on damages cases, rely on the decision by the competition

authority, which is binding on the court. In 'stand-alone' claims, which are rare in practice, the plaintiff needs to provide separate proof.

- With regard to causation, the EU Damages Directive (article 17(2)) establishes a legal presumption that cartel infringements cause harm. This legal presumption goes further than the factual presumption that has, for instance, been established in German jurisprudence. While the factual presumption only constitutes one factor in the overall assessment of causation and must be weighed against all other available factors, the legal presumption applies unless the defendant is able to prove the contrary.
- For the quantification of harm, neither the burden nor the standard of proof must render the exercise of the right to damages practically impossible or excessively difficult (article 17(1) EU Damages Directive). More specifically, national courts must be entitled to *estimate* the amount of damages where it is impossible or excessively difficult to precisely *calculate* that harm. European law does not impose any type of presumption in this regard, but does not prohibit corresponding national rules either. The Romanian legislator in October 2020 introduced a rebuttable presumption that cartels lead to a cartel overcharge of 20 per cent.
- The burden of proof for passing-on lies with the claimant or the defendant, depending on whether, respectively, the pass-on is used as an offence (indirect purchaser claims damages) or a defence (cartelist rejects damages claims by direct purchaser) (articles 13 and 14 EU Damages Directive). Claimants and defendants can request the disclosure of evidence from the other party or third parties. Article 14 EU Damages Directive creates a certain asymmetry in the standard of proof between the offensive and defensive use of the pass-on, as it grants indirect purchasers a rebuttable presumption of a pass-on.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The duration of civil proceedings in national courts differs across Europe. This factor plays an important role when determining where to file a civil claim ('forum shopping'):

- In Germany, cartel damages actions involving the usual two appellate stages take on average five to six years. The trend is towards longer proceedings, especially where claims are bundled.
- In Spain and the Netherlands, the situation is similar, with very long durations in particular for bundled claims. Thus, in Dutch courts, several bundled claims are pending inter alia relating to the air cargo, trucks, gas-insulated switchgear, escalators and elevators, cathode ray tubes, bitumen, beer and sodium chlorate cartels. None are resolved yet, even though the first claim relating to the air cargo cartel, for instance, was filed in 2010.
- In the United Kingdom, proceedings are even longer (but often also even larger). For instance, many of the follow-on damages claims relating to the trucks cartel were filed in 2016 or 2017. The first instance trials for these claims are listed to take place between mid-2022 and late 2023. Further, there is the possibility of appeals to the Court of Appeal and possibly the Supreme Court. Another example is the *Merricks v Mastercard* case, in which the English Supreme Court in December 2020 issued its long-awaited decision on the admissibility of collective proceedings. This case was filed in 2016 and the Supreme Court's decision concerns only one of many issues under dispute.

If national courts involve the ECJ and request a preliminary ruling, the current average duration of such proceedings before the ECJ is 15.5 months according to the court's annual report for 2019. It is not possible to accelerate proceedings before the ECJ in antitrust matters.

Limitation periods

17 | What are the relevant limitation periods?

The relevant ECJ precedent on limitation rules is *Cogeco* (C-637/17 of 2019). It relates to a follow-on damages claim filed by Cogeco in Portugal based on an abuse of dominance by a national TV sports channel, which was sanctioned by the Portuguese competition authority. The Lisbon District Court considered the claim to be time-barred under the national three-year limitation period. The court concluded that the period had started to run in 2009 with the initiation of the infringement proceedings and had thus expired before Cogeco filed the damages action in 2015. The court was of the opinion that the running of the statute of limitation was not suspended during the Portuguese competition authority's investigation, but referred the question to the ECJ. The ECJ considered the Portuguese limitation rules to be too restrictive. It concluded that the combination of a three-year limitation period and no suspension rule made it practically impossible for Cogeco to exercise its damages rights and thus undermined the full effectiveness of EU law. The Lisbon District Court nevertheless dismissed the claim on the basis that it was time-barred. The court noted that the ECJ had overlooked that, even though the running of the statute of limitation was not suspended ex lege, Cogeco could, under Portuguese law, have applied for a suspension.

