THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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THIRTEENTH EDITION

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This article was first published in April 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-486-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AFFLECK GREENE MCMURTRY LLP

AGUILAR CASTILLO LOVE, SRL

ANGARA ABELLO CONCEPCION REGALA & CRUZ LAW OFFICES (ACCRALAW)

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a

private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views toward protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties

to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
New York
March 2020

Chapter 5

BELGIUM

Frank Wijckmans, Maaike Visser, Karolien Francken, Monique Sengeløv and Manda Wilson[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2019, private antitrust litigation in Belgium continued to follow the same trends as in 2018. There were no significant developments in 2019 as to the private damages actions before Belgian courts.

In the private damages actions relating to the European *Trucks* antitrust case brought in Belgium, two interim judgments designating an expert have been rendered.

Though a development in the Cambridge Analytica data scandal was expected at the beginning of November 2019, the first hearing before the Commercial Court of Brussels has now been set for 2 March 2020. The Cambridge Analytica data scandal centred around a privacy breach by Facebook in March 2018, whereby the political consultant Cambridge Analytica was able to access personal data of Facebook users. This data was subsequently used to influence elections in various countries. In the aftermath of this scandal, Test Aankoop filed a claim before the Commercial Court of Brussels in June 2018, claiming at least €200 of damages for each Facebook user that had been the victim of the privacy breach. Considering that around 33,000 people joined the action, this case could potentially lead to Facebook facing a damages claim of €6.6 million in total.

In 2019, there were also no significant developments in the European *Lifts and Escalators* case. This case dates back to 2007, when the European Commission found that four elevator and escalator companies (Kone, Otis, ThyssenKrupp and Schindler) had participated in a cartel. In June 2008, the Commission initiated a follow-on damages case before the Brussels Commercial Court to recover the damage it had suffered following the infringing conduct of the elevator companies. The Commercial Court dismissed the Commission's claim because of the lack of evidence on the Commission's side.[2] Subsequently, the Commission lodged an appeal before the Brussels Court of Appeal (i.e., the Market Court) whereby the latter ordered the four companies to disclose documents from the Commission's file on 28 October 2015 by interim judgment. The four companies appealed this judgment of the Court of Appeal before the Belgian Supreme Court. The Belgian Supreme Court dismissed the appeal against the interim judgment of the Brussels Court of Appeal and referred the case back to that Court on 22 March 2018. The case is currently still pending before the Brussels Court of Appeal.

1 Frank Wijckmans is a partner, Maaike Visser is counsel, Karolien Francken is a senior associate and Monique Sengeløv and Manda Wilson are junior associates at Contrast.

2 The judgment of 24 November 2014 of the Brussels Commercial Court can be consulted via the following link: https://ec.europa.eu/competition/national_courts/cases/143115/143115_1_3.pdf.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition enforcement in Belgium generally consists of four different types of actions. First, injured parties may seek cease-and-desist orders. These actions represent the majority of private enforcement actions brought under Belgian law. Cease-and-desist orders will generally be based on Articles XVII.1 et seq. of the Code on Economic Law (CEL). These Articles relate to a specific procedure to obtain cease-and-desist orders from the president of the Commercial Court competent in the matter of unfair trade practices. It is settled case law that competition law infringements are considered to fall within the scope of the notion of unfair trade practices as set out in Article VI.104 CEL. Second, it is also possible to request an interim remedy from the president of the competent court to obtain urgent relief.[3] Contrary to cease-and-desist orders, this judgment will only result in temporary relief, and not in a judgment on the merits.[4] A third category of private enforcement actions available to claimants are private damages actions. These are dealt with in more detail below. Finally, competition law defences might also occasionally arise in contractual disputes.[5]

With regard to the third category of (recovery) damages actions, a specific set of rules was made available as of 22 June 2017 to those persons that wish to claim damages on account of having suffered harm following an infringement of competition law.[6] With the act of 6 June 2017 (Implementation Act), the Belgian legislator transposed the Private Damages Directive[7] regarding actions for damages into the Belgian legislative framework. This was done by inserting a new Title 3, 'The action for damages for infringements of competition law', in Book XVII, 'Particular judicial procedures', of the CEL. Although private damages actions were already possible prior to the transposition of the Private Damages Directive on the basis of general tort principles,[8] Article XVII.72 CEL now explicitly provides that any natural or legal person who has suffered harm due to an infringement of competition law has the right to claim and to obtain full compensation for that harm, in accordance with the general tort principles under Belgian law. The Implementation Act provides a number of new substantive and procedural rules that facilitate the bringing of private damages actions by lessening the burden of proof on claimants. This is achieved through the introduction of various presumptions and by making access to evidence easier. At the same time, the Implementation Act also extends the scope of the Belgian class action regime to infringements of European competition law that can be brought before the Brussels courts.[9]

Private damages actions can be brought by any natural or legal person, irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether there has been a prior finding of an infringement by a competition

3 In accordance with Article 584 Belgian Judicial Code, the claimant will have to prove that the action requires urgent relief.

4 Article 1039 Judicial Code.

5 In this respect, the nullity of the contract can be requested on the basis of Article 1184 Belgian Civil Code or a declaratory judgment can be sought on the basis of Article 18 Judicial Code.

6 The Implementation Act applies both to infringements of Article 101 and Article 102 Treaty on the Functioning of the European Union (TFEU), as well as to their counterpart under Belgian law, Article IV.1 and Article IV.2 CEL.

