Private Antitrust Litigation

Consulting editor
Francesca Richmond

2019

GETTING THE DEAL THROUGH

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Baker McKenzie LLP

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Private Antitrust Litigation 2019

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Private Antitrust Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Greece and Norway.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 consulting editor, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Belgium

Tom Schoors and Lauren Rasking
Allen & Overy (Belgium) LLP

Legislation and jurisdiction

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

Belgium is not known as a claimant-friendly forum for private antitrust litigation. So far, the number of private enforcement actions before Belgian courts has remained limited.

With the transposition of Directive 2014/104/EU (Damages Directive) in mid-2017, the Belgian legislator has introduced significant changes to facilitate private enforcement actions. The law encourages such actions, in particular by alleviating the claimants' burden of proof and by facilitating the access to evidence.

At the same time, the scope of the Belgian class action regime was extended to infringements of European competition law. This change also aims to increase the role of Belgian courts in the development of private antitrust litigation.

Although the legislative changes have not removed all obstacles for claimants (eg, no broad disclosure system, or no possibility for (all) undertakings to bring actions for collective redress), more claimants are bringing private enforcement actions before the Belgian courts. In particular, the number of follow-on actions for cartel infringements is steadily increasing.

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?

The Belgian legislator transposed the Damages Directive by the Act of 6 June 2017, inserting a Title 3 'The action for damages for infringements of competition law' in Book XVII 'Particular judicial proceedings' of the Belgian Code of Economic Law (CEL). The Act was published on 12 June 2017 in the Belgian Official Gazette and came into force on 22 June 2017. According to article 45 of the Act of 6 June 2017, the procedural rules introduced by this new section of the CEL do not apply to private enforcement actions of which the court was seized prior to 26 December 2014.

Although private enforcement actions could be brought before the entry into force of the transposed Damages Directive (in particular as a tort claim on the basis of article 1382 of the Belgian Civil Code), the CEL now provides expressly that any natural or legal person (including consumers, undertakings and public authorities) who has suffered harm as a result of an infringement of competition law has the right to claim and to obtain full compensation for that harm, according to the general provisions of Belgian law (article XVII.72 of the CEL).

Both direct and indirect customers can have standing to bring private enforcement actions. Direct and indirect purchasers benefit from the rebuttable presumption that the cartel infringement caused harm (article XVII.73 of the CEL (see question 15)) and indirect purchasers of goods or services affected by an infringement benefit from a rebuttable presumption that direct buyers passed on their overcharge (article XVII.84 of the CEL (see question 15)).

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

Title 3 'The action for damages for infringements of competition law' in Book XVII 'Particular judicial proceedings' of the CEL introduced certain (procedural and substantive) rules to govern actions for damages for the infringement of competition law (see question 2). These rules apply as a lex specialis. However, because no deviating rule is provided in Title 3 of the CEL, rules of ordinary law are applicable (section 2, article XVII.71 of the CEL).

Private enforcement actions can be brought before the competent commercial court or court of first instance. The ordinary provisions of the Belgian Judicial Code apply. We note that Brussels courts have exclusive jurisdiction to hear actions for collective redress (article XVII.35 of the CEL (see question 19)). The judgment of the commercial court or court of first instance can be appealed before the courts of appeal. Under specific conditions, the judgment of the court of appeal can be further appealed before the 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.

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?

The CEL applies to private enforcement actions for infringements of article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) and their equivalent under Belgian law (ie, article IV.1 or IV.2 of the CEL (article I.22 of the CEL)). However, the limited scope of the lex specialis does not preclude claimants from bringing private enforcement actions for any other infringement of competition law in accordance with the ordinary provisions of Belgian law.

A decision by a competition authority establishing an infringement is not required. Claimants can bring standalone or follow-on actions for damages.

With regard to the effect of a finding of infringement, a distinction is made between such a finding by the competition authority or review court in Belgium and in other member states of the European Union:

- section 1, article XVII.82 of the CEL introduced an irrebuttable presumption that an infringement of competition law has been committed, if this was found in a final decision of the Belgian Competition Authority (BCA) or the Brussels Court of Appeal; and
- section 2, article XVII.82 of the CEL determines that a final infringement decision adopted by another national competition authority in the European Union or its review court constitutes, at least, prima facie evidence that an infringement of competition law has occurred and may be assessed along with any other evidence adduced by the parties.

