International Competition Network

Development of Private Enforcement of Competition Law in ICN Jurisdictions

Subgroup 2 of the Cartel Working Group

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1. Introduction

Public enforcement is a key driver for investigating and sanctioning antitrust infringements in most ICN member jurisdictions. At the same time, addressing the rights of victims of antitrust infringements through private enforcement has become increasingly significant.

Many legal systems seem well equipped to consider private interests in antitrust proceedings before courts or competition agencies. However, the adoption of enforcement mechanisms allowing private parties to effectively seek compensation for antitrust violations, may require a more sophisticated legal framework. One that, for example, removes obstacles for claimants to prove an infringement and establish damages. The challenges are *inter alia* proving an infringement, as well as establishing the loss and causation, and calculating damages.

One of the main purposes of public enforcement is to ensure effective deterrence by detecting breaches of competition laws, adopting infringement decisions and by punishing perpetrators. Private enforcement of competition law can also achieve deterrence, although often through a compensatory rather than a punitive lens. Working unilaterally, or in tandem with public enforcement, it can enable companies and consumers to contribute to antitrust enforcement and to seek compensation for harm caused by anticompetitive behaviour. The role that private enforcement plays in an enforcement system and in particular the balance between private and public enforcement varies by jurisdiction.

When it comes to the private enforcement of competition law, there are different prevailing systems. One system of private enforcement is more compensatory in principle, i.e. the primary goal is to achieve compensation for victims. This requires legislators to adopt laws primarily to remove practical obstacles in bringing actions for damages before national courts. For example, in the EU, this development was facilitated by the adoption of the EU Damages Directive. To strike the right balance between public and private enforcement, the applicable law includes specific rules and safeguards ensuring that competition agencies can continue to effectively enforce competition rules, while victims of antitrust violations can seek compensation.

Another prevailing system, i.e. the US system, promotes both deterrence and compensation by providing for private treble damages actions against cartels. Like in other systems, cartel defendants are jointly and severally liable for damages caused by the entire conspiracy. In major cartel cases, the damages recovered on behalf of US consumers often exceed the fines imposed in the Justice Department's prosecutions. These differences are often attributable to the differing standards of proof in the United States; in criminal cases the government must prove its case to a jury beyond a reasonable doubt while civil claimants only need to meet the lower "preponderance of the evidence" standard. Civil recoveries go to victims. Other jurisdictions have taken different approaches to achieve similar goals, as discussed further in this chapter.

Information collected from ICN member agencies and non-governmental advisors in response to a questionnaire in September 2017-18[1] indicates an upward trend in private antitrust enforcement

[1] In the 2017-2018 ICN year, CWG Subgroup 1 launched a wide survey on the "Key elements for an efficient and effective leniency program and its application" with a questionnaire. The aim was to explore how certain policies and circumstances influence the willingness of undertakings to make use of leniency programmes. The

across the globe. In their replies to the questionnaire, 31 out of 33 national competition agencies and 41 of 43 non-governmental advisors stated that private enforcement of competition law and private damage claims are possible in their respective jurisdictions. Only a few respondents had statistics on the growth of private damages claims. But of the 72 respondents that recognized private enforcement mechanisms in their jurisdiction, 14 considered it frequent and 33 increasing.

This chapter of the ICN Anti-Cartel Enforcement manual is intended to provide an overview of the different models of private enforcement and the approach to common issues. It allows jurisdictions that may decide to adopt private enforcement mechanisms to draw upon previous experiences and existing principles that can fit in administrative, civil and criminal anti-cartel enforcement regimes. Based on national specificities the diverse ICN members should be able to further develop their applicable rules, where necessary. As cartel cases often have an international dimension it is important for legislators around the globe to consider the rules of other jurisdictions.

The following sections address the interplay between private and public enforcement (Section 2), including limits to disclosure as well as liability of the leniency[2] recipient; and elements to consider when promoting private enforcement (Section 3), such as collective redress and the quantification of harm.

The legal features set out below are to ensure coherence and therefore maximise the overall effectiveness of antitrust enforcement. Awareness of the following issues can facilitate private enforcement while maintaining the integrity of public enforcement.

2. Interplay between public and private enforcement – overview of main principles

Public and private enforcement should be viewed as complementary tools, as both serve the same ultimate goal of ensuring optimal compliance with competition rules. Public enforcement through sanctions may be punitive, depending on the system, but is in any event intended primarily to achieve deterrence. That is one of the reasons it is so important for competition agencies to be transparent about public enforcement decisions. Private enforcement has the specific goal of

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SG1 Co-Chairs led an international team that analysed the replies from 33 competition agencies and 43 non-governmental advisors (NGAs) representing 19 jurisdictions (18 countries and the European Union). The outcome is a working group paper "Survey on the key elements for an efficient and effective leniency program and its application" that:

- Provides an overview of the most frequently used elements of national leniency systems and the key leniency incentives and disincentives on the basis of the replies received.
- Presents the replies in relation to the obligation to file leniency applications in more than one jurisdiction; as well as the interaction between leniency and other policies i.e. ex officio investigations; reporting obligations to public procurement agencies and sectoral regulators; sanctions on individuals; private damages claims; and settlements.