7 Directive 2014/104/EU.

8 Article 1382 Civil Code.

9 Article XVII.37, 33° CEL; Article XVII.35 CEL stipulates that the courts of Brussels will have jurisdiction to hear actions for collective redress.

authority. A decision by a competition authority establishing a competition infringement is therefore not a prerequisite. Both standalone and follow-on actions for damages are available under Articles XVII.71 CEL to XVII.91 CEL.

As stated above, the general principles of Belgian tort law will remain applicable to private damages actions. This means that to bring a successful action for damages, the claimant must demonstrate a fault attributable to the defendant, the concrete and certain damage suffered by the claimant, and a causal link between the fault and the damage caused. The Implementation Act, however, introduced a number of legal presumptions to lessen (or even reverse) the burden of proof to the benefit of claimants. One example is the rebuttable presumption that cartels cause harm.[10] Within this legal framework, it will be for the infringer to rebut the presumption. Private damages actions can be brought before the competent commercial court or the court of first instance.[11] It is, however, important to flag that the Implementation Act does not quantify the harm. The precise harm suffered will have to be demonstrated in each specific case. To the extent that the precise and concrete harm has been established, the claimant will be entitled to full compensation (i.e., actual loss, lost profit plus interest). The Belgian legislator does not allow for overcompensation or punitive damages.

For private damages actions brought under general tort law, the limitation period is five years following the day on which the claimant became (or should reasonably have become) aware of the harm suffered and of the identity of the person liable for such harm, or in any event 20 years from the occurrence of the facts that caused the harm.[12] Article XVII.90 CEL provides, however, that the limitation period is five years after the day on which the infringement of competition law has ceased and the injured party knows (or should reasonably have known) of the infringement, the damage that was suffered and the identity of the infringer.[13] To determine the start date of the limitation period, it will not be sufficient that the claimant is aware of the damage and the wrongdoing. The injured party must also have (reasonable) knowledge of the fact that the wrongdoing constitutes an infringement of competition law.[14] Additionally, the limitation period will be interrupted if a competition authority takes action to investigate or brings proceedings for an infringement of competition law until a final infringement decision is taken.[15] Such period will be suspended in respect of the parties that are or were involved in an amicable settlement.[16] For cease-and-desist actions, the limitation period is one year after the termination of the cause of action.[17]

Finally, the liability for infringing competition law is administrative in nature. Infringements of competition law are not criminally sanctioned in Belgium. The only exception concerns bid-rigging practices, where the companies involved can be sentenced to pay fines, and the individuals concerned can face imprisonment up to six months, or the payment of fines, or both.

10 Article XVII.73 CEL.

11 The provisions of the Judicial Code will apply.

12 Article 2262 *bis* Judicial Code.

13 In the event of a single and continuous infringement, the infringement shall only be deemed to have ceased on the day on which the last infringement ended.

14 I Claeys and M Van Nieuwenborgh, 'De rechtsvordering tot schadevergoeding voor mededingings-inbreuken. Een grote stap vooruit?', TBH 2018, 2, (119) 136–137.

15 Article XVII.90 §2 CEL.

16 Article XVII.91 CEL.

17 Article XVII.5 CEL.

III EXTRATERRITORIALITY

Consistent with EU principles, the application of antitrust laws in Belgium is governed by the effects doctrine. This means that antitrust laws in Belgium also apply to foreign companies or to domestic companies that act outside Belgium if their actions have an adverse effect on competition in the Belgian market.

For example, in 2013 the Belgian Competition Authority sanctioned five Belgian and German flour mills for having taken part in a cartel on the market for the production and sale of flour in Belgium, thereby infringing the Belgian and European competition rules.[18] The investigation started with leniency applications, which were triggered by inspections by the German Competition Authority, the Bundeskartellamt, in 2008 at the premises of a number of large German mills. The Dutch Competition Authority also carried out an investigation in this sector, which led to the imposition of fines in December 2010 for most of the same mills also involved in the Belgian case.[19]

There are no statutory or common law exemptions that apply to private damages litigation.

The jurisdiction of the Belgian courts to hear private damages actions is established according to EU Regulation 1215/2012.[20] Pursuant to Article 4(1) of this Regulation, Belgian courts have jurisdiction when the defendant has its domicile or usual residence in Belgium at the time proceedings are initiated. In cases where proceedings are initiated against multiple defendants, it is sufficient for one of the defendants to have its domicile or usual residence in Belgium (Article 8(1) EU Regulation 1215/2012).The claimant can also bring a private antitrust litigation before the Belgian courts if the event giving rise to the harm or the harm itself occurred in Belgium (Article 7(2) EU Regulation 1215/2012). Finally, pursuant to Article 26 of EU Regulation 1215/2012, a defendant can agree to appear before a Belgian court even if the court is not competent.

IV STANDING

Article XVII.72 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 obtain full compensation in accordance with the rules of ordinary law.

18 Decision of the Belgian Competition Authority No. 2013-I/O-06 of 28 February 2013 in case MEDE-I/O-08/0009.

19 Decision of the Dutch Competition Authority of 16 December 2010 in case 6306.

20 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] O.J. L351/1.