The CEL does not mention decisions of the European Commission (or of the EU courts in appeals of European Commission decisions). However, article 16 of Regulation (EC) No. 1/2003 (Modernisation Regulation) already provided the same binding character of an infringement decision of the European Commission as a decision of the BCA (or its review courts).

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?

As a general rule, Belgian courts have jurisdiction when the defendant has its domicile or usual residence in Belgium at the time proceedings are initiated (1°, section 1, article 5 of the Belgian Code on Private International Law (PIL) and article 4(1) of Regulation (EU) 1215/2012 (Brussels Recast Regulation)).

In cases where are multiple defendants, it is sufficient for one of the defendants to have its domicile or usual residence in Belgium (2°, section 1, article 5 of the PIL and 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 there is a 'close connection'. Claimants can attempt to ensure Belgian courts have jurisdiction by including a Belgian 'anchor defendant'.

The claimant can also decide to bring private enforcement actions before the Belgian courts if the event giving rise to the harm or the harm itself occurred or may occur in Belgium (2°, article 96 of the PIL and 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 (2°, section 1, article 6 of the PIL and article 26 of the Brussels Recast Regulation).

There is no clear (Belgian) case law on the effect of arbitration clauses between claimants and defendants on the jurisdiction of the Belgian courts. Although earlier relevant case law of the European Court of Justice (ECJ) found that arbitration clauses only cover disputes that arise directly from the legal relationship in the context of which they had been agreed on (and not competition law infringements) (*CDC v Akzo Nobel et al*, C-352/13, 21 May 2015, paragraphs 69 to 70), recent (English) case law might indicate that broad arbitration clauses could apply to private enforcement actions to the extent that there is a close connection between the infringement and the wording of such a clause (English High Court, *Microsoft Mobile OY (Ltd) v Sony Europe Limited et al* [2017] EWHC 374 (Ch)). It is too soon to tell what impact (if any) the recent decision in the ECJ regarding the incompatibility of arbitration clauses in internal EU Bilateral Investment Treaties with EU law will have on this debate and, if so, if national courts would only strike out arbitration clauses in the context of stand-alone private actions for damages or also for follow-on actions (*Slovak Republic v Achmea BV*, C-284/16, 6 March 2018).

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

Yes. Private enforcement actions can be brought against both corporations and individuals before the Belgian courts. Corporations and individuals from other jurisdictions can be sued before a Belgian court if the applicable rules on jurisdiction provide sufficient ground to do so (see question 5).

Private action procedure

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

Yes. 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. Consequently, a third-party funder cannot take a share of any proceeds of the action unless an agreement is concluded between the third-party funder and the group members before the distribution of the compensation.

Although claims can be assigned in principle, third parties must be cautious because the Belgian Civil Code provides that the debtor of an assigned contested claim can discharge its obligations under the contested claim by paying an amount equal to the price paid by the assignee for the contested claim, increased with interest and cost (articles 1699 to 1701 of the Civil Code).

Although deontological rules do not allow pure 'no win, no pay' contingency fees, lawyers may charge a reasonable success fee to clients.

8 Are jury trials available?

No. There are no jury trials in civil proceedings in Belgium.

9 What pretrial discovery procedures are available?

Belgian procedural law does not provide for a separate discovery procedure. Hence, there is also no pretrial 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 to 882-bis of the Judicial Code). If a party can convince the court that another party to the proceedings or a third party has possession of a document that could prove a fact that is relevant to the dispute, the court can order such a (third) party to disclose the document. Generally, courts tend to apply the conditions for such document production in a strict way.

The possibility for a court to order document production is also included in Title 3 'The action for damages for infringements of competition law' in Book XVII 'Particular judicial proceedings' of the CEL: 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 costs of disclosure, or the existence of confidential information in the requested documents) (article XVII.74 of the CEL).

10 What evidence is admissible?

In principle, each party advancing claims has the burden to prove any facts he 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 ex officio (articles 915 to 961/3 of the Judicial Code). However, cross-examination of witnesses is prohibited (article 936 of the Judicial Code). Parties are not allowed to ask direct questions to the witnesses but can request the court to ask witnesses certain questions. It must be noted that hearing witnesses is not common in Belgian proceedings.