The EU Damages Directive, which was not yet applicable at the time of *Cogeco*, provides detailed rules on limitation periods (article 10 EU Damages Directive) that have now been implemented in all member states (but may not apply retroactively):

- the limitation period for cartel damages claims is five years;
- the limitation period does not begin to run before the infringement has ceased and, cumulatively, the claimant has knowledge (or can reasonably be expected to have knowledge) of:
  - the behaviour constituting the infringement;
  - the fact that the infringement caused harm; and
  - the identity of the infringer; and
- the running of the limitation period is suspended for the duration of the competition authority's investigation and any subsequent appeal process plus an additional period of one year after the infringement decision has become final.

The EU Damages Directive does not prevent member states from maintaining so-called absolute limitation periods (ie, limitation periods that start to run independently of the claimant's knowledge (Recital 36 EU Damages Directive)). Thus, in Germany, an absolute limitation period of 10 years exists, starting on the day on which the damage occurred (for all damages until 26 December 2016) or, respectively, the infringement ended (for all damages from 27 December 2016 onwards). The situation is similar in the Netherlands, where an absolute limitation period of 20 years exists that begins to run from the moment the damage occurred (for all damages until 9 February 2017) or the day after the infringement ended (for all damages from 10 February 2017 onwards). There are no equivalent absolute statutes of limitations in Spain and the United Kingdom. In accordance with the ECJ's judgment in *Cogeco*, the EU Damages Directive states that absolute limitation periods must not render it practically impossible or excessively difficult to exercise damages rights (Recital 36).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals available before national courts are determined by national procedural laws. Next to appeals at national level, a request for a

referral of selected questions to the ECJ may be an option. Such referrals are only admissible if they relate to legal questions, namely the interpretation of EU law.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Since 2008, the European Commission has been advocating collective proceedings for antitrust claims (White Paper on Damages actions for breach of the EC antitrust rules). However, the EU Damages Directive of 2014 did not include provisions on collective proceedings. Several member states had expressed concerns that such a mechanism would result in 'US-style class actions' or the emergence of a 'claims industry' in Europe. Collective proceedings in respect of antitrust claims will not become available under the recently adopted EU Representative Actions Directive ((EU) 2020/1828) either. While an earlier version included collective proceedings for antitrust infringements, they are no longer part of the final version, which entered into force on 24 December 2020.

There is, therefore, no harmonisation in national legislative frameworks. Collective proceedings have been introduced in a number of European jurisdictions, including the UK and the Netherlands:

- The English Consumer Rights Act 2015 introduced opt-out and opt-in collective proceedings allowing a class representative to bring an action on behalf of all those harmed by an antitrust infringement. While opt-out class actions are only available to UK-domiciled claimants, opt-in collective proceedings can be brought by claimants located abroad as well. In both cases, the class representative must apply for a collective proceedings order (CPO) from the Competition Appeal Tribunal (CAT) before proceeding to trial. This certification process ensures that the class members have sufficient 'common' interest to constitute a suitable class of claimants. While the framework was created in 2015, no collective proceedings have yet passed the certification stage. However, the landmark judgment by the English Supreme Court in *Merricks v MasterCard* of 11 December 2020 provides more legal certainty.
- The Dutch legal system also provides for collective proceedings for private antitrust litigation. Claimants may unite themselves through associations or foundations (Stichting), which may litigate on behalf of the injured parties. On 1 January 2020, the Act on Collective Damages in Class Actions (WAMCA) entered into force which introduced opt-out class actions and, moreover, allowed foundations to claim damages instead of, as previously, merely declaratory judgments. The new regime is not limited to antitrust infringements; it allows class actions based on violations of consumer, environmental and data protection laws. To date, the cases filed under this regime do not include antitrust claims.

In comparison, a number of other European countries, such as Germany, do not provide for collective proceedings in competition law matters. Claimants nevertheless bundle claims by other means, such as the assignment of claims to a claims vehicle or the joint launch of an action by several plaintiffs (*subjektive Klagehäufung*).