Both direct and indirect purchasers[21] may have standing – as alleged injured parties – to bring an action for damages[22] against infringers[23] of competition law.[24] Direct and indirect purchasers benefit from the rebuttable presumption that the cartel infringement caused harm.[25] Indirect purchasers of goods or services affected by an infringement of competition law benefit from a rebuttable presumption that direct buyers passed on their overcharge.[26]

Claimants can bring standalone or follow-on actions for damages (following a decision by a competition authority establishing an infringement). Claimants can be a natural person or a legal entity.

The ordinary provisions of the Judicial Code will apply to assess the standing of the claimant. A claimant needs to have the capacity of holding the right invoked in the claim and must have an acquired, personal and immediate legal interest when filing the claim. The claimant can act if its rights are harmed or under serious threat of being harmed.[27] Given the requisite personal interest, claims cannot be filed in the general interest.[28] Individual claimants that have suffered personal harm are not prevented from grouping their claims in a single summons, with any damages being awarded to each claimant separately. It is also conceivable that various individual claims are assigned to a single person.

Consumer associations and public interest groups have standing to bring an action for collective redress for infringements of competition law provided they comply with the applicable rules to act as a group representative.[29]

21 Direct purchasers are defined as 'a natural or legal person who acquired, directly from an infringer, products that were the object of an infringement of competition law.' (Article I.22.20° CEL.) Indirect purchasers are defined as 'a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products that were the object of an infringement of competition law, or products containing them or derived therefrom.' (Article I.22.21° CEL.)

22 An action for damages is defined as 'an action under Article XVII.72 by which a claim for damages is brought before a court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim' (Article I.22.3° CEL).

23 Infringers are defined as 'an undertaking or association of undertakings which has committed an infringement of competition law' (Article I.22.2° CEL).

24 Infringement of competition law is defined as 'an infringement of Article 101 or 102 TFEU and/or Article IV.1 or IV.2' (Article I.22.1° CEL). Article IV.1 and IV.2 CEL are the Belgian equivalents of Article 101 and 102 TFEU. In a recent preliminary ruling, the European Court of Justice found that persons not acting as suppliers or customers in the market affected by the cartel, must be able to request compensation for loss resulting from the fact that, as a result of that cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and, consequently, were unable to use that difference more profitably. The European Court pointed out that it will be for the national court to determine whether the applicant had the possibility of making more profitable investments and, if that is the case, whether the applicant adduces the evidence necessary for the existence of a causal connection between that loss and the cartel at issue. Judgment 12 December 2019, *Otis GmbH and Others v. Land Oberösterreich and Others*, C-435/18, ECLI:EU:C:2019:1069, Paragraphs 32-33.

25 Article XVII.73 CEL: 'Cartel infringements are presumed to cause harm. The infringer shall have the right to rebut that presumption.'

26 Article XVII.84 CEL, see Section IX.

27 Articles 17 and 18 Judicial Code.

28 See Section VII.

29 Article XVII.39 CEL.

V THE PROCESS OF DISCOVERY

Private damages actions are generally characterised by an information asymmetry that exists to the detriment of the claimant trying to demonstrate its claim. Previously, the submission of evidence in this type of dispute was only governed by the general rules available in the Judicial Code. On the basis of Article 877 Judicial Code, judges are entitled to require the production of a specific document, including from third parties, provided that it can reasonably be assumed that the party (or a third party) has it in his or her possession and the document is considered relevant to the dispute.[30] As opposed to common law countries, there is no pretrial discovery available under Belgian law.

Following the entry into force of the Implementation Act on 22 June 2017, specific rules regarding the production of documents and access to evidence were introduced for private damages actions. It follows from the Implementation Act that the parties in private damages actions will have the possibility to request the production of certain (categories) of documents, including documents from the file of the competition authority. More precisely, Article XVII.74 CEL allows the court to order the disclosure of (categories) of documents kept by a party, following a motivated request (i.e., a reasoned justification) from one of the parties. This does not, however, mean that a request can be formulated broadly. Each request will still have to be described as accurately as possible, and should identify the category of documents by reference to common features such as the nature, object or content of the documents and the relevant time frame.[31]

When assessing the request for document production, the court must balance the legitimate interests of the parties and assess the proportionality of the request. Article XVII.74 CEL provides in particular that the court should take into account before ordering the disclosure the factual relevance, the costs of disclosure (in particular with relation to third parties) and whether the requested documents might hold any confidential information. To the extent that one of the parties is required to disclose documents holding confidential information, Article XVII.75 CEL grants the judge the power to order additional measures to ensure the confidential treatment of this information, such as allowing for the submission of non-confidential versions, having an expert draft a non-confidential summary or limiting the access to a select number of persons. In addition, Article XVII.76 CEL also provides that a (third) party that is ordered to disclose documents may submit written comments and be heard by the court, if the court gives him or her permission to do so, irrespective of whether the documents contain confidential information. In this respect, the European Commission has also prepared a draft communication to support national courts when dealing with requests to disclose confidential information in private enforcement actions. The European Commission has indicated that it will carefully review the guidance received from targeted stakeholders during the consultation this year before finalising the communication.[32]

With regard to the information kept in the file of a national competition authority, specific rules were likewise introduced that facilitate access. In summary, the documents kept in the file of the national competition authority are divided into three categories: blacklisted

30 I Claeys and M Van Nieuwenborgh, 'De rechtsvordering tot schadevergoeding voor mededingings-inbreuken. Een grote stap vooruit?', TBH 2018, 2, (119) 131.