Expert evidence is also admissible. Since party-appointed experts have no duty to the court, this evidence can sometimes be given less weight. In private enforcement actions, it is likely that economists will be appointed, either by the parties or by the court, to determine the extent of the harm suffered as a consequence of a cartel infringement given that such assessment often requires a complex economic analysis.

The Belgian law transposing the Damages Directive now also provides courts with the option to request assistance from the BCA to determine the quantum of the harm.

11 What evidence is protected by legal 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 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, 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 private life (article 8 of the European Convention on Human Rights). Belgian courts have 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 (3°, section 2, article XVII.74 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).

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

Under Belgian law, liability for infringing articles IV.1 and IV.2 of the CEL or articles 101 and 102 of the TFEU is administrative in nature. When finding an infringement of these provisions, the BCA may impose an administrative fine.

Although it would therefore be unlikely that the infringement of competition law is sanctioned by a criminal conviction (unless it would have been combined with a general offence such as fraud or forgery), it would not preclude the possibility to bring private enforcement actions. It must be noted that civil proceedings will be suspended until a decision in criminal proceedings has been obtained to avoid incompatible judgments (article 4 of the Preliminary Title of the Code of Criminal Procedure).

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?

Belgian law does not generally provide criminal sanctions for antitrust infringements (see question 12). Therefore, evidence or findings in criminal proceedings are not often used in private antitrust litigation. If a party were to use evidence from criminal proceedings in private enforcement actions, it may be limited in doing so by the secrecy of the criminal investigation. An exception could be found, for example, in article 314 of the Belgian Criminal Code that provides criminal sanctions for fraud when tendering for contracts with public authorities (bid rigging). The finding of a criminal court that a person has infringed this provision constitutes a civil wrongdoing; consequently, the party seeking compensation for damages will only need to demonstrate the harm suffered and a causal link with the bid rigging.

It is possible for a claimant in private enforcement actions to rely on the findings of a national competition authority or the European Commission (or the relevant review court) (see question 4).

In addition, the Belgian law transposing the Damages Directive introduced the possibility to obtain evidence from the file of the competition authorities. Belgian courts can only order the disclosure of evidence in the file of the competition authority if the following conditions are fulfilled:

- courts must verify that no (third) party is reasonably able to provide the requested evidence (principle of subsidiarity) (section 2, article XVII.77, juncto IV.45, section 2, article IV.46 of the CEL); and
- courts must also assess the proportionality of an order to disclose such evidence and consider in particular:
  - whether the request to disclose evidence has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof;
  - whether the party requesting disclosure of evidence is doing so in relation to an action for damages; and
  - the need to safeguard the effectiveness of the public enforcement of competition law (section 1, article XVII.78 of the CEL).

Furthermore, two categories of evidence from the file of the competition authorities were given additional protection against disclosure:

- Belgian courts may only order the disclosure of the following information after a competition authority, by adopting a decision or otherwise, has closed its proceedings:
  - 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 (section 1, article XVII.79 of the CEL (grey list); and
- Belgian courts cannot, at any time, order a party or a third party to disclose:
  - leniency statements; and
  - settlement submissions (section 2, article XVII.79, of the CEL (black list).

The implementation of the Damages Directive has therefore significantly facilitated the disclosure of evidence in the file of the competition authority. 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.

It is important to note that the use of evidence obtained through access to the file of the competition authority has been limited:

- 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. The same is true for evidence on the grey list until the moment the competition authority has closed its proceedings. If such evidence is nevertheless submitted, it will be deemed to be inadmissible (sections 1 and 2, article XVII.80 of the CEL); and
- any other evidence, 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 only 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 (section 3, article XVII.80 of the CEL).

Private enforcement actions can be brought against leniency applicants, but there is an absolute protection for leniency statements and settlement submissions (the black list). In addition, exceptions are provided for the immunity recipient to the general principle of joint and several liability of companies that have infringed competition law (see question 33).

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

A defendant can request a stay at any moment during the proceedings for reasons of procedural efficiency.

Belgian courts might take a more pragmatic approach towards requests for a stay of proceedings in follow-on cartel damages cases on the basis of the *Masterfoods* decision of the ECJ, which requires a national judge to 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 General Court or the ECJ (*Masterfoods Ltd v HB Ice Cream Ltd*, C-344-98, 14 December 2000; also article 16 of the Modernisation Regulation).

