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GCR INSIGHT

PRIVATE LITIGATION GUIDE

SECOND EDITION

Editors

Nicholas Heaton and Benjamin Holt

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PART 1

KEY ISSUES

Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective

Till Schreiber and Martin Seegers¹

Introduction

Private enforcement of competition law in Europe has in the past decade been driven in large part by the enforcement of damages claims aggregated from multiple companies affected by the same competition law infringement in one single action. Follow-on damages actions based on forms of claims aggregation have been brought in various jurisdictions: for example, against participants of Europe-wide cartels in *Air Cargo*, *Hydrogen Peroxide*, *Lifts and Escalators*, *Sodium Chlorate*, *Paraffin Wax* and *Trucks*. The cases led to landmark judgments by courts in several jurisdictions and to numerous out-of-court settlements resulting in significant compensation payments to corporate antitrust victims.

In parallel, several EU Member States have introduced forms of group or class actions, partially as a reaction to the Commission Recommendation on common principles for collective redress mechanisms in Europe.² The collective mechanisms adopted across the EU vary significantly: while in France, Italy (pre- and post-judgment) and Germany victims may opt into a collective or representative action, the United Kingdom and Portugal provide opt-out mechanisms, countries like Belgium have an alternative opt-in or opt-out model, where the court decides on the mechanism depending on the circumstances of the case. With the exception of the United Kingdom (e.g., in *Mastercard*, *Trucks* and *Forex*), having left the European Union

1 Till Schreiber is managing director and Martin Seegers is legal counsel of CDC Cartel Damage Claims Consulting SPRL.

2 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.

on 31 January 2020, these mechanisms have not yet played a role in the context of antitrust litigation. Nevertheless, they are practically indispensable in allowing the enforcement of mass claims, in particular at the end-consumer level.

The present chapter reflects on current developments, the need for effective collective approaches in private enforcement cases, the impact of the EU Directive 2014/104/EU (the Directive),³ the multi-jurisdictional framework for bringing such claims and strategic considerations from a claimant perspective.

Directive and beyond: need for collective approaches

The Directive codified case law of the European Court of Justice (CJEU) on the right to full compensation for competition law infringements and provides for a (minimum) common legal framework in the EU Member States. However, it did not specifically provide for collective procedures.

Practical difficulties to full compensation

The enforcement of antitrust damage claims is complex, and time- and cost-intensive requiring a combination of specific economic, legal and IT expertise. Despite the Directive, consumers, small- and medium-sized enterprises and even large corporate victims continue to face many practical difficulties.

The main obstacles for claimants to enforce antitrust claims can be summarised as follows:

- the need to demonstrate and prove the damaging effects of market-wide competition law infringements, most notably cartels, on individual companies. Any economic analysis and quantification, including causality aspects, typically requires detailed data and information covering the affected market ideally before, during, and after the infringement;
- information asymmetries and lack of evidence due to the secret nature of cartels;
- potential strains on ongoing commercial relationships associated with an individual exposure to (multiple) defendants;
- the risk of drawn-out litigation owing to the inherent legal and economic complexities;
- high costs for lawyers and economic experts, though the outcome of the process is uncertain;
- potentially high court fees and cost-risk asymmetries between claimants and (multiple) defendants, as cartels by definition have numerous participants; and
- in EU-wide cases, cartel members are seated and active in several jurisdictions and victims have suffered damages across Europe.

For these reasons, a majority of victims of anticompetitive practices still do not actively pursue their damage claims on an individual basis.

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

Collective approaches as an effective solution

Many of these difficulties can be remedied or at least alleviated by collective approaches. From a structural perspective, collective approaches have significant advantages and increase the chances for an effective enforcement of claims for damages resulting from the infringement of competition law.