31 Consideration 16 of the Private Damages Directive.

32 Draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts, available at: https://ec.europa.eu/competition/consultations/2019_private_enforcement/en.pdf.

documents, grey-listed documents and white-listed documents (a residual category). With regard to documents that are blacklisted (i.e., leniency statements and settlement submissions), the Belgian courts cannot order disclosure.[33] The national judge can only verify whether the documents do in fact fall within this category.[34] With regard to the documents on the grey list, disclosure will only be possible as of the moment the competition authority has closed its proceedings. The grey list concerns the documents prepared with the specific purpose of being used for the proceedings of the competition authority, information drafted by the competition authority and sent to the parties during the proceedings, and settlement submissions that have been withdrawn.[35] For the residual category (white list), production may be requested at any time during the proceedings, provided of course that the conditions required for the production of documents are met.[36]

In any event and irrespective of the category of documents, the court will be required to assess the proportionality of an order to disclose documents from the file of the competition authority. Moreover, the court is obliged to consider whether the request is sufficiently specific, whether it is part of a claim for damages and whether it does not detract from the effective enforcement of competition law.[37] The competition authority will be asked to provide written comments on the proportionality of the request.[38] The disclosure can only be ordered from the competition authority to the extent that no (third) party is reasonably able to provide the requested evidence.[39] Under no circumstances will the disclosure request provide the parties with access to the internal documents of the competition authority or letters exchanged between competition authorities.[40]

In addition, the use of evidence obtained through access to the file of the national competition authority is restricted. Parties are prohibited from using the documents listed on the black list that were obtained through access to the file of a competition authority in a damages action.[41] The same goes for documents listed on the grey list until the proceedings have been closed by the competition authority.[42] In the event that such evidence is put forward, the court will deem the evidence inadmissible.[43]

Under general procedural law, strict sanctions apply to parties and third parties not complying with the court's instructions on document production. In this respect, the court may impose a compensation or penalty payment if parties or third parties do not produce the required documents.[44] In addition, since the entry into force of the Implementation Act, the court will be able to impose on (third) parties or their legal representatives a fine ranging from €1,000 to €10 million, depending on the specific circumstances of the case when they fail to comply with the rules set out above relating to the production of documents, the

33 Article XVII.79. §2 CEL; in accordance with Article XVII.79. §4 CEL, this protection will, however, only be granted to those parts containing the leniency declaration or the settlement proposal.
34 Article XVII.79. §3 CEL.
35 Article XVII.79. §1 CEL.
36 Article XVII.79. §5 CEL.
37 Article XVII.78. §1 CEL.
38 Article XVII.78. §2 CEL.
39 Article XVII.77. §2 CEL.
40 Article XVII.77. §1 CEL.
41 Article XVII.80. §1 CEL.
42 Article XVII.80. §2 CEL.
43 Article XVII.80 CEL.
44 Article 882 Judicial Code.

confidentiality of documents or the use of information gathered via the discovery process.[45] Moreover, the court is also allowed to draw inferences that are detrimental to the party that breached the above rules. For example, the court will be able to establish that a discussion point has been proven or that claims and defences are rejected in whole or in part, or to order payment of the costs of the proceedings.[46] Finally, the Belgian procedural rules also allow for parties to produce witnesses or to seek an order that some witnesses be heard.[47] A cross-examination of the witnesses is, however, not allowed.

VI USE OF EXPERTS

Article 962 Judicial Code permits a judge to appoint an expert. The judge can do so *ex officio* or with the consent of the parties. The parties can also produce their own expert reports. It is common that experts are used in complex litigations. Due to the (econometric and even economic) complexity of private damages actions, courts are expected to require the assistance of an expert, for example to quantify the harm.

The interim judgment in which the judge appoints the expert will also contain a description of the assignment of the expert. The parties must cooperate with the expert. The costs relating to the expert's activity are borne by the parties.

The report produced by the expert is not legally binding on the court. The court can deviate from the advice of the expert. However, in practice the expert report will have significant evidentiary value.

In the *Lifts and Escalators* case, the Commercial Court of Brussels refused to appoint an expert. The Court found that the European Commission had failed to establish its harm with sufficient certainty to justify the cost and effort of expert proceedings.

VII CLASS ACTIONS

As of 1 September 2014, it is possible in Belgium to bring an action for collective redress for a number of violations of both Belgian and EU rules.[48] With the Implementation Act, the grounds to bring an action for collective redress were extended to infringements of European competition law.[49] On the basis of Book XVII.17 – Title 2 CEL 'Collective recovery actions', it will be possible for groups of consumers or for groups of small and medium-sized enterprises (SMEs) to initiate a legal action for collective recovery. This possibility was introduced for SMEs as of 1 June 2018.