As a stay only affects the decision, courts can hear the cases up to and including trial, while awaiting the outcome of the decision of the European Commission (or review court) while avoiding a formal stay of proceedings. The court can therefore decide to stay proceedings to avoid giving a judgment that would run counter to a future decision of the European Commission (or review court).

A defendant could also seek to stay the private enforcement action, in case 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).

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?

Under the general provisions of Belgian tort law (article 1382 of the Belgian Civil Code), in order to bring a successful action for damages, a claimant must prove:

- the wrongdoing attributable to the infringer;
- the harm that he has suffered; and
- the causal link between the infringer's wrongdoing and such harm.

In principle, each party must prove its own allegations (article 870 of the Judicial Code (see question 10).

However, in the context of private enforcement actions, the Belgian legislator has alleviated the burden of proof by introducing several legal presumptions:

- First, where an infringement of competition law has already been established by a competition authority, the CEL introduced

a presumption that an infringement of competition law has been committed:
  - section 1, article XVII.82 of the CEL introduced an irrebuttable presumption that an infringement of competition law has been committed, if this was found in a final decision of the BCA or the Brussels Court of Appeal; and
  - section 2, article XVII.82 of the CEL determines that a final infringement decision adopted by another national competition authority in the European Union or its review court constitutes, at least, prima facie evidence that an infringement of competition law has occurred and may be assessed along with any other evidence adduced by the parties (see question 4).
- Second, article XVII.73 of the CEL introduced a rebuttable presumption that cartel infringements cause harm. The burden of rebutting this presumption rests on the infringer. However, Book XVII of the CEL does not quantify the presumed harm. The national court can request the assistance from the BCA in order to determine the quantum of the harm (section 2, article IV.77 of the CEL juncto article 962 of the Judicial Code). This is important, because the difficulty to demonstrate that an infringement caused harm has proven to be difficult before the introduction of this new law that includes a presumption of harm. For example, in the Lifts Cartel case (*EU v Otis and others*, Brussels Commercial Court, 24 November 2014, A/08/06816), the Brussels Commercial Court rejected the damage claims, because the claimants had failed to prove that the infringement had caused actual harm. The Belgian court considered that the Commission's infringement decision did not prove that the tendering authorities had been overcharged. The economic study commissioned by the European Commission had concluded that cartels very often, but not always, lead to an overcharge.
- Third, indirect purchasers of goods or services affected by an infringement benefit from a rebuttable presumption that direct buyers passed on their overcharge (article XVII.84 of the CEL).

According to article XVII.83 of the CEL, a defendant may argue that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law to its own customers, therefore having reduced its actual loss, as a defence against the direct customer's claim for damages. The burden of proof that the overcharge was passed on lies with the defendant, who may reasonably require disclosure from the claimant and, or from third parties. Where the defendant invokes a passing-on defence, the claimant will have to show that he or she did not (or, at least, not to the extent alleged by the defendant) pass on the overcharge to their own customers.

In order to alleviate the high burden of proof on indirect purchasers, article XVII.84 of the CEL provides that an indirect purchaser is deemed to have proven that a passing-on has occurred, if he has demonstrated 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.

It remains to be seen how questions of indirect purchasers or 'passing-on' defences will be handled in practice.

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

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;
- if appealed, before the court of appeal, approximately two to three years; and
- if further appealed, before the Supreme Court, approximately two years.

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

17 What are the relevant limitation periods?

The Belgian Civil Code foresees that a tort claim is time-barred:
- five years after the day on which the claimant became (or should reasonably have become) aware of the injury and of the identity of the person liable for this injury (the relative limitation period); and
- in any event, 20 years after the moment of the event giving rise to the harm (the absolute limitation period) (section 1(2), article 2262-bis of the Civil Code).

Section 1, article XVII.90 of the CEL refers to the ordinary limitation periods foreseen in the Belgian Civil Code and specifies that the relative 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 (section 2, article XVII.90 of the CEL).

The limitation period will be suspended during 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.

Under Belgian law, terms of limitation are a matter of substantive, not procedural law.

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

The judgment of the commercial court or court of first instance in private enforcement 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 the 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.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Yes. The Belgian legal system foresees three types of collective proceedings:
- actions for collective redress (class actions);
- actions of collective interest; and
- collective (related) actions.

Actions for collective redress (class actions)

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 EU rules (entry into force on 1 September 2014). On 6 June 2017, the grounds to bring an action for collective redress were extended to infringements of competition law (article XVII.36.1° of the CEL juncto article XVII.37.1° (a) and 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) represented by non-profit organisations or public bodies.