[2] The term leniency means a system of immunity and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence. Leniency programmes cover both the narrower defined leniency policy (i.e. the written set of rules and conditions adopted by a competition authority) as well as other elements supplementing the policy in a wider environment. See Checklist for efficient and effective leniency programmes (2017); see also the Anti-Cartel Enforcement Manual Chapter 2: Drafting and Implementing an Effective Leniency Policy. In this document, the term “leniency” covers also total immunity from fines and sanctions, unless otherwise specified.

retribution or corrective justice, and may depending on the system also have deterrent and punitive effects. Competition agencies may be supportive of private enforcement because it enhances deterrence. Equally, agencies may be supportive of the concept of compensation. Nonetheless, for most competition agencies public enforcement will remain the primary goal.

The following sections address typical challenges regarding the interaction between public and private enforcement, which can be found in different forms depending on the system. In 2.1, we address specifically the interaction between competition agencies and the courts in private enforcement actions. This is reflected in the probative value of infringement decisions, their content, limitation periods, the role of agencies in civil proceedings and efforts made in different jurisdictions to encourage voluntary compensation for victims. In 2.2 and 2.3, we address how different jurisdictions endeavour to strike a balance between civil compensation through the courts and the protection of the cooperative elements of their public enforcement system, such as leniency and settlement programmes. This is done through limiting disclosure of evidence (2.2) and limiting the liability of the leniency recipient (2.3).

2.1. Interaction between competition agencies and courts in private enforcement actions

The probative value of infringement decisions

A substantial number of antitrust damages cases build upon a competition agency's finding of an infringement. In these 'follow-on' cases, a competition agency's infringement decision has additional probative value in many jurisdictions. This promotes private enforcement in two ways. Firstly, it alleviates the most challenging burden to private claimants, which is establishing an infringement. Secondly, it can prevent defendants from attempting to re-litigate a finding of infringement for which the possibilities of appeal have been exhausted, thereby promoting legal certainty and the coherent application of competition law. Both of these benefits depend on the degree to which infringement decisions can be refuted by defendants in civil proceedings. In other words, the extent to which the decision of the agency is binding on the court, can influence the burden of proof on the claimant in establishing liability for damages.

The specific probative value of an infringement decision varies by jurisdiction. At one end of the spectrum is the approach taken by the EU, where an infringement decision from the European Commission or the national competition agency of a Member State provides irrefutable proof that an addressee has infringed EU competition law in civil action procedures before the courts of that specific Member State. The courts that handle follow-on cases in those jurisdictions cannot issue judgments contradicting the Commission's or the agency's decision. In another approach, adopted for example, by the US, Canada and Australia, infringement decisions provide *prima facie* evidence of an infringement in a civil action. At the other end of the spectrum is the approach taken by Brazil, for example, where infringement decisions have no special probative value.

The content of infringement decisions

In follow-on actions, the infringement decision is the basis for the damages claim. Infringement decisions, often rich in relevant information, provide potential claimants with a stronger starting position, especially in jurisdictions where disclosure mechanisms are more restrictive. Without legal safeguards, this can cause tension between the interest in promoting private enforcement and the interest in protecting public enforcement by the competition agency, in terms of (i) preserving the

incentives on private parties that the regime has established, (ii) avoiding prejudice to public enforcement, and (iii) not putting an unnecessary burden on the public authority.

For instance, applying for leniency may become less attractive if the leniency applicant is later more exposed to damages claims than parties that have not applied for leniency. To shield leniency applicants from this drawback, many competition agencies protect the contents of voluntary leniency statements or permit a "paperless process" whereby no formal written statement is provided by the applicant. The same applies to statements made in the context of a settlement decision by the competition agency.

The adoption of settlement decisions by an agency can be advantageous to potential claimants in a civil enforcement action in that they bring a speedier end to the public enforcement proceedings. Not only does this contribute to deterrence, it also allows follow-on actions for damages in a sector to commence earlier than they would have done had the parties not chosen for settlement. Settlement decisions, which tend to be shorter, may be less detailed than decisions that follow adversarial proceedings. It is important that the agency ensures that the most important information for potential claimants - the product concerned, the undertakings involved and the period in which the infringement took place – will always be included in the decision.

Commitment decisions are generally used by agencies to address competition concerns and to end public proceedings without concluding on the existence of an infringement. Nevertheless, claimants have used commitment decisions as evidence of anticompetitive behaviour in claims for damages. Although they are not infringement decisions, the content of commitment decisions can influence private enforcement actions.

Limitation periods

Competition law infringements are usually secretive and as a result, most jurisdictions have statutory limitation periods that start to run only when an injured party becomes aware of the infringement and the damages suffered. This prevents claims from expiring before an infringement is even terminated. The length of such subjective limitation periods range usually from two to five years depending on the jurisdiction, but may be as long as ten years. Many jurisdictions have stipulated additional, specific limitation periods for follow-on cases. These allow claimants to file a civil suit until a certain period of time, for example two years in Canada after public proceedings are finally closed and in the EU, the Damages Directive stipulates that the suspension of the limitation shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Limitation periods should be long enough to provide damaged parties with a genuine opportunity to submit a claim, knowing the definitive outcome of public proceedings. However, long limitation periods also have counterproductive effects on claims for antitrust damages. Defendants will be hesitant to enter into negotiations for an out-of-court settlement in a situation where they as yet have no definitive overview of all the claims lodged against them. To promote actual compensation, jurisdictions should strive for limitation periods that are long enough to accommodate claimants, yet not so long as to frustrate out-of-court settlements between the parties.

Role of agencies in proceedings before national courts

Some jurisdictions allow competition agencies to intervene and participate in private action proceedings before national courts. In Hong Kong for example, the Competition Commission may, with court approval, participate as a full party to the proceedings. In the EU, the competition agencies of Member States may, upon their own initiative, submit written observations to national courts relating to the application of EU competition law.