In general, actions for collective redress will be governed by the same provisions as private enforcement actions, with only two exceptions. First, it is not possible to invoke a passing-on defence in collective redress actions, and second, the court is not able to suspend the proceedings if the parties engage in consensual dispute resolution negotiations.[50] The procedural organisation of the class action is characterised by some particular points. To start, it is not possible for the injured parties to bring the collective action themselves. The

45 Article XVII.81. §1 CEL.

46 Article XVII.81. §4 CEL.

47 Article 915 et seq. Judicial Code.

48 Article XVII.35 CEL: 'The Brussels courts have exclusive jurisdictions to hear actions for collective redress'.

49 Article XVII.36, 1° CEL juncto Article XVII.37.1° (a) and 33° CEL.

50 Article XVII.70 CEL.

collective claim must be brought by a group representative. Only consumer associations and public bodies that meet the conditions listed in Article XVII.39 CEL may act as such a group representative. The very specific nature of these criteria has de facto resulted in only the Belgian consumer protection organisation Test Aankoop being able to initiate collective actions for damages.[51]

The Belgian rules do not provide a certification stage. The first stage in an action for collective redress consists of assessing the admissibility of the claim.[52] The group representative must state its choice for the opt-in or the opt-out formula, and provide a reasoning as to why the proposed system should be applied.[53] Article XVII.43 CEL provides that the court will subsequently have to decide on the admissibility of the action within two months and determine the term for customers to exercise their option rights. The law provides furthermore for a mandatory negotiation phase that starts immediately after the decision of the court on the admissibility of the action.[54] Following the final decision of the court, a court-appointed administrator will be assigned with the task of paying the compensation to the members of the group under the court's supervision.[55] Future amendments to these rules may be expected as a European legal framework for collective redress is currently being negotiated at the European level.[56]

Other specific Belgian legislation exists that may provide a legal basis for collective actions. In this respect, a collective interest action exists for injunctive relief against practices that harm consumer interests. It will not be possible for these organisations to recover damages for their members, but only for themselves to the extent that their own personal interests have been harmed. Finally, it is also possible under Belgian law to consolidate private damages actions when they are interconnected such that it is deemed appropriate to assess them together.[57] From a substantive perspective, these actions will, however, remain individual actions.

VIII CALCULATING DAMAGES

The principle of full compensation applies to private damages actions in Belgium. Article XVII.72 CEL provides that any natural or legal person who has suffered harm as a result of a competition law infringement has the right to claim and to obtain full compensation for such harm. The person who suffered harm must be reinstated in the position he or she would have been in if the infringement had not taken place. This implies that the claimant can seek compensatory damages that cover both the actual loss suffered and the profit forgone, plus (compensatory) interest. There is no limit as to the amount of damages that may be awarded.

51 I Claeys and M Van Nieuwenborgh, 'De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?', TBH 2018, 2, (119) 138.

52 Article XVII.42 CEL.

53 Article XVII.43. §2 CEL.

54 Article XVII.45 CEL.

55 Article XVII.57 CEL–Article XVII.62 CEL.

56 Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)), available at: https://www.europarl.europa.eu/doceo/document/A-8-2018-0447_EN.html.

57 Article 30 Belgian Civil Code.

The damages that can be sought are purely compensatory in nature. The Belgian courts are not entitled to award punitive or treble damages.

Article XVII.73 CEL includes a rebuttable presumption that a cartel infringement causes harm. Book XVII does not, however, quantify the presumed harm. It is up to the claimant to prove the amount of damage that it has suffered. This is a costly and fact-intensive process that requires complex economic modelling. The claimant can use any method it finds appropriate to calculate the damages. It is the court that will ultimately decide upon the adequate level of compensation. The European Commission has provided the courts and the parties with tools to assist them with the quantification of the damages.[58] The courts have the option to request the assistance of the Belgian Competition Authority to determine the quantum of the harm.[59] Courts also heavily rely upon expert reports to determine the amount of damages, even though the reports themselves are not binding on the court. If the court is unable to determine the amount of the damages in an accurate way, it has the discretionary power to award compensation *ex aequo et bono* (i.e., based on a good faith assessment).[60] The Commercial Court of Ghent effectively used its discretionary power in the *Honda* case.[61] The judge decided that it was excessively difficult to determine the amount of damage suffered, given that the facts dated back more than 20 years. The judge awarded the claimants €20,000 each, based on an *ex aequo et bono* assessment.[62]

When setting the amount of the damage suffered, the court does not take into account the fine that the defendant had to pay in the context of public enforcement. However, Article IV.70 CEL provides the Belgian Competition Authority with the ability to consider the amount paid in the context of a consensual settlement as a mitigating factor when determining the fine.

The losing party will in principle be ordered to pay the costs of the proceedings. These costs include the costs of service, filing and registration as well as the legal representation costs. The costs relating to legal representation are a fixed amount determined by law, based on the value of the claim, and do not correspond to the actual lawyers' fees paid.

IX PASS-ON DEFENCES

Pursuant to Article XVII.83 CEL, the defendant may invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. Hence, following the transposition of the Private

58 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, O.J. 13 June 2013, 167, 19, online available via https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF; Practical guide regarding quantifying harm in actions for damages based on breaches of Article 101 or 102 of the treaty on the functioning of the European Union, SWD (2013) 205, available at https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf; Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, O.J. 9 August 2019, 267, 4, available at https://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf.

59 Article IV.77 CEL juncto Article 962 Judicial Code.

60 Cass. 13 January 1999, Arr.Cass. 1999, 40.

61 Kh. Gent 23 March 2017, TBM 2017, 179.

62 I Claeys and M Van Nieuwenborgh, 'De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?', TBH 2018, 2, (119) 131.

Damages Directive, it is clear that the defendant has a right to invoke a passing-on defence (as a defensive tool or shield). Article XVII.70 CEL provides as an exception that defendants in an action for collective redress cannot invoke a passing-on defence.