Depending on their concrete form, collective approaches have notably the following advantages:

- the creation of synergies for the quantification of damages, since collective approaches can allow for the collection of data from a multitude of damaged persons and companies, thus enhancing the chances to prove harm caused by the infringement;
- the creation of synergies for the enforcement of claims in court and through out-of-court settlements (e.g., a stronger negotiation position);
- the enhancement of the claimants' cost-risk ratio through overall economies of scale; and
- increased procedural economy, since collective approaches result in a significant concentration of court procedures, which is advantageous for claimants, defendants and the courts.⁴

Trend of aggregated and collective claims

Collective enforcement mechanisms have, essentially for political reasons, been excluded from the Directive. Nevertheless, effective forms of collective approaches have developed in practice, and pre-dating the Directive.

Claims aggregation

A first effective solution that has evolved in the EU is the bundling of claims through a specialised company or entity, often referred to as a 'claims vehicle'. The approach of bundling claims on a material law level results in a de facto collective claims enforcement, without being a form of collective redress. The model was developed more than 15 years ago by CDC Cartel Damage Claims to enforce corporate antitrust claims. Today, the model is widely used in different forms and by different parties across Europe (see for leading cases further below).

This model typically has the following features:

- a multitude of persons or companies damaged by an infringement assign their claims via claims purchase and assignment agreements with negotiated commercial terms to a specialised company or entity that enforces the overall claim in its own name, at its own cost and at its own risk in and out of court;
- the 'claims vehicle' ensures the collection and analyses of relevant data and documents, which significantly increases the chances of proving individual damages as well as the market-wide effects of the infringement;

4 The burden and cost consequences for defendants when exposed to individual claims and damage actions filed on a massive scale pose a substantial challenge. This is evident from the *Trucks* cartel litigation where thousands of actions were filed across Europe. Although in many jurisdictions claims had been effectively bundled on a larger scale and subsequently brought in one legal action before one court; for example, in the Netherlands and Germany, and although group and collective actions had been filed with the UK Competition Appeals Tribunal, Spanish claimants announced in February 2019 that they were filing over 7,300 individual legal actions 'as there is no class action mechanism in Spain'; see GCR News Briefing, 4 February 2019, 'Trucks claims worth over €700 million filed in Spain'.

- the specialised company or entity ensures the overall funding of the case; and
- for victims, the approach results in a full outsourcing of the complex, time- and cost-intensive process of both evidencing cartel damages and enforcing claims.

In practice, a critical mass of claims is required to optimise the economic analysis and the claims enforcement process. Ideally, the claims aggregator combines economic, legal and technical know-how, including specific IT solutions facilitating the collection and analysis of market and transaction data on a large scale. Aggregated data collected from a larger number of cartel victims and covering longer time periods allow for a more adequate damage assessment. Experienced claims aggregators with specialised know-how can eliminate information asymmetries, present a sound theory of harm in court and hold stronger positions in settlement negotiations.

The claims aggregation model is operated in different forms and not all parties offer the fully integrated approach outlined above. The bundling model is sometimes also used to enforce claims assigned by consumers. However, cases brought by consumer associations (e.g., *Which?* in the United Kingdom, *Que Choisir?* in France, VKI in Austria) are rare and have not always been successful. One reason may be that, in addition, consumer associations often do not have the organisational and financial means to cope with the complexity of antitrust damages claims and time- and cost-intensive litigation.

Concentration of proceedings, ideally before specialised courts

Secondly, some EU Member States allow and encourage courts to concentrate damage proceedings relating to one and the same competition law infringement to increase procedural efficiencies. This solution can play an important role for guaranteeing an effective access to justice where claims have not been bundled on a material law level or through special procedural tools of collective, group or class actions, in particular if combined with courts or chambers specialised in the field of competition law. This concentration of proceedings seems in particular helpful where individual claims are brought in parallel and on a massive scale, as for example in the *Trucks* cartel litigation in Spain.