On the specific issue of the calculation of damages, in a majority of jurisdictions, the national courts play the leading role in determining the amount of damages, but some permit competition agencies to be called upon for assistance. A request for such assistance can emanate from the judge or through the parties to the proceedings. In most jurisdictions, (for example, EU member states, Brazil, Japan) the competition agencies are under no obligation to respond positively to such a request. Experience to date suggests that such requests will be infrequent. Some competition agencies may be reluctant to give advice on the quantum of damages, considering that their competence is focused on assessing the effect of a cartel on a market. This is different from analysing the impact of a cartel on a specific natural or legal person. In many jurisdictions, (for example, Hungary and Japan), in the event that the competition agency provides a Court with an opinion on the assessment of the damage calculation, such opinion is not binding.

Encouraging voluntary compensation for victims

Several jurisdictions have chosen to adopt a system encouraging parties to a cartel to offer compensation to their victims. In Australia, if an infringer has insufficient financial resources to pay both a fine and compensation, courts will prefer the payment of compensation. In the US, payment of restitution to injured parties is a condition that must be satisfied before an applicant can obtain the final grant of leniency. In the UK, the competition agency has the power to approve redress schemes offered voluntarily by infringement parties.

In a number of jurisdictions, competition agencies have the possibility, or the obligation, to consider compensation paid to victims as a mitigating factor when fixing their fine. The reduction granted can sometimes be relatively significant. In Korea, for example, the competition agencies can apply a 20 to 30% reduction. In Turkey the fine can be reduced at a rate of one fourth to three fifths. In Canada, restitution is a factor that can be taken into account by a court in imposing a sentence for a criminal offence.[3] Putting such a scheme into effect, in practice, may nevertheless raise difficulties. Indeed, several factors may need to be considered such as the level of compensation or the nature and number of victims to be compensated, before determining whether a reduction of fine can be granted.

2.2. Limits to disclosure of evidence – protection from discovery

Relevance of disclosure

Access to evidence is important in private antitrust litigation due to information asymmetries between the victims of competition law violations and infringers. In cases where there is a binding decision of a competition agency finding an infringement of competition law, disclosure of the decision may already help to decrease some information asymmetries.

[3] See generally *R. v. Maxzone Auto Parts (Canada) Corp*., 2012 FC 1117.

Some jurisdictions also allow potential claimants to request disclosure of evidence from the defendants and third parties including, on a subsidiary basis, i.e. if the information cannot be obtained from other parties, competition agencies, based on their general civil procedure rules or specific rules for antitrust litigation. For example, in the US, claimants have traditionally been entitled to discovery proceedings under federal and state procedural law. Similar requirements are present in Canada under the relevant federal and provincial rules of civil procedure, though discovery proceedings in Canada are not as wide ranging or as intensive as in the US. In the EU, the EU Damages Directive introduced competition law specific disclosure rules that will apply in all Member States as a minimum standard to harmonize the heterogeneous rules that existed in only a few Member States. On the basis of these rules, national courts of the Member States will be able to order disclosure of relevant evidence and categories of evidence provided the claim of damage is plausible, the evidence is relevant and the scope of disclosure is proportionate. In particular the purpose of the latter requirement is to prevent "fishing expeditions", i.e. non-specific or overly broad requests for information that are unlikely to be of relevance for the parties to the proceedings. In some Member States these rules will apply only in pending proceedings relating to an action for damages, but in others potential claimants will be able to initiate a separate disclosure proceeding before initiating an action for damages.

Rationale for limits to disclosure

Information stemming from the competition agency's proceedings can be a valuable source of evidence. From a policy perspective, it is clear that there must be limits to the disclosure in national court proceedings of evidence in a competition agency's file. Disclosure rules should not unduly detract from the effectiveness of the enforcement of competition law by a competition agency. The disclosure of evidence contained in a competition agency's file in private damages proceedings has to be limited in order to avoid interference with ongoing investigations, to ensure continued willingness to voluntarily submit evidence – including self-incriminating documents such as leniency applications and settlement submissions – to the competition agency and to protect a competition agency's internal decision-making process as well as its international cooperation efforts. Leniency programmes and settlement procedures are important tools for the public enforcement of competition law as they contribute significantly to the detection, efficient prosecution of, and imposition of penalties for the most serious infringements of competition law. Furthermore, as many decisions of competition agencies in competition law cases are based on leniency applications, and competition law damages actions generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings will be deterred from cooperating with competition agencies under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition agencies, were to be disclosed. Furthermore, such disclosure would pose a risk of exposing cooperating undertakings or their management board to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition agencies. To ensure undertakings' continued willingness to approach competition agencies voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence by operation of statutory confidentiality or applicable rules of privilege.

Scope of disclosure

When considering the appropriate limits to disclosure of evidence in private damages proceedings it is important to ensure that disclosure measures are proportionate especially when disclosure risks unravelling the investigation strategy of a competition agency by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition agencies.