Such actions for collective redress are governed by the same provisions of Book XVII, Title 3 of the CEL as individual private enforcement actions, with two exceptions:
- defendants cannot invoke a passing-on defence in an action for collective redress; and
- Belgian courts cannot suspend the proceedings for up to two years, when the parties engage in consensual dispute resolution relating to their private enforcement actions (article XVII.70 of the CEL juncto articles XVII.83 and XVII.89 of the CEL).

Consumer associations and public interest groups have standing, provided that they comply with all legal conditions to act as a group representative (article XVII.39 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. They may, however, 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 enforcement actions arising from a similar event in the same proceedings by different claimants. The related actions are handled by the court jointly even if they remain, from a legal perspective, individual actions (articles 30 and 701 of the Judicial Code).

20 Are collective proceedings mandated by legislation?

Yes. Actions for collective redress (class actions) are governed by Title 2 'Actions for collective redress' in Book XVII 'Particular judicial proceedings' of the CEL.

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

Under Belgian law, an action for collective redress does not require any form of certification.

However, the first stage of an action for collective redress is the admissibility phase (articles XVII.42 to 44 of the CEL). The purpose of the admissibility phase is to determine:

- whether the alleged breach suffered by consumers falls within the scope of the action for collective redress;
- the status and adequacy of the group representative; and
- the efficiency of the action for collective redress compared to individual actions.

22 Have courts certified collective proceedings in antitrust matters?

As the possibility to bring private enforcement actions for collective redress was only introduced on 22 June 2017, no decisions on admissibility of such actions have been taken by Belgian courts so far.

23 Can plaintiffs opt out or opt in?

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

- opt-in system: only consumers 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 system: all consumers 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 (3°, section 1, article XVII.42 of the CEL).

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

Opt-in systems are mandatory in two instances:

- for consumers who have no habitual residence in Belgium (2°, section 1, article XVII.38 of the CEL); and
- for actions for collective redress of physical or moral collective damage (section 2, article XVII.43 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 (section 4, article XVII.49 of the CEL (see question 24).

24 Do collective settlements require judicial authorisation?

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 of the request, the court determines a term for the parties to negotiate a collective settlement (ie, between three and six months after the expiry of the term for customers to exercise their option rights) (8°, section 2, article XVII.43 of the CEL). Upon a joint request by the parties, this term can be extended once by a maximum of six months (section 1, article XVII.45 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 (section 2, article XVII.49 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 (section 4, article XVII.49 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 collective settlement agreement already entered into binding on all group members.

Where there is more than one defendant, they can settle separately. The judicial approval will in such 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.

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?

There are 13 judicial districts for courts of first instance and nine commercial courts with 27 different departments in Belgium. The courts of first instance have general jurisdiction on all disputes where the value of the claim is in excess of €2,500. The commercial courts have jurisdiction on all disputes between enterprises (irrespective of the value of the claim), provided the dispute concerns an act that was carried out in the pursuit of its economic objective, but except when the dispute belongs to the exclusive jurisdiction of other courts. The competent court is determined in accordance with the ordinary procedural rules (articles 556 to 663 of the Judicial Code).

However, Brussels courts have exclusive jurisdiction for actions for collective redress (article XVII.35 of the CEL).

If private enforcement actions have been brought against multiple parties in several proceedings, the parties can still request the court to join these proceedings (articles 30 and 565 to 566 of the Judicial Code). Article 30 of the Judicial Code foresees that related actions can be dealt with together, when they are so interconnected that it is appropriate to assess them together in order to avoid solutions which may be irreconcilable if they were to be assessed separately (see question 19).

26 Has a plaintiffs' collective-proceeding bar developed?

No. Since the introduction of actions for collective redress (class actions) in the Belgian legal system (applicable to damage suffered as from the date of entry into force on 1 September 2014) only a limited number of class actions have been filed before Belgian courts. So far, all these actions have been brought by the main Belgian consumer protection organisation Test-Achats/Test-Aankoop.

Remedies

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

Title 3 'The action for damages for infringements of competition law' in Book XVII 'Particular judicial proceedings' of the CEL expressly provides for the principle of full compensation that was already foreseen in ordinary law.

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 has the right to claim and to obtain 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.