Against the background of the experience in *Trucks* on 6 May 2020, the Spanish authority supervising the Judiciary (*Consejo General del Poder Judicial*) published a reform proposal which foresees a new collective approach to private enforcement. Judges shall consider the 'bundling' of proceedings in competition law cases that involve a similar damage quantification, are brought by the same lawyer and against the same undertaking within the meaning of EU competition law (Article 76.2.4 Draft LEC).

Collective, group or class actions

A third trend to be observed is the introduction of collective redress mechanisms by some EU Member States. It still has to be seen to what extent the different collective or group actions, representative or class actions are truly effective, in particular in the field of competition law. Whereas most adopt an opt-in model, some provide an opt-out as operated under the US class action. The opt-out is often considered to be in conflict with the principle that claims can only be adjudicated where the claims holder agrees to be part of an action. That is why the scope of opt-out mechanisms is usually limited to the jurisdiction in question (e.g., the United Kingdom,

new collective action in the Netherlands). Problems that are typically associated with procedural collective mechanisms are, for example, disputes regarding class or representative claim certifications or collective proceedings orders, as currently in *Mastercard*⁵ and *Trucks*.⁶

In the Netherlands, claims can collectively be enforced by a foundation (*stichting*) or association operating usually on the basis of mandates and a special statutory basis. Until recently, the model only allowed for declaratory or injunctive relief. However, on 1 January 2020, the Dutch Act on collective damages claims (*Wet afwikkeling massaschade in collectieve actie*) entered into force.⁷ The statute broadens options for bringing collective actions, as it now allows foundations or associations to seek damages through a collective action on an opt-out basis, although the old regime still applies in cases regarding events that took place before 15 November 2016. An additional innovative possibility is foreseen with the Dutch law on the settlement for mass damages (*Wet Collectieve Afwikkeling Massaschade*), allowing the settlement of mass claims on an opt-out basis.

In Germany, on 1 November 2018, the law on the model declaratory action (*Musterfeststellungsklage*)⁸ entered into force. It was introduced in the wake of the *Diesel* case to facilitate collective redress for consumers in cases of mass damages. The opt-in representative action can only be filed by qualified institutions. Individual consumers have to register in a special claims registry. The declaratory judgment does not lead to damages, for which the consumers would have to subsequently file an (individual) damage action.

However, with the exception of the United Kingdom, these collective, group or class actions have not yet played a prominent role in the field of private enforcement. But they are necessary to allow compensation of dispersed mass harm at the end-consumer level. In any event, from a claimant's perspective, the availability in practice of both the (integrated) claims aggregation models and effective collective claims procedures will help to overcome existing difficulties and disincentives for effective compensation and access to justice.

2020 EU New deal for consumers

On 30 June 2020, the European Parliament and the Council agreed on the text of the draft 'Directive on representative actions for the protection of the collective interest of consumers'.⁹ The directive is part of the New Deal for consumers' initiative which the Commission started to bolster consumers' rights.¹⁰ It should be formally endorsed in Autumn, following which a final

5 The admissibility of the class action brought in the UK by Walter Hugh Merricks against Mastercard (i.e., a collective action on behalf of 46 million consumers), is pending before the UK Supreme Court (ref C3/2017/2778); see MLex, Insight of 25 July 2019, 'Mastercard wins bid to take fight over card-fee mass lawsuit to UK's top court'.

6 Collective actions brought before the Competition Appeals Tribunal by the special purpose vehicle UK Trucks Claims Limited (opt-out, with a fall-back option of opt-in, ref 1282/7/7/18) and Road Haulage Association Limited (opt-in, ref 1289/7/7/18) display similar inherent procedural complexities; see MLex, Insight of 6 June 2019, 'Truck cartelists seeking to stall mass damages claims'.

7 Legal Gazette ('Staatsblad') 2019, pp. 130 and 447.

8 Act to Introduce Civil Model Declaratory Proceedings ('Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage'), Federal Law Gazette ('Bundesgesetzblatt') I, 12 July 2018, p. 1151.