The EU Damages Directive is a good example of such protection. Since the implementation of the Directive there is a harmonized minimum standard across the EU regarding the scope of disclosure of evidence in private antitrust litigation and a largely fully harmonized standard of the necessary safeguards for striking the right balance between private and public enforcement. In particular, the EU Damages Directive provides that the national courts may not under any circumstances order the parties to the proceedings or any third party, including the national competition agencies and the European Commission, to disclose leniency statements or not withdrawn settlement submissions in damages actions or separate disclosure proceedings. Certain documents, such as replies to requests for information, statement of objections and withdrawn settlement submissions cannot be disclosed until the competition agencies' investigation has been closed by adopting a decision. Where such documents are obtained solely through access to the file of a competition agency their use is deemed inadmissible in damages actions and the court may impose penalties if these limits on the use of evidence are not observed. Moreover, the use of any other documents obtained through such access to the file is limited to the natural or legal person who initiated the request of access to the file to prevent such documents from becoming tradable information. Internal documents of and the correspondence between European competition agencies are not subject to the Directive's disclosure rules and are protected by the rules and practices of the EU or national law.

When deciding on a disclosure request, particularly requests directed at third parties, national courts also have to give full effect to applicable legal professional privileges under European or national law and to consider the confidential nature of the information sought. Disclosure requests to third parties are not excluded in principle, where national courts consider the disclosure relevant to the action for damages and proportionate. But in such cases, the national courts must require effective measures to protect confidential information, including redacting sensitive passages in documents, conducting in camera hearings or restricting the group of persons granted access to such documents.

If an addressee of a disclosure order fails or refuses to comply with an order, the national laws of the Member States provide for different legal consequences. In some Member States the national courts can impose a fine, in others disclosure orders are not legally enforceable. Instead, the national courts will take the failure or refusal adversely into account in their assessment of the evidence adduced. Similar penalties apply in the event that a person destroys relevant evidence.

Another model is the US system in which disclosure of evidence is rooted in a longstanding tradition of liberal discovery in civil litigation and is typically very broad in its scope. Before trial, the parties in competition law cases may discover information from each other and from third parties that may be relevant to the claims or defences in the case. This ensures that all parties understand the nature and scope of the claims. The rules applicable to this discovery process in competition law cases are the same rules applied in other civil law cases. The parties gather information through mandatory disclosures under the Federal Rules of Civil Procedure, such as written interrogatories, requests for

production of documents and information, requests for admissions, depositions, and expert disclosures. This process of discovery lays the foundation for the facts the parties will present to the court. The Federal Rules of Civil Procedure act to limit potential abuse of these discovery tools. These rules require that the information be proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. Furthermore, these Federal Rules of Civil procedure and similar state court rules also protect against disclosure of information that is privileged lawyer client communication. As noted above, similar, though less broad requirements, are present in Canadian civil litigation.

Notwithstanding the breadth of discovery in the US system, civil plaintiffs' ability to discover information from competition agencies is extremely limited. The US statutes that give competition agencies broad authority to demand production of information during investigations of possible competition law infringements also include strong confidentiality provisions that normally prevent the information from being made public except in connection with official proceedings. Similar protections exist in Canada though the scope of protection is subject to some limitations.

In Canada, the Competition Bureau's general position is that it will not provide information to persons contemplating, or who are parties to, civil proceedings for damages commenced under the *Competition Act*, unless ordered by a Court. Where necessary, the Bureau will take the appropriate steps to maintain the confidentiality of the information requested, notably by opposing the subpoena or seeking protective court orders.

All in all, the scope and limits of disclosure cannot be defined without taking into account the respective legal system's general compensation and civil procedure rules.

2.3. Limits to the liability of the leniency recipient

Generally, cartelists are usually jointly and severally liable for the harm caused by their infringement, meaning that each victim can obtain full compensation from each cartelist, and the co-cartelists can then claim contributions from each other.

However, as mentioned above, a leniency recipient is likely to be the first (and easier) target for follow-on civil damages actions. That is because, while its co-cartelists may spend many years challenging the infringement decision in courts, the leniency applicant is unlikely to appeal and will therefore be the first party against whom the infringement decision becomes final. The cartel's victims can therefore rely on the binding effect of the infringement finding against the leniency recipient and could in theory sue it for damages for the full harm caused by the entire cartel.

Further, many leniency programmes require leniency recipients to admit to the infringement, which of course can increase the chances of a successful claim against the applicant compared to its co-cartelists. Plus, to the extent that a leniency application describes that applicant's own conduct, it may prove to be easier for the victim to recover against that applicant.

The disadvantage of being sued first and being held liable for the full amount of the cartel can of course be a major disincentive for a would-be leniency applicant. That may create a problem for

public enforcement because leniency recipients play a key role: they expose secret cartel infringements, thereby limiting the harm that could have been caused if the infringement had continued for a longer period until detection by the public authority.

It is therefore prudent for competition agencies to think about ways to safeguard leniency incentives. The right balance must be struck between public and private enforcement so that the exposure of private enforcement does not unduly disincentivize self-reporting to public enforcement officials. Of course, the idea behind a special liability regime is not to absolve the leniency recipient from civil liability for damages completely, but to provide the right set of incentives to encourage cooperation, including assurance that the leniency applicant does not suffer worse consequences from damages actions than its co-cartelists.

Certain jurisdictions have tried to address this issue by removing exposure to treble damages and by limiting the leniency recipient's liability to its direct and indirect purchasers or suppliers. For example, in the US, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, also referred to as ACPERA, limits the liability for civil damages claims in private antitrust actions for a qualifying leniency applicant. For claims against a corporation that enters into an antitrust leniency agreement with the US Department of Justice Antitrust Division or a cooperating individual covered by such an agreement and that provides satisfactory cooperation to the claimant in the private action, a claimant cannot recover damages exceeding the portion of the actual damages sustained by such claimant which is attributable to the leniency applicant. Thus, by satisfying the cooperation requirements of ACPERA, a leniency applicant can avoid joint and several treble damages liability.