The injured person must be reinstated into the position he or she would have been in if the infringement had not been committed.

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

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

- Interim remedy: a claim can be brought before the president of the competent court to obtain urgent relief in summary proceedings. Such relief is temporary and does not bind the court that will hear the full case on its merits. The claimant must demonstrate that urgent relief is required, that he holds a prima facie claim and that the balance of interest weighs in favour of granting the relief sought (section 3, articles 19 and 584 of the Judicial Code).
- Actions for a cease and desist order (articles XVII.1 to XVII.13 and XVII.27 of the CEL).
- Nullity of contractual clauses (article 1108 of the Civil Code).
- Declaratory judgment (paragraph 2, article 18 of the Judicial Code).

29 Are punitive or exemplary damages available?

No. The Belgian system does not provide for treble or punitive damages.

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

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

Compensatory interest accrues from the date the damages were incurred. Belgian courts will usually apply the legal interest rate (currently at 2 per cent). Such legal interest rate is determined by governmental decree and published from time to time in the Belgian Official Gazette.

From the moment a claimant files a claim for damages in court, interest accrues, until the moment of final payment. Belgian courts will usually apply the legal interest rate.

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

No. The quantum of the damages suffered by claimants of private enforcement actions is determined by the harm they suffered owing to the infringement of competition law. 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 enforcement actions as a mitigating factor if this occurred prior to the BCA's decision to impose a fine (section 1, article IV.70 of the CEL).

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

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:

- costs of service, filing and registration with the court registry; and
- 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, it is a fixed indemnity, determined by law, on the basis of the value of the claim (from €90 to €36,000). These amounts must be paid by the losing party 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.

33 Is liability imposed on a joint and several basis?

Belgian ordinary tort law provides that persons that contributed to the wrongdoing and the harm caused by that wrongdoing are jointly and severally liable. Title 3 'The action for damages for infringements of competition law' in Book XVII 'Particular judicial proceedings' of the CET confirms this principle: companies that have infringed competition law shall be jointly and severally liable for the harm caused (section 1, article XVII.86 of the CEL).

However, the Belgian law transposing the Damages Directive also foresees two exceptions:

- immunity recipients (section 3, article XVII.86 of the CEL); and
- small and medium-sized enterprises (SMEs) if the following (cumulative) conditions are fulfilled:
  - the SME had a market share below 5 per cent (at any time during the infringement);
  - 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
  - the SME was not a leader or coercer of the infringement and it is not a repeat offender (section 2, article XVII.86 of the CEL).

The above two categories of infringers only have to pay damages for the harm caused to their own (direct or indirect) customers. However, if a claimant would be unable to obtain full compensation from the other infringers (for example for insolvency reasons), the immunity recipient or SME will still be fully liable (sections 2 and 3, article XVII.86 of the CEL).

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

Yes. An infringer may recover a contribution from any other infringer in a recourse action. The amount of such contribution shall be determined in the light of the relative responsibility for the harm caused by the infringement (section 1, article XVII.87 of the CEL). Defendants can bring contribution claims against co-infringers in separate contribution proceedings, or they can join them in the principal private enforcement actions brought against them by the claimant (forced intervention).

The Belgian law transposing the Damages Directive again foresees two exceptions:

- the contribution of the immunity recipient will be limited to the amount of the harm it caused to its own direct or indirect customers (section 2, article XVII.87 of the CEL); and
- the non-settling infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer (section 1(2), article XVII.88 of the CEL).

35 Is the 'passing on' defence allowed?

Yes. The Belgian law transposing the Damages Directive recognises the defendant's right to invoke a passing-on defence. This means that the defendant could demonstrate that the victim has reduced its actual loss, by passing on (in whole or in part) the over-charge to subsequent customers.

Such a passing-on defence can obviously not be invoked against end customers (article XVII.84 of the CEL (see question 15).

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

Yes. All ordinary defences in civil proceedings are applicable to private enforcement actions (including challenging admissibility on procedural grounds or requesting dismissal for lack of evidence).

37 Is alternative dispute resolution available?

Yes. The Belgian law 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 of the CEL).

Alternative dispute resolution is even 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 (see question 17));
- Belgian courts can suspend the proceedings for up to two years, when the parties engage in consensual dispute resolution relating to their private enforcement 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 (section 1(2), article XVII.88 of the CEL).

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