9 Council of the European Union, 30 June 2020, inter-institutional file 2018/0089(COD), 9223/20, outcome of proceedings.

10 Commission, COM (2018) 184 final - 2018/089 (COD).

vote at Parliament will take place, presumably in December 2020. The directive will require EU Member States to put in place procedures by which 'qualified entities' will be able to bring representative actions to seek notably injunctions and damages on behalf of a group of consumers who have been harmed by an infringement of EU law.

However, the representative action envisaged under the draft directive is limited in scope. The infringement for which a representative action may be brought must relate to a limited set of European regulations and directives on consumer protection as set out in Annex I to the draft directive. Those regulations and directives concern general consumer protection rules and do not include or refer to rules of EU competition law. This gap is surprising given that the discussion on forms of collective redress regarding competition law infringements started already in 2008 with the Commission's 'White Paper on damages actions for breach of the EC antitrust rules' and led to its non-binding 'Recommendation on common principles for collective redress mechanisms'.¹¹

Main differences between and common features of claims aggregation and collective redress

Under the claims aggregation or bundling model, the entity acquiring the damages claims is typically acting in its own right. It is not acting for or on behalf of the original claims' holders, but in its own name and account. As a result, there is only one claimant seeking compensation for all aggregated claims. The aggregation of claims does, in particular, not require major changes of civil procedure rules and is in line with the legal cultures and principles in most EU Member States. The assignment of claims and assets today is as well a common feature in many business sectors and markets. In addition, integrated forms of claims aggregation result in significant synergies for the quantification of damages. Victims of anticompetitive practices that opt for a claims aggregation model should verify that the claims vehicle has the necessary know-how, experience and resources to bring the case to the end. The personal and financial involvement, combined with a careful *ex ante* assessment typically ensures that claims aggregators in practice pursue only meritorious claims.

On the other hand, collective mechanisms are typically initiated by a representative entity or a lead plaintiff for a certain group or class of affected persons. This results in special procedural requirements, for example regarding the certification process by which the representative organisation or plaintiff is designated and a group or class is defined. The exact conditions vary from jurisdiction to jurisdiction and are subject to specific legislation. If a jurisdiction provides for collective redress mechanisms in the field of competition law, it seems particularly appropriate for the enforcement of low-level damages that are dispersed on a large scale. In such cases collective actions on an opt-out basis will typically be more efficient compared to the bundling of individual claims. There are also synergies for defendants and the courts, as one collective action replaces thousands or even millions of individual actions. One main further challenge for any form of collective action is the allocation of the proceeds of successful recovery to the individual class or group member. Often, a substantive part of the compensation payment remains unclaimed and is distributed to public funds, such as the access to justice

11 Commission White Paper, 2 April 2008, COM(2008) 165 final, and Recommendation of 11 June 2013 (footnote 2).

fund in the case of the class action mechanism in the UK. This problem does not arise in the case of the aggregation of individual claims, as the share of the individual assignor in the overall damage can be clearly identified, for example on the basis of the individual purchase volume.

One main challenge for claimants and defendants in the context of collective claims in the field of competition law will be the challenge to find out-of-court solutions for parallel proceedings that are pending in multiple jurisdictions in relation to one and the same infringement. In this respect, collective settlement mechanisms will play a key role. The opt-out settlement mechanism in the Netherlands could, for example, provide a solution for settling parallel actions with aggregated claims as well as collective actions across European jurisdictions.

Recognition of and requirements for claims aggregation

The model of aggregating or bundling antitrust damages claims and enforcing them in one action has been widely recognised at both national level and EU level.

Recognition by the Directive

The role of the claims aggregation and bundling model and the key role of claims aggregators was recently confirmed by the Directive. Article 2(4) of the Directive explicitly confirms the standing of entities acquiring damage claims. Similarly, the possibility of an entity that acquired antitrust claims from damaged persons enforcing those claims is recognised in Article 7(3) Damages Directive. In its preparatory works, including the impact study, the European Commission stated that the collective approach of enforcing aggregated or bundled claims is known to most EU Member States. A study prepared for the European Parliament acknowledged that the 'claims transfer to a third party may help to overcome the problem of lack of participation by injured parties.'¹² Similarly, Advocate General Jääskinen in his opinion in *CDC Hydrogen Peroxide* (case C-352/13) recognised that in antitrust cases, claims aggregators pursue claims where it is regularly 'not reasonable' even for corporate victims to pursue claims individually.