In the EU, even though joint and several liability is the rule, the EU Damages Directive provides that the immunity recipient (i.e. the leniency application that has ultimately received full reduction of fines) is only liable in damages to: (i) its direct or indirect purchasers or suppliers; and (ii) other injured consumers in the situation where full compensation cannot be obtained from the other companies involved in the same infringement, which is however rather unlikely.

The EU Damages Directive also encourages consensual settlements between the infringers and the victim of the cartel. The Directive provides that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm inflicted upon the injured party (subject to an exception where the non-settling co-infringers cannot compensate the injured party for the remaining harm). According to Article 19 of the Directive, any remaining claim of the settling injured party can only be exercised against non-settling co-infringers and non-settling co-infringers are not allowed to recover contribution for the remaining claim from the settling co-infringer.

3. Elements to consider when promoting private enforcement

3.1. Institutional preconditions for development of private anti-cartel enforcement

All except two of the jurisdictions surveyed for the preparation of this Chapter reported that they have had legal provisions in their national law enabling private anti-cartel enforcement and damage claims for a considerable period of time. 19.4% of the respondents reported that private enforcement is frequent in their countries. Another 43.4% of the respondents indicated that it was increasing (see Annex 1 of the Good practices for incentivising leniency applications, available at

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf).

While many national legal systems appear to be well situated for the consideration of private actions on cartel activities by national competition agencies and courts, some may require more sophisticated institutional framework and capacity building before they can effectively redress private damages. Remarkably, only 13.1% of the responding jurisdictions indicated that private enforcement took place in over one half of the cartel cases (in four of these jurisdictions – in two thirds of the cases). In the remaining jurisdictions private enforcement took place in less than 10% of the cartel cases or the relevant indicator was not available because of a lack of statistics.

Possibilities of private damage compensation can be limited for a variety of country-specific reasons. These can include (but may not be limited to) a lack of conventional and transparent regulations governing various aspects of actions for private damages. For example, regulations governing the eligibility of claimants to claim private damages, or special/punitive damages, high legal standards applicable to the finding of liability for an antitrust infringement, a lack of rules governing the calculation of damages incurred by customers or competitors. These problems are even more complicated in a situation of damages caused by several companies comprising a cartel, compared, for example, with damages caused by unilateral abuse. In some cases, the identification of victims can be an additional problem, as for example in the cases involving customers of a trade network.

Most of the responding jurisdictions indicated that the establishment of an antitrust violation and calculation of damages are ultimately for the determination of the courts. The jurisdictions seem to be quite heterogeneous in terms of the role of the competition agencies in calculating damages: 25% of them responded that the national competition agency does play a role in the calculation of damages by courts, while 63.2% asserted the contrary. Regardless of the formal role of competition agencies in calculating damages, a common understanding of the issues at stake between competition agencies and national courts may contribute to a harmonious development of private antitrust enforcement.

In some jurisdictions, competition agencies participate in regular meetings – typically on an annual basis – with judges to promote discussions on competition issues. Several agencies have also carried out training projects, specifically designed for judges. These have proved to be particularly fruitful when they follow a case-based approach, that gives judges the opportunity to discuss the practical aspects of real-life scenarios and to address typical challenges faced in competition review.

The results achieved by these initiatives may be twofold. These initiatives may improve the way national judges assess economic evidence and arguments when adjudicating private claims involving competition-related issues. Also, they may provide judges with sound background knowledge on selected competition issues, such as market definition and the assessment of market power, the functioning of cartels, counterfactual analysis, exclusionary and exploitative abuses.

For their part, competition agencies should strive to make their decisions clear and understandable. It can be challenging to draft a decision that clearly and cogently reflects the outcome of an extensive and complex investigation. However, it is crucial to avoid unnecessary complexity to ensure that the agency's reasoning is fully understood by all stakeholders, and first and foremost by the judiciary.

It is essential for policy-makers, developing their national private anti-cartel enforcement systems, to support the successful introduction and/or upgrade of existing systems to meet the needs of private enforcement. The following are some steps competition agencies can take to support the development of private enforcement systems:

- To establish a legal regime for private claims for redress of damages resulting from cartels and abuse of market power, including collective redress. In addition, provisions regulating the establishment of liability for cartel practices, including its allocation among the cartel participants, are needed. This may require introduction of amendments to the systems' existing antitrust and civil laws and possibly in the applicable bylaws.
- To train judges to enable them to make informed decisions on damages resulting from cartels and abuse of market power, damage calculation, and redress and allocation of the damage compensation charges among cartel participants.
- To provide training for local antitrust private lawyers who plan to represent plaintiffs and defendants in courts.
- To acknowledge the priority of private cartel enforcement at a policy level and involve all the potential stakeholders, including competition agencies, the private competition law bar, the judges, as well as the business community in a broad discussion and formulation of national policy. To secure broad public and political support for the development of private enforcement it is necessary to explain its role in promoting the efficient functioning of markets, safeguarding the interests of various social groups, and ensuring compensation for victims of cartels.
- To assess the jurisdiction's ability to develop a private cartel enforcement regime based on an analysis of its legal and institutional framework, as well as on the relevant skills and competence of the involved stakeholders, judges and lawyers, in the jurisdiction. If the latter is insufficient, it may be advisable to postpone the introduction of private enforcement until the required conditions are in place.

In reality victims of competition law infringements face a number of challenges that can reduce their incentives to seek compensation. If policymakers decide to support private enforcement, they will have to take into account the practical obstacles. Some of these are mentioned in the subsequent sections.