The definition of overcharge is identical to that stated in the Private Damages Directive:[63] the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant and third parties. Given that the burden of proof is placed on someone who will in fact not hold the necessary evidence, the defendant has the ability to reasonably request access to the relevant information in accordance with the rules on the disclosure of evidence.[64] Where a passing-on defence is raised, it will be up to the claimant to demonstrate not to have passed on the overcharge to its own customers.

The passing-on defence is without prejudice to the right of an injured party to claim and obtain compensation for loss of profit due to a full or partial passing-on of the overcharge.[65] This is an acknowledgment of the fact that an injured party who has (fully or partially) passed on the overcharge may still be confronted with harm. Such harm can take the form of a loss of profit due to the fact that the increase of the price has caused a reduction in demand.[66]

Article XVII.84 CEL provides that indirect purchasers of goods or services affected by an infringement benefit from a rebuttable presumption that direct buyers have passed on their overcharge. An indirect purchaser is deemed to have proven that passing-on has occurred if he or she has demonstrated that the defendant has committed an infringement of competition law, the infringement of competition law has resulted in an overcharge for the direct purchaser of 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.

If the indirect purchaser has demonstrated each of these three points (cumulatively), then a rebuttable presumption exists that the indirect purchaser has prima facie shown the existence of a passing-on of an overcharge to its detriment. The scope of such overcharge is still to be quantified.[67] The presumption is rebutted if the defendant (the infringer) can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Article XVII.85 CEL transposes Article 15 of the Private Damages Directive, relating to actions for damages by claimants from different levels in the supply chain in a passing-on context. Where actions for damages are introduced by claimants from different levels of the supply chain, the court can take due account of any of the following: (1) actions for damages that are related to the same infringement of competition law, but that are brought

63 Article I.22.17° CEL.

64 Article XVII.74 and following CEL.

65 Article XVII.83 CEL.

66 F Wijckmans, M Visser, S Jaques and E Noël, *The EU Private Damages Directive, Practical Insights*, Intersentia 2016, p. 62, Paragraphs 199–200.

67 F Wijckmans, M Visser, S Jaques and E Noël, *The EU Private Damages Directive, Practical Insights*, Intersentia 2016, p. 65, Paragraphs 211–212.

by claimants from other levels in the supply chain; (2) judgments resulting from actions for damages as referred to in point (1); and (3) relevant information in the public domain resulting from the public enforcement of competition law.[68]

In accordance with Article 16 of the Private Damages Directive and following a public consultation, the European Commission has issued guidelines for national courts on how to estimate the share of the overcharge that was passed on to indirect purchasers and final consumers in August 2019.[69] These guidelines are meant to provide practical guidance to national courts and stakeholders by reference to the applicable legal context, the relevant economic theory and quantification methods specifically in the passing-on context.

X FOLLOW-ON LITIGATION

The majority of damages actions brought are follow-on claims relating to a decision rendered by either a national competition authority or the European Commission establishing an infringement of competition law. A decision by a competition authority establishing a competition law infringement is, however, not a prerequisite. It is possible to bring a standalone action for damages. Belgian law does not foresee, in general, limitations on or immunities from follow-on damages actions. In principle, private enforcement actions can be brought against both companies and individuals, including leniency applicants.

That being said, Article XVII.86, Section 2 CEL does provide that an infringer that received full immunity and SMEs that fulfil three specific and cumulative conditions[70] can only be held liable for the amount of harm caused to their own direct or indirect customers.[71] In the event, however, that a claimant would not be able to obtain full compensation from the other infringers, the recipient that received full immunity or an SME will still be held fully liable.[72] When a settlement is reached between the injured party and an infringing party, the injured party will only be able to address its remaining claim for compensation to the non-settling co-infringers.[73]

Furthermore, a number of presumptions will apply to follow-on actions, depending on which competition authority has taken the decision establishing a competition law infringement. In the scenario that the decision was taken by the Belgian Competition Authority or the Brussels Court of Appeal, an irrefutable presumption that an infringement took place will exist and the fault will be established.[74] Although the CEL does not mention decisions taken by the European Commission, the same irrefutable presumption will apply on account of Article 16 Regulation No. 1/2003, which grants the same binding nature to

68 F Wijckmans, M Visser, S Jaques and E Noël, *The EU Private Damages Directive, Practical Insights*, Intersentia 2016, p. 67, Paragraph 218 and following.

69 Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, O.J. 9 August 2019, 267, 4, online available via https://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf.

70 The three cumulative conditions are at any time during the infringement the SME had a market share below 5 per cent; the economic viability of the SME could be jeopardised and cause its assets to lose all their value; and the SME cannot have been the leader or coercer of the infringement, and is not a repeat offender.