There is no study yet on the role of claims aggregators in the private enforcement of competition law in the European Union. However, it is safe to assume that such companies or entities have been successful in court and out-of-court where single damage actions would either not have been initiated or – in the worst case – would have failed.

Actions pursued by claims aggregators have also resulted in a multitude of ground-breaking judgments in various jurisdictions confirming key principles such as the joint and several liability of cartel members for the damage caused by a single and continuous infringement.¹³ The claims aggregation or bundling model thus contributes to the achievement of the main objective of the CJEU and legislators regarding private enforcement: legal certainty and the effective compensation for infringements of EU competition rules.

¹² EU Parliament, *Collective Redress in Antitrust*, 2012, p. 37.

¹³ See, e.g., District Court The Hague, C/09/414499 / HA ZA 12-293 – *CDC Project 14 SA v. Shell et al.*; District Court Helsinki, No. 6492, ref 11/16750 – *CDC Hydrogen Peroxide v. Kemira*.

Recognition at national level

At the national level, courts, in particular in the Netherlands, Germany, Austria and Finland, have expressly confirmed the standing of specialised entities that have bundled together a multitude of antitrust damage claims by way of assignment. Although the business model and the underlying agreements of claims aggregators have been heavily attacked by defendants, it is now common practice in many business sectors that claims are transferred to a third party.

For example, the District Court in Helsinki, by judgment of 4 July 2013 (No. 6492, ref 11/16750) in the follow-on action brought by CDC Hydrogen Peroxide, confirmed the validity of the assignments by several affected companies to the claimant. The court referred, inter alia, to 'CDC's better resources for gathering the information necessary for the matters under consideration' and the fact that the assignors did not succeed in settling their claims out-of-court, which was the reason they had decided to sell and assign their claims to CDC.

Further, it is established case law of the Dutch courts that cartel victims can assign their claims to a litigation vehicle or claims vehicle that bundles those claims into a single action. In 2014, the Court of Appeal in Amsterdam (ref 200.122.098/01) regarding the follow-on action brought by claims vehicle EWD against members of the European *Air Cargo* cartel rejected the allegation that the bundling would constitute an abuse of civil procedure. In another action against the *Air Cargo* cartel, the District Court of Amsterdam by judgment of 13 September 2017 (ref C/13/486440/HA ZA 11-944) found that the assignments between the shippers and the claims vehicle *Equilib* were not contrary to public morals or public order: 'Combining such claims by means of assignment to a litigation vehicle is thus a legitimate means by which to achieve efficient settlement of cartel damage, as now also follows from Directive 2014/104/EU.' This ruling was confirmed by the Amsterdam Court of Appeal in two judgments of 10 March 2020,¹⁴ as well as in the *Sodium Chlorate* cartel litigation by judgment of 4 February 2020 (ref C/13/500953/HZA 11-2560) confirmed as well that the claims for damages resulting from the cartel are transferable and that their assignments to CDC Project 13 are valid.