Applicable legislation

20 | Are collective proceedings mandated by legislation?

At a European level, collective proceedings are not mandated by statute. The new EU directive on collective proceedings that entered into force on 24 December 2020 (Representative Actions Directive) does not cover private antitrust actions.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no European legal framework for collective proceedings with regard to private antitrust actions.

22 | Have courts certified collective proceedings in antitrust matters?

There is no European legal framework for collective proceedings in antitrust matters. However, collective proceedings have been introduced in a number of European countries, including the United Kingdom and the Netherlands.

- In the United Kingdom, while several collective proceedings have been launched, none of them have been certified by the courts. However, the landmark judgment by the English Supreme Court in *Merricks v MasterCard* of 11 December 2020 may now lead to claims being certified. This case relates to a collective damages claim of approximately €16 billion filed by Mr Merricks against MasterCard on behalf of a class of over 46 million consumers for losses resulting from anticompetitive multilateral interchange fees (MIF). Mr Merricks alleges that the infringement resulted in merchants paying higher MIFs, which merchants then passed on to consumers. In the first instance, the Competition Appeal Tribunal (CAT) refused to certify the claim. Upon appeal, the Court of Appeal overturned the CAT's decision in April 2019. The Supreme Court, upon further appeal, confirmed this ruling and identified a number of errors in the CAT's assessment. The case has now been referred back to the CAT to reconsider whether the CPO should be granted in light of the Supreme Court's guidance. If a CPO is granted, the case could proceed to trial.
- The Dutch legal system also provides for collective proceedings for private antitrust litigation, but no antitrust claims have yet been filed under the Act on Collective Damages in Class Actions since its introduction on 1 January 2020. In the Netherlands, a majority of the bundled antitrust damages claims have been based on an assignment of claims to a claims vehicle, which then files the claim. In February 2020, the Amsterdam Court of Appeal in *CDC/Kemira* confirmed the validity of the assignments made to the claims vehicle Cartel Damages Claims in relation to the sodium chlorate cartel. In March 2020, the Amsterdam Court of Appeal also confirmed the validity of the claims vehicle Stichting Cartel Compensation in relation to the air cargo cartel.

In countries where no collective proceedings have yet been introduced, such as Germany, claimants have launched a number of bundled claims, often via claims vehicles using assignment models. The most frequent model is similar to the above-mentioned model used in the Netherlands – injured parties assign their claims to a claims vehicle, which then launches the action. Another common strategy is to combine individual actions into one collective action. In two recent decisions, however, German first-instance courts have adopted a relatively strict stance towards such alternative models; both decisions have been appealed.

Opting in or out

23 | Can plaintiffs opt out or opt in?

There is no European legal framework for collective proceedings in antitrust matters.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

There is no European legal framework on collective settlements. Such mechanisms are equally rare at national level. One prominent example would be the Netherlands where the Dutch Act on Collective Settlements of Mass Claims (WCAM) facilitates collective settlements. The law allows the Amsterdam Court of Appeal to declare settlements as binding on all class members. The court may reject the settlement if the terms are unreasonable (eg, compensation is inadequate). The declaration binds all class members and is not limited to the parties to the proceedings. However, it is possible for class members to explicitly opt out of the settlement and pursue damages individually.

Since the WCAM's entry into force in July 2005, nine collective settlement agreements have been declared binding. None of these cases concerned antitrust matters – instead, they dealt with claims from large numbers of individuals concerning, for example, violations of securities laws.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Collective proceedings are available in some European countries such as the United Kingdom and the Netherlands. If different legal proceedings in respect of the same matter are brought in more than one jurisdiction, article 29 Regulation (EU) No. 1215/2012 gives priority to the court first seised with the matter to avoid irreconcilable judgments. The court then has the exclusive power to establish whether it is competent to rule on the matter. Other courts seised with the matter must stay their proceedings until this is established. If the court first seised confirms its jurisdiction, then the other courts must decline jurisdiction in favour of that court (*lis alibi pendens* rule).