71 Article XVII.86. §2 and §3 CEL.

72 Article XVII.86. §2 and §3 CEL.

73 Article XVII.88. §1 CEL.

74 Article XVII.82. §1 CEL.

decisions from the European Commission as to decisions rendered by a national competition authority.[75] Decisions adopted by a national competition authority other than the Belgian Competition Authority will only serve as prima facie evidence that an infringement of competition law has occurred, and the court will have to assess the decision together with any other evidence provided by the parties.[76]

An important question is the scope of the binding nature of a decision and of the presumptions based on the decision. For instance, will the binding nature and the presumption extend only to the infringers themselves or also to their parent companies? In this respect, the Commercial Court of Brussels has explicitly confirmed that a decision of the European Commission does not qualify as evidence of a fault attributable to a party that is not an addressee of the decision. The Court stipulated that the binding nature of a decision only extends to the infringements and the infringing parties identified in the decision. This cannot be extended to other facts or parties.[77] This is supported by the Private Damages Directive itself, which states explicitly that the 'effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction'.[78] In *Skanska*[79] the European Court of Justice addressed this question. It found that the concept of an 'undertaking' has the same meaning in private enforcement actions as it does in public enforcement by the European Commission or the national competition authorities. This equivalence has some important consequences. For example, a broad interpretation of this judgment could result in a parent company being held liable under national civil law for the competition law infringements of its subsidiary. Furthermore, this judgment will also impact the M&A practice as it introduces the concept of 'economic continuity' for private enforcement actions. This implies that a company that takes over and continues the activities of another company can be required to pay damages arising from the latter's earlier competition law infringements. Civil liability for a competition law infringement will now adhere to the activities of an 'undertaking' rather than to a specific legal entity.[80]

XI PRIVILEGES

The principle of attorney–client privilege is widely recognised in Belgium. The following documents are covered by attorney–client privilege: correspondence between a client and an attorney, internal documents that are prepared exclusively for the purpose of obtaining external legal advice and internal documents summarising or disseminating external legal advice. Similarly, correspondence by in-house lawyers and their employers is also covered by legal privilege, provided that the in-house lawyers are members of the Belgian institute of in-house lawyers.[81] In 2010, the European Court of Justice decided that communications

75 I Claeys and M Van Nieuwenborgh, 'De rechtsvordering tot schadevergoeding voor mededingings-inbreuken. Een grote stap vooruit?', TBH 2018, 2, (119) 123–124.

76 Article XVII.82. §2 CEL.

77 Kh. Brussel 24 April 2015, TBM 2015, No. 3, (212) 216.

78 Consideration 34 of the Private Damages Directive.

79 Judgment 14 March 2019, *Skanska Industrial Solutions ea*, C-724/17, EU: C:2019:204.

80 See, 'The company is liquidated, long live the undertaking!' in *In the Picture*, August 2019, online available at: https://www.contrast-law.be/en/publications/in-the-picture/the-company-is-liquidated-long-live-the-undertaking/.

81 Article 5 Act of 1 March 2000 establishing an institute for in-house lawyers.

to and from in-house counsel are not protected by legal professional privilege in the context of a European Commission investigation.[82] Legal professional privilege for in-house lawyers therefore only applies to proceedings before the Belgian authorities, and not when the Belgian authorities assist the European Commission in an investigation.

On the basis of the right to private life,[83] a party can refuse to produce confidential documents when they contain business secrets. The Belgian courts have a wide discretion to decide whether the reason given for the refusal of production is legitimate. Courts can also take certain additional measures to ensure that business secrets are treated confidentially (e.g., by redacting or imposing confidentiality rings).[84]

The Implementation Act introduced the potential to obtain evidence from the file of the competition authorities. If certain conditions are fulfilled, the courts can order the disclosure of the file.[85] Certain documents can only be disclosed after the competition authority has closed its investigation or has taken a decision. Certain documentation of the file of the competition authority can never be disclosed, such as leniency applications.[86] The CEL has thus significantly facilitated the disclosure of the file of the competition authority compared to prior practice.

XII SETTLEMENT PROCEDURES

Articles 2044 to 2058 Civil Code give parties the right to settle disputes at all times at their own initiative. Settlement procedures are not judicial procedures as such. Parties can settle a dispute outside any court action or during an ongoing procedure before court.

Articles 2044 to 2058 Civil Code contain four conditions and characteristics of settlements. First, settlements can terminate existing disputes and prevent future claims. Secondly, settlements must be made in writing. Thirdly, parties can renounce certain rights or claims, but only in relation to the dispute that they aim to settle. Lastly, settlements are deemed the final adjudication of the dispute between the parties. A settlement can only be repealed for fraud or coercion, or when the cause of the settlement is or becomes void.

Article XVII.43, Section 2, 8° CEL imposes a mandatory negotiation phase for collective settlements. During this negotiation phase the parties must attempt to reach a settlement of their dispute. This negotiation phase starts after the decision of the court on the admissibility of the request for collective redress. The duration of this period will be determined by the court, but can be extended if the parties jointly request to do so.[87]

Settlements that are reached in the mandatory negotiation phase are binding on all members of the group. Parties can also ask for judicial approval of the settlement they have reached.[88] Such judicial approval does not entail acknowledgment of guilt or liability with regard to the facts underlying the settlement.

In the majority of cases, settlements are kept confidential.

82 Judgment 14 September 2010, *Akzo v. Commission*, C-550/07 P, ECLI:EU:C:2010:512.

83 Article 8 European Convention on Human Rights.

84 Article XVII.75 CEL.

85 Articles XVII.77-78 CEL.

86 Article XVII.79 CEL.

87 Article XVII.45, Section 1 CEL.

88 Article XVII.47 CEL.

XIII ARBITRATION

Alternative dispute mechanisms are available in Belgium for private damages actions. These mechanisms are not legal proceedings. Arbitration procedures are conventional in nature,[89] and an arbitration agreement must determine the modalities thereof.

Article I.22.18 CEL defines consensual dispute resolution as 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.22.19 CEL defines consensual settlement as an agreement reached through consensual dispute resolution as well as an arbitral award.