3.2. Collective redress mechanisms

Introduction

Often, where a cartel has been subject to an infringement decision by a competition agency, 'follow-on' actions for damages by affected customers will follow. In such actions, private parties intend to obtain compensation for the harm they suffer. The claimant need not prove the infringement but must establish the loss suffered as a result of it. The likelihood of follow-on actions being brought depends on many circumstances, including the amount of harm suffered by each potential victim. If the harm per each potential victim is relatively low, it is less likely that they will bring an action for damages as the necessary costs may exceed the maximum amount of damages (so-called 'negative value claims'). Instead of lodging individual claims, wronged parties can also come together, or be grouped together, to seek or be offered 'collective redress'.

Collective redress is welcome, as it can enhance effective protection and compensation of people and businesses that have suffered loss as a result of competition law breaches. Collective redress proceedings can also create efficiencies by lowering the procedural costs per complaint, and saving time, compared to multiple individual claims. However, where loss is spread over a large group (for example, purchasers of cartelised consumer goods), it can be hard to identify all affected parties, and public enforcement resulting in the disgorgement of profits to the benefit of the public purse may be considered a more efficient alternative.

In some jurisdictions, there might be limitations on the introduction of some of the collective redress mechanisms discussed below, for example where they are incompatible with fundamental principles of national law or where they could create a risk of the emergence of a "claims industry" that could hinder effective cartel prosecution.

The overall purpose of the introduction of collective redress mechanisms might also vary between jurisdictions depending on the aims of their private enforcement systems. Some jurisdictions consider compensation of the individual to be the main purpose of private enforcement, while the prevention and deterrence of competition law breaches is seen as the preserve of public enforcement. Other jurisdictions consider private enforcement to be a tool to create additional deterrence and support public enforcement. These differences in approach might influence the scope of national collective redress mechanisms.

Collective actions (opt-in and opt-out)

Some jurisdictions provide for some type of collective action litigation for the purposes of private redress to a class of affected parties. The characteristics of a collective action and the legal prerequisites for it may vary from jurisdiction to jurisdiction, but some main characteristics can be identified.

Depending on national law, collective actions may be restricted, for example with regard to the interests that can be invoked (for example a 'scope rule' may determine that only interests sufficiently related to the country of litigation can be invoked), to the class that can be represented, and to the types of claim that can be brought (for example, in the Netherlands, it is not yet possible to claim monetary damages in a collective action, although a legislative proposal on this is currently being debated).

Collective actions may operate on an 'opt-in' basis, an 'opt-out' basis. If a collective action is on an opt-in basis, only those aggrieved parties who have actively engaged in the litigation (e.g. through the sending of an opt-in letter to the body representing the class) will be bound by the court's judgment. The advantage of such a system is that nobody will be bound except those who have actively expressed their intent to be bound. There is a however the likelihood that the class actually being represented is smaller than the total population of affected customers who could claim redress.

If a collective action is on an opt-out basis, a representative body is – in principle – able to obtain a judgment for all affected parties who did not actively opt-out. In practice, the scope of affected parties covered by the judgment will depend on national law and the extent to which the judgment is recognized and/or binding in other jurisdictions: for a world-wide class, not all jurisdictions will accept the judgment of the court assuming jurisdiction for such a class. In cases where the loss

caused by a cartel is spread over a large group of customers (for example, where there is a cartel in a consumer goods market), it can be difficult to identify all affected parties.

Some jurisdictions operate a system which combines features of the opt-in and opt-out systems. For example, while the collective action is on an opt-out basis, once an out-of-court settlement is reached, claimants wishing to be party to the settlement must opt-in to be bound by it. The combined system can also be used where there are territorial limits on the scope of collective actions, for example where residents are represented on an opt-out basis and non-residents on an opt-in basis.

The assignment model in opt-in proceedings

In the assignment model, a prospective claimant – often a company specially created in order to claim damages (a 'claims vehicle') – collects claims for damages from affected parties who assign their claim to the claims vehicle. Often, professional litigation funders are behind these vehicles and initiate the process of identifying and approaching potentially affected parties and convincing them to assign their damages claims to the claims vehicle (so-called 'book-building').

For the litigation funders, the litigation is an investment: their expectation is that the financing of the litigation results in a profitable return on their outlay. As is the case with other types of investments, the horizon for an expected return is 5-10 years. For the assignors, the assignment model is an easy and low-cost way of seeking redress: often, the price agreed for the assignment of their (alleged) claim is only a fraction of the nominal value thereof, sometimes it is even zero. The price paid for the transfer of claim is instead a percentage of any award resulting from the litigation (percentages may vary from approximately 20-50%, often around 30%). An assignment model is thus a form of ‘no win, no fee’ litigation arrangement.

If the claim is not successful, the litigations costs are often borne by the claims vehicle. For the assignors, this way of book building is attractive: the claims vehicle becomes the legal owner of the claim and bears the full litigation risk.

The assignment model requires a lot of administration and organisation on behalf of the claims vehicle, to ensure that the requirements for assignment of each claim are met, and to ensure adequate participation by assignors in proceedings (e.g. at the litigation stage where evidence from the assignors may be needed to substantiate the claims).