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

EU law pursues the principle of full compensation. Full compensation places a person in the position in which that person would have been had the infringement of competition law not occurred (article 3(2) EU Damages Directive and European Court of Justice (ECJ) judgments in *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006)).

Forms of damages in cartel damages cases include:

- overcharges paid by customers of cartel members or undercharges in case of a buyers' cartel;
- umbrella damages (ie, overcharges paid by customers of cartel outsiders (ECJ judgment *Kone* (C-557/12 of 2014)); and
- overhang damages (ie, higher prices paid after the end of the cartel. In abuse of dominance cases claimants typically claim lost profits, for instance, if a company was foreclosed from the market by the dominant undertaking.

The EU Damages Directive (article 17) sets binding standards for all national regimes concerning the quantification of harm. In addition, the EC has published non-binding guidelines for national courts on how to quantify damages caused by competition law infringements (Communication on quantifying harm in antitrust damages actions, 2013). A 'Practical Guide' accompanying the report explains various economic and econometric methods of estimating damages. Even though the Practical Guide is not binding, it is frequently referred to by parties in national proceedings.

Despite these common, Europe-wide legal standards for the quantification of damages, substantial differences remain between the legal frameworks at national level as well as the practical approaches taken by national courts:

- In Germany, there have been a number of judgments awarding damages (eight in total regarding cartel damages). The median rate of damages awarded in Germany is 6.5 per cent according to the statistics, with the amounts of damages awarded ranging from 5 per cent to 33.5 per cent. Notable recent precedents are three judgments of the Regional Court of Dortmund concerning the rails cartel in which the court estimated cartel overcharges of 15 per cent and 10 per cent, without consulting an economic expert or applying the established econometric methods. The Regional Court of Munich, in contrast, refused to estimate the cartel overcharge without instructing an economic expert in a decision of February 2021 related to the *Trucks* case. Finally, lump sum damages clauses in supply contracts are permissible according to a ruling of the German Federal Court of Justice of February 2021. The court held that lump sum damages clauses of up to 15 per cent can be acceptable, but also clarified that the defendant may prove that the damage actually caused was lower than that or that no damage occurred at all.
- In the Netherlands, decisions awarding damages are rare. In *TenneT/ABB*, the District Court of Gelderland in 2017 awarded an amount of €23 million plus interest to TenneT. It was the first decision to award cartel damages in the Netherlands. However, ABB appealed the decision and, in 2018, the Arnhem-Leeuwarden Court of Appeal appointed its own economic experts to estimate the damages amount.
- In the United Kingdom, damages have only been awarded in one case so far: *BritNed v ABB*. BritNed claimed damages including interest in excess of €200 million based on the EC's decision in the *Power Cable* case. In February 2018, the High Court awarded BritNed only a part of the damages sought (€11.7 million plus interest). Following ABB's appeal, the Court of Appeal in December 2019 further reduced the damages amount awarded and ordered BritNed to repay approximately €5 million to ABB.
- In contrast, the Spanish courts have regularly awarded damages. Most of the judgments relate to the trucks cartel. According to statistics, there are at least 96 judgments by first instance courts and 12 judgments by appellate courts in Spain relating to the trucks cartel. These have awarded damages of between 5 per cent and 15 per cent of the purchase price plus interest.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

According to the ECJ in *Factortame I* (C-213/89 of 1990), national courts have the power to grant interim relief in matters concerning rights derived directly from EU law (such as articles 101 and 102 TFEU), even if national procedural rules do not allow it. In this case, an English court found an infringement of EU law, but noted that English law did not allow interim relief. It therefore referred the question to the ECJ, which held that national courts may base interim measures directly on European law because the protection of rights under EU law required the immediate availability of a remedy.

The specific procedural requirements for seeking and obtaining interim relief, such as the standard of proof, are a matter of national procedural rules.

Punitive damages

29 | Are punitive or exemplary damages available?

No. The EU Damages Directive is based on the principle of full compensation and explicitly states that damages regimes must not lead to overcompensation, whether by means of punitive or exemplary damages (article 3(3)).