The Implementation Act encourages – as does the Private Damages Directive – to a certain extent the use of consensual dispute resolution processes. During a consensual dispute resolution process (excluding arbitration), the limitation period is suspended for the duration of the process.[90] When parties opt for consensual dispute resolution concerning a claim covered by an action for damages in which the court has been seized, the proceedings can be suspended by the court for up to two years.[91] Finally, the CEL provides for specific effects of consensual settlements on subsequent actions for damages.[92]

The interplay between arbitration clauses and private damages actions remains an outstanding issue. To date, there is no guiding (Belgian) case law. Given the increasing trend for private damages actions and the growing emphasis on alternative dispute resolution, the Belgian courts are expected to provide guidance on this outstanding issue in the near future.

Various initiatives have been taken in Belgium to bring competition law and arbitration closer together. Contacts have been established between DG Competition of the European Commission, CEPANI[93] and the Brussels School of Competition.[94] These contacts have been externalised into seminars where arbitrators and competition lawyers have the chance to meet and exchange thoughts.

XIV INDEMNIFICATION AND CONTRIBUTION

Following the transposition of the Private Damages Directive into Belgian law, undertakings that are found to have infringed competition law through joint behaviour will be held jointly and severally liable for the harm caused by such wrongdoing.[95] In other words, each of the undertakings will be bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he or she has been fully compensated.

As stated above, Article XVII.86 CEL provides for two exceptions to the principle of joint and several liability: where the infringer has received full immunity, and for SMEs that fulfil three specific and cumulative conditions. For these two categories of infringers, the contribution will be limited to the amount of harm caused to its own direct or indirect

89 Arbitration is governed by Articles 1676 to 1723 Judicial Code.

90 Article XVII.91 CEL.

91 Article XVII.89 CEL.

92 Article XVII.88 CEL. See F Wijckmans, M Visser, S Jaques and E Noël, *The EU Private Damages Directive, Practical Insights*, Intersentia 2016, pp. 77–79, Paragraphs 254–258.

93 CEPANI is the Belgian Centre for Arbitration and Mediation: http://www.cepani.be/en.

94 More information on the Brussels School of Competition can be found at http://bsc.brussels/.

95 Article XVII.86 CEL.

customers.[96] When a claimant is not able to retrieve full compensation from the other co-infringers, the recipient that received full immunity or an SME may be held liable, so as to ensure that the injured party receives full compensation.[97]

In turn, the addressed co-infringer will be able to bring contribution claims against the other co-infringers for their share of the liability, including interest.[98] These contribution claims can be brought against co-infringers in separate contribution proceedings, or the co-infringers can be ordered to join the private damages proceedings initiated by the claimant by way of forced intervention. Here too, the Implementation Act provides for two exceptions, in the sense that the contribution from the recipient that received full immunity will be limited to the amount of harm caused to its own direct or indirect customers and, with regard to claimed umbrella losses, its share will be determined in light of its relative responsibility for the harm caused.[99] Overall, it will not be possible for the non-settling infringers to recover contribution from the settling co-infringers.[100] In this regard, the court is also required to take into account the amount of any damages paid pursuant to a prior consensual settlement by an infringer, when determining the amount of contribution that a co-infringer may recover from any other co-infringers.[101]

XV FUTURE DEVELOPMENTS AND OUTLOOK

The transposition of the Private Damages Directive has facilitated private damages action in Belgium. For example, the Implementation Act alleviated the burden of proof of the claimant and facilitated access to evidence. Furthermore, the class action regime in Belgium is now applicable to infringements of European competition law.

Even though these legislative changes encourage private damages actions, Belgium is not on the short list for bringing such cases. However, a steadily increased number of claimants are bringing private damages actions before the Belgian courts, particularly by means of follow-on actions for cartel infringements.

While the number of private damages actions in Belgium is steadily increasing, Belgian judges will be faced with specific challenges that are to be dealt with *de novo* as they will require departing from the classic litigation culture. The following challenges come to mind.

First, it remains to be seen when the CEL will be applied fully in practice in a specific case. This will in particular require an assessment of which stipulations are considered of a substantive or procedural nature, including the presumptions that have been put in place.

The second challenge ahead is the actual quantification exercise of damages and the submission of economic evidence. It can be expected that this will be a complex exercise in practice, including specific econometric analysis. In addition, economic experts will need to gain experience in performing this exercise and a procedural court practice will need to be established.

96 Article XVII.87 CEL.
97 Article XVII.86 CEL.
98 Article XVII.87. §1 CEL.
99 Article XVII.87. §2 CEL.
100 Article XVIII.88. §1 CEL.
101 Article XVII.88. §3 CEL.

A third development that will be monitored is the extent to which judges will depart from the classic application of the rules on evidence held by third parties (the classic application being established under Article 877 Judicial Code). The CEL allows for broader discovery requests in accordance with the stipulations of the Private Damages Directive.

A fourth question is whether an actual culture of assignment of claims will be established in Belgium, this not being the case to date.

A final consideration that comes to mind is to what extent decisions of the Belgian Competition Authority and its findings will be taken into account by Belgian judges when assessing the question of the attribution of liability for certain conduct and causality.

It remains to be seen how the above challenges will be handled before the Belgian courts.

Appendix 1

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ISBN 978-1-83862-486-6