As claimants are in principle free to assign their claims to whoever they want, there is often no limit in the territorial coverage of assignment model proceedings. When assessing the validity of the assigned claims, multiple national legal systems will often apply. Depending on the national procedural law of the jurisdiction where legal proceedings have been initiated, assignors may be added to the proceedings after they have been initiated. National law also governs the conditions under which claims vehicles may operate, such as sufficient funding against an adverse cost order or corporate governance requirements. In the absence of national regulation or supervision, commercial claims vehicles can provide and advertise their services as see fit. This can make it hard for potential claimants to assess how professional and reliable a claims vehicle is. Should the vehicle commit professional misconduct (e.g. if they disregard the statute of limitations) this could result in considerable damage (e.g. in the form of extinction of claims), for which there may be no adequate

remedy. Also, in order to gather as many claims as possible, claims vehicles may give rise to unrealistic expectations, ultimately leaving the claimants disappointed.

Collective settlements and voluntary collective redress

Generally speaking, there are two possible routes for claimants in collective redress proceedings to receive their redress: the contested and the uncontested routes.

In the contested route, the redress is the result of a court award which determines and disposes of a contested collective action.

In the uncontested route, the redress is the result of agreed terms between the claimants and the defendant which extinguish the claimants' rights to claim in court proceedings.

Contested collective proceedings commenced in court might of course become uncontested if an out-of-court collective settlement is subsequently reached. However, uncontested redress might also come about from a voluntary offer from a party that has breached competition law to its affected customers. Some jurisdictions have mechanisms to incentivise this kind of voluntary redress.

In opt-in proceedings, the defendant has more certainty on the scale of its potential damages compared to opt-out proceedings which in principle cover all affected customers. When negotiating an out-of-court settlement, the defendant is likely to be willing to pay a higher price per claim in the case of a smaller, fixed group of claimants (in opt-in proceedings) than in the case of a larger, undetermined group of claimants (in opt-out proceedings). This is beneficial to the claimants who have opted-in, as the price received per claimant will be higher. Of course, the disadvantage of the opt-in system here is that potential claimants that did not opt-in receive no redress through the collective settlement. To receive redress, they would need to bring their own individual private actions, with the costs and risks associated with that, and any settlement terms they are subsequently offered may not be as advantageous of those of the collective settlement agreed with the claimants in the opt-in proceedings.

Some jurisdictions lay down specific procedures for collective settlements, with or without some form of judicial control or other oversight.

The involvement of a court or other agency is often related to safeguarding the fairness of the settlement and declaring the settlement binding on the parties. In the Netherlands, for example, the court can declare the settlement to be binding on the parties represented in the collective action, sometimes on an opt-out basis.

Furthermore, an agency might be involved to consider the impact of the settlement on public enforcement, e.g. by lowering the fines imposed.

The UK has a mechanism through which public enforcement can be used to encourage voluntary redress as an alternative to follow-on private litigation. The CMA (or a sector regulator with competition powers) can certify a voluntary redress scheme offered by a party, in relation to a UK or European Commission infringement decision, where that scheme has been set up according to a process specified in statutory regulations. While redress schemes can be offered separately in the UK without such certification, the process puts approved redress schemes on a statutory footing. The legislation allows the competition agency to approve the framework of a voluntary compensation

scheme (satisfying itself as to its overall fairness, reasonableness and adequacy), while the levels of actual compensation to be offered are determined by an independent board of experts established under the scheme. Where schemes are approved, the UK agency will take into account the voluntary offer of redress when assessing the level of fine for an infringement and would generally expect to offer a reduction in the level of penalty imposed. Such a reduction would likely be up to a maximum of 20 per cent.

3.3. Quantification of harm

The starting point for calculating damages in cases of competition law infringements is determining the actual harm to the victims and the amount in damages that will make the victim "whole." Calculating damages can be difficult and expensive. It may require intensive fact gathering and/or sophisticated economic analysis. Victims of competition law infringements typically face serious practical challenges in quantifying the harm they suffered. Given the potential difficulties of proving harm from an infringement, most private enforcement regimes take a practical approach to proving harm, in order to avoid placing unduly high burdens or unreasonably exacting standards on claimant seeking to establish their injuries.

Claimants are normally permitted to prove harm using any of several approaches. For example, the European Commission has issued extensive guidance on the quantification of damages in a published "Practical Guide" that is aimed at assisting the judiciary, counsel, and claimants of member states. The comprehensive guidance explains in detail the many different economic and evidentiary approaches and may be used in proving damages. In addition to these non-binding rules, the EU's Damages Directive has stipulated that national courts in the EU must have the power to estimate the amount of the harm.

In the US, claimants must establish that they were injured in their business or property as a direct and proximate result of an antitrust violation. The anticompetitive conduct must be a material and substantial cause of the injury. And the plaintiff is only entitled to damages that it has proven to a jury and that are not based on speculation or guesswork. Like the EU, US law is flexible and it does not prescribe one formula for calculating damages in cases involving competition law infringements. Methodologies for calculating harm in US cases vary widely and depend on such factors as the alleged violation and injury and the data available to the claimant. For example, the "before and after" approach compares a plaintiff's profits, sales, or prices paid during the alleged violation with a period before or after that time period. The "yardstick" approach compares the plaintiff's performance in the affected market with its performance in other markets or with the performance of benchmark firms in markets not affected by the alleged violation. These methodologies normally require access to substantial amounts of data, complex economic analysis, and use of expert witnesses.

Procedural rules can ensure that those harmed by the conduct receive damages, even if the calculation of the exact amount is not possible. For example, some jurisdictions use a presumption of a specific overcharge percentage—for example, Hungary and Latvia use a presumption of 10% overcharge. Also, in jurisdictions where private enforcement is also meant to deter infringements, the laws may provide for a multiplier to the damages award. For example, US claimants generally are entitled to an automatic trebling of their damages unless a defendant has been granted leniency by

the US Department of Justice Antitrust Division. This serves to ensure that victims are fully compensated.