In practice, the question of overcompensation often becomes relevant in the context of the pass-on of damages. Simultaneous claims from different market levels can lead to overcompensation. The EU Damages Directive (article 15 and Recital 39) aims to protect defendants from multiple liability towards claimants from different levels of the supply chain and limits claims at each market level to the actual loss. In certain cases, even though goods have been sold over various market levels, simultaneous claims at different market levels can be excluded for practical purposes, for instance where indirect customers only suffered 'micro-damages' and are unlikely to assert them. The German Federal Court of Justice held in a judgment of 23 September 2020 that in such cases a deviation from the principle of full compensation can be justified and an award of the full amount made to the direct customer, even if it might have been able to pass on parts of its losses to indirect customers.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

The ECJ dealt with the right to interest in the matter *Manfredi* (C-295/04 of 2006). The court referred to the principle of full compensation and held that the payment of interest constitutes an 'essential component' of such compensation. The EU Damages Directive further specifies this right and stipulates that interest is due from the time when the harm occurred until the time when compensation is paid (article 3(2) and Recital 12 of the EU Damages Directive).

National regimes differ significantly, but interest is usually a very significant factor. Since damages claims often relate to cartels that took place 10 or more years before, large sums of interest accrue and often make up more than half of the damages amount:

- One of the most generous regimes is that of the Netherlands, where the interest rate amounts to seven percentage points above the European Central Bank (ECB) base rate. Moreover, in a departure from most other European jurisdictions, compound interest is owed.
- In Germany, the interest rate is also relatively high, at five percentage points above the ECB base rate. Compensatory interest is available as a separate head of loss.
- In England, judges have relatively wide discretion and, in practice, often award interest at a rate of one to four percentage points above the Bank of England base rate. In the case *BritNed v ABB*, compound interest was claimed but rejected by the English High Court.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

European law requires full compensation. Therefore, claimants are entitled to full compensation, even in cases in which the cartelist has already paid a substantial fine. By the same token, substantial fines do not necessarily imply high damages; even though the impact of the cartel may play a certain role when setting the fine, the methodology used to determine fines follows different principles and criteria.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

There are no rules under EU law on legal costs in national civil proceedings; this is determined by national law. If the ECJ issues a preliminary ruling at the request of a national court, it is for the referring court to decide on the costs of the proceedings before the ECJ (article 102 Rules of Procedure of the Court of Justice).

Joint and several liability

33 | Is liability imposed on a joint and several basis?

According to article 11(1) EU Damages Directive, cartelists are jointly and severally liable for the full harm caused by the infringement to which they are a party. The claimant thus has the right to claim full compensation for the damages caused by the infringement from any infringer. Only immunity recipients enjoy certain privileges.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

The EU Damages Directive (article 11(5)) provides for the possibility of contribution among defendants. A defendant liable for damages caused by other members of a cartel may recover the corresponding amounts from them. These European rules are supplemented by national laws that regulate the details of how contribution can be claimed:

- Under German and Spanish law, for instance, contribution claims must be asserted subsequent to a judgment in the damages proceedings. To ensure that the findings of the court in the damages proceedings are binding on the court dealing with the subsequent contribution claim, defendants typically serve third-party notices in the damages proceedings and invite other cartelists to join them as third-party defendants.
- In the Netherlands and the United Kingdom, contribution claims can either be introduced in the damages proceedings or raised subsequent to a judgment awarding damages.

Contribution shall, according to article 11(5) EU Damages Directive, be allocated among the cartelists according to their 'relative responsibility'. The EU Damages Directive does not provide a definition and thus leaves this to national laws. In Germany, the Federal Court of Justice, in a ruling on the calcium carbide cartel, mentioned a number of possible criteria for determining the relative responsibility: the share of supplies affected by the cartel, the cartelists' market shares, the role of the

respective cartelist in the cartel, the cartel-related profit or simply a pro rata allocation. In the United Kingdom, Netherlands and Spain, there is no case law on this point. However, similar criteria are under discussion in legal literature.

Finally, the EU Damages Directive regulates the effect of a partial settlement on any subsequent damages actions. According to article 19(1), the claim of the settling injured party is reduced by the settling co-infringer's share. In addition, article 19(2) provides that non-settling co-infringers cannot claim contribution from the settling co-infringer. This concept is based on the German concept of the *beschränkte Gesamtwirkung* (limited overall effect).

Passing on

35 | Is the 'passing-on' defence allowed?

The regime established by the EU Damages Directive pursues the idea of full compensation at all market levels. Correspondingly, under article 13 EU Damages Directive, the 'passing on' defence is available to defendants to reduce or eliminate the plaintiff's damages claim by showing that the plaintiff passed on (parts of) the overcharge to its customers. Mirroring this, indirect purchasers have the right to claim damages from the defendant by showing that they suffered (parts of) the overcharge due to a pass-on by intermediate upstream suppliers. The EU Damages Directive even grants indirect purchasers a rebuttable presumption that a pass-on occurred.

Cartelists may thus face damages claims from different market levels. Article 15 EU Damages Directive foresees certain procedural safeguards to protect the defendant from multiple liabilities towards claimants from different market levels.

To assist national courts in estimating the amount of a pass-on, on 9 August 2019 the EC published comprehensive guidelines (Passing-on Guidelines). However, the approaches of national courts differ:

- Spanish courts seem particularly restrictive, as the 'passing on' defence has not yet been accepted by any court.
- English courts, in contrast, consider pass-on to be a valid defence (Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC*, 2020). While the burden of proving a pass-on generally lies with the defendant, once the defendant has substantiated a pass-on, the plaintiff must disclose how it has dealt with increased costs due to cartelised prices.
- The regime is similar in Germany, based on the landmark decision of the Federal Court of Justice in *ORWI* in 2011.
- In the Netherlands, the 'passing-on' defence has been explicitly recognised by the Supreme Court (*TenneT/ABB*, 2016). Nevertheless, in the first judgment in the Netherlands awarding cartel damages, the District Court of Gelderland rejected the argument. It referred to the fact that customers on the next market level might not claim damages because the damages amounts at this level were too small ('scattered damages'). The judgment has been appealed.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In addition to the defences such as relating to the limitation of claims, the quantification of damages or the 'pass on', a number of further defences exist. In all cases in which there is no binding infringement decision ('stand-alone' claims), defendants may contest the alleged conduct. In follow-on damages cases, defendants typically defend themselves by showing that parts or all of the products do not fall within the product scope, geographic scope and period of the infringement, which means that they were not affected. Often, defendants also object to the plaintiff's standing to bring a claim or the defendant's liability. Whether the court has jurisdiction is also a regular issue. Additional defences are available depending on the circumstances of the individual case.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

The EU Damages Directive notes that alternative dispute resolutions are desirable and mentions out-of-court settlements, arbitration or mediation as possible mechanisms (Recital 48). The directive contains provisions that are aimed at facilitating such mechanisms, including the suspension of court proceedings for the duration of any consensual dispute resolution process (article 18). Correspondingly, in the case *Microsoft Mobile/Sony*, the English High Court in 2017 stayed follow-on damages proceedings relating to the lithium-ion batteries cartel to give effect to an arbitration clause.

Out-of-court settlements are common in cartel damages cases. Arbitration and mediation, in contrast, are used less often. This is, among other things, due to the fact that cartel damages claims typically involve a large number of defendants. Unless all of them submit to the dispute resolution process, which is highly unlikely, practical problems will arise. For instance, in proceedings before state courts, the parties to the action may serve third-party notices to ensure that the ruling is binding on non-involved parties (eg, in the context of subsequent contribution claims); this is not possible in arbitration proceedings.