3.4. Passing on

When calculating damages and quantifying harm as a result of the price and volume effect, the question arises whether the losses that a cartel victim has passed on to its customers should be taken into account. Generally, the party that is held liable for the cartel damage has an interest in arguing that the claimant has suffered no or less damage because the claimant passed on the price overcharge in whole or in part in the price of its products or services. A passing-on defence may therefore avoid overcompensation of the victim of the cartel who was able to pass on the overcharge to its customers. At the same time, the recognition that the customer of the cartel may have passed on the overcharge to customers lower in the chain raises the question whether these indirect purchasers can claim damages. Indirect customers may have an interest to claim that there was pass-on by the direct purchasers

The U.S. Supreme Court rejected the passing-on defence at the Federal-level in 1968 in its opinion in *Hanover Shoe Inc. v. United Shoe Machinery Co*[4] This means that direct purchasers can claim the full amount of any proven overcharge from the cartelists, without any reduction for the overcharge which has been passed on to their customers. Likewise, in 1977, the U.S. Supreme Court decided in *Illinois Brick Co. v. Illinois*[5] that the rule from *Hanover Shoe* should be read to mean that indirect purchasers cannot sue for their damages. Following *Illinois Brick*, however, certain jurisdictions have adopted legislation allowing indirect purchasers to bring damages actions under state antitrust laws. In any trial, these indirect purchasers would have to prove that the overcharge was passed on.

Due in part to inconsistencies between US federal and state law, some U.S. observers have urged reform in this area. As a prominent example, in 2007, the bipartisan Antitrust Modernization Commission recommended that the U.S. Congress overrule *Illinois Brick* and *Hanover Shoe* to allow a more accurate apportionment of damages. A case currently pending before the US Supreme court, namely *Pepper v. Apple*, raised these questions regarding passing-on, as well.

In Canada, the Supreme Court has clarified that plaintiffs may bring damages claims in competition class actions on behalf of both direct and indirect purchasers. This means that separate direct purchaser and indirect purchaser claims are typically not advanced in Canada, in contrast to the US.

The EU legislature has opted for a different model. At the EU-level, the Damages Directive requires that defendants should be able to invoke a passing-on defence in cartel damages actions, by arguing that the claimant - the direct purchaser- passed on the whole or part of the overcharge resulting from the cartel infringement to its own customers - the indirect purchasers. The burden of proving this passing-on rests with the defendant. Unsurprisingly, the indirect purchasers affected can also claim damages. In such cases, the burden of proving the existence and scope of such a passing-on will rest with the indirect purchaser. According to Article 14(2) of the Damages Directive, the indirect purchaser will be deemed to have proven the passing-on where that indirect purchaser has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement of

[4] Hanover Shoe Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968).
[5] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) 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.

In July 2018 the European Commission published draft guidelines to assist national courts on how to estimate the share of the overcharge which is passed on to the indirect purchaser. The final text is planned to be adopted in 2019. A study on the passing-on of overcharges, published in October 2016, is the basis for these guidelines. The guidelines will hopefully be welcomed by national courts, considering that the study shows that national courts have had relatively little experience of dealing with pass-on claims. In addition, the study reveals that outcomes have differed across the Member States, not only in regard of how to quantify the share of the passed-on overcharge, but also on the factors to be taken into account when accepting or rejecting the passing-on defence.

Meanwhile, national courts are confronted with the question of how to deal with the passing on defence. Although it is clear that this type of defence is available in most European jurisdictions, there is no full clarity on the circumstances in which it can be invoked. For instance, courts in the Netherlands and the United Kingdom have ruled that passing-on should not be taken into account, where it is considered highly unlikely that indirect customers can successfully claim their damages. These judgments are somewhat controversial in legal systems, which are based on the principle that only actual damages can be claimed and that there should not be overcompensation.

4. Conclusion

Whereas private enforcement of competition law is possible in nearly all ICN Member States, and whereas it is arguably frequent or increasing in the majority of them, this chapter illustrates that the applicable rules are quite diverse. This diversity stems particularly from the fact that there are different prevailing systems of private enforcement – with different emphases on compensating victims or deterring infringers – and distinct institutional preconditions.

One of the core challenges is to strike the right balance between public and private enforcement of competition law. The protection of leniency programmes is a fundamental principle of private enforcement. In particular, leniency applications have proved to be important tools for competition agencies to detect cartels and follow-on decisions of such agencies may, in turn, help victims of competition law infringements to receive compensation for the harm they have suffered. However, leniency applicants, and especially immunity recipients, may become a preferred target for such victims and therefore they receive protection in a number of ICN Member States. Important examples in that respect are limitations to the disclosure of leniency statements and the liability of leniency recipients.

Based on the experiences in many jurisdictions, it may be particularly challenging to transform the general possibility of recovery following a competition law infringement into an effective right to compensation. To address the challenges that victims typically face in actions against infringers, ICN Member States, with more established competition law redress mechanisms, have quite diverse sets of rules in place. Clearly, the rules and methods on issues such as the quantification of harm seem to be more universally applicable than those relating to collective redress models. However, there is no "one size fits all" set of detailed rules, which this chapter could propose. Rather, it sets out core challenges and fundamental principles. The intention is that these insights form a valuable input for

agencies and policy-makers contemplating further development of the competition law framework in their respective jurisdictions.