Following the ECJ's ruling in *Eco Swiss* (C-126/97 of 1999), the arbitrability of competition law is accepted in most countries. The ECJ provided guidance on the enforceability of jurisdiction clauses in *CDC/Hydrogen Peroxide* (C 352/13 of 2015) and might adopt a similar approach concerning arbitration clauses. The ECJ held that jurisdiction clauses only apply to cartel damages claims if the clauses specifically refer to them. National case law on arbitration clauses is divided: courts in some countries, including the English High Court in *Microsoft Mobile v Sony Europe* (2017), have adopted a more liberal approach and ruled that common arbitration clauses also cover antitrust damages claims. Courts in other countries, such as in the Netherlands, are more restrictive and exclude antitrust damages claims unless they are expressly referred to in the arbitration clause.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

There is an emerging trend of a greater number of judgments awarding damages. The vast majority of judgments on cartel damages so far relate to procedural issues and questions of liability, whereas judgments on quantum (ie, the damages amount) are rare. This is currently changing. Spanish courts, in particular, regularly award damages. More than 100 judgments have been rendered by Spanish courts, mostly concerning the trucks cartel, that have awarded damages assuming overcharge rates of 5–15 per cent. In Germany, the focus is slowly shifting from liability to quantum. While German courts have to date preferred to issue judgments on liability only (in the form of declaratory or interlocutory judgments), recent decisions by the Federal Court of Justice have restricted the scope for such judgments. Many courts have, therefore, instructed economic experts to calculate the damages amount and the number of judgments awarding damages will increase accordingly. Recently, one first-instance court even estimated damages without instructing an economic expert and awarded damages at an overcharge rate of 15 per cent.

A hot topic in many European jurisdictions is the admissibility of collective proceedings. Class actions such as those in the United States are not available in Europe, but plaintiff firms are exploring alternative models. In the United Kingdom, certain collective proceedings are admissible and several proceedings are pending at the CAT. Although none of these claims have yet been certified, the recent judgment by the English Supreme Court in *Merricks v MasterCard* is considered by many as a possible breakthrough. In the Netherlands, courts have recently accepted the validity of two bundled claims using assignment models (ie, the assignment of claims to a claims vehicle acting as plaintiff). In Germany, the topic is particularly controversial. On the one hand, the Federal Court of Justice accepted the validity of a claims vehicle bundling claims from consumers relating to breaches of tenancy laws (*LexFox*). On the other hand, several first-instance courts rejected other bundled claims, including one claim relating to cartel damages (*myRight*, *Flightright*, *Financialright*).

A third controversial topic in Europe is 'forum shopping' (ie, the question of where a plaintiff may file its claim). Popular jurisdictions among plaintiffs continue to be England, the Netherlands and Germany. It remains to be seen whether Brexit will make claims in England less attractive, as decisions by the EC concerning competition law infringements issued after 1 January 2021 are no longer binding on English courts (ie, plaintiffs must separately prove an infringement). Moreover, issues may arise as certain procedural rules, for example, those relating to the service of claims on defendants located abroad, have ceased to apply. Spain has recently started to see an uptick in cases – plaintiffs have been attracted by the fact that proceedings move quickly to trial and courts regularly award damages. Now that the EU Damages Directive has led to the implementation of more plaintiff-friendly rules across Europe, additional jurisdictions could become interesting to plaintiffs.

Coronavirus

39 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

At the European level, no measures specific to private antitrust litigation have been adopted to address the possible consequences of the covid-19 pandemic. At the national level, particularly in the early phase of the pandemic, many jurisdictions suspended or significantly extended procedural deadlines and postponed oral hearings. This created a backlog that has not yet been fully cleared.

However, companies and their advisors are now expected to meet deadlines despite the pandemic. According to case law in the United Kingdom, the pandemic cannot serve as an excuse for missing deadlines, such as in the context of disclosure requests.

Many oral hearings in antitrust litigation take place as planned. While some hearings are held in person, many courts – including in the Netherlands, Germany, Spain and the United Kingdom – prefer remote hearings using video conferences. In other countries (eg, Italy), hearings can also be held in writing. However, there are still a significant number of oral hearings that continue to be postponed, partly because courts are reluctant to resort to new formats, and partly because one or several parties insist on holding the hearing in person.

The lessons of the pandemic could nevertheless prove helpful and lead to a lasting change in procedure. For example, some countries or individual courts might be inclined to maintain the possibility to conduct remote hearings, even after the pandemic.

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