A special situation exists in Ireland and the United Kingdom in relation to the ancient common law doctrines of champerty and maintenance. There is still legal uncertainty regarding the possibility to transfer damage claims by assignment, although recent judgments confirm the validity of the claims aggregation model also under common law. For example, the English High Court in its judgment of 22 May 2017 in *Casehub* confirmed that the assignment by a consumer of his low value claims – which were not worth pursuing on its own – to a claims vehicle is not void under the champerty and maintenance doctrine. Rather, access to justice would in view of the High Court be 'enhanced'. The court therefore did not find public policy grounds to determine the assignment as invalid: 'On the contrary, there are in my judgment strong public policy grounds in favour of upholding the assignment.'¹⁵

Special legal and practical requirements

Depending on the jurisdiction and the concrete form under which a claims aggregator is enforcing antitrust claims, specific regulatory provisions might be applicable. In Germany, for example, requirements under the Legal Services Act (RDG) – which internationally is rather unique

14 Amsterdam Court of Appeal, ref 200.229.231/01 and ref 200.229.216/01.

15 High Court, England and Wales, *Casehub Ltd v. Wolf Cola Ltd* [2017] EWHC 1169 (Ch).

– might be applicable. The RDG sets out obligations for (non-lawyer) providers of legal services in relation to the personal ability and reliability, know-how and financial means as well as the obligation to register formally with the judiciary. Recently, the Regional Court Munich I by judgment of 7 February 2020 in *financialright claims* considered the claims assignment to a claims vehicle in the *Trucks cartel* case invalid, even though the claimant was registered. In view of the court, the claims aggregation and enforcement activity in particular resulted in a conflict of interest between the assignors which had transferred their claims to the claimant and the third-party litigation funder that was funding the action.¹⁶ However, it remains to be seen whether the ruling is in line notably with the interpretation of the RDG by Germany's highest civil court, the Federal Court of Justice. By landmark judgment of 27 November 2019, the Federal Court of Justice demands for a rather 'liberal understanding of the notion of debt collection service', taking into account the fundamental rights of both service providers and assignors as well as changed realities of life.¹⁷ In a series of subsequent judgments the Federal Court of Justice made clear that debt collection services must 'not be understood in a narrow way'.¹⁸ German courts have further required that claims aggregators that purchase damage claims from multiple victims of competition law infringements need to have the documented financial means to pay the potential adverse legal costs for court proceedings at three instances, at the time of concluding the claims purchase and assignment agreements.¹⁹

From a practical point of view, claims aggregators must substantiate as far as possible the claim for each individual assignor, at least on the basis of best estimates. This requires not only an individual damages analysis, which can of course be based on the larger and more robust data set provided by all assignors taken together, but in particular technical know-how and an efficient logistical infrastructure. If claims aggregators do not fulfill these requirements, they risk losing their action. This is evident, for example, from the judgments by the District Court Midden-Nederland and the Court of Appeal Arnhem-Leeuwarden in the *Lifts and Escalators cartel* case.²⁰ Even after multiple rounds of written and oral debate, the claimant neither provided the assignment documentation (i.e., written evidence of the transfer of the damages claim to the claims vehicle) nor the underlying documentation regarding the individual damage. The courts therefore dismissed the action as not sufficiently substantiated.

16 Regional Court Munich I, judgment of 7 February 2020, ref 37 O 18934/17 – *financialright claims GmbH* (pending appeal); in contrast, the Regional Court Braunschweig, decision of 23 December 2019, ref 3 O 5657/18, in the *myRight (Diesel)* case did not see a conflict of interests.

17 Federal Court of Justice, judgment of 27 November 2019, ref VIII ZR 285/18 – *LexFox I*, para. 141; see for a commentary A. Stadler, *Juristenzeitung (JZ)* 2020, p. 321 et seq., addressing as well the judgments by the Regional Courts Munich I and Braunschweig mentioned above.

18 Federal Court of Justice, judgments of 8 April 2020, ref VIII ZR 130/19 – *LexFox II*, para. 43, 45; of 6 May 2020, VIII ZR 120/19 – *LexFox III*, para. 43, 45, and of 27 May 2020, ref VIII ZR 45/19 – *LexFox IV*, para. 53.

19 See in particular Higher Regional Court of Düsseldorf, judgment of 18 February 2015 (ref Az VI U 3/14).

20 District Court Midden-Nederland, judgment of 20 July 2016, ECLI:NL:RBMNE:2016:4284; Court of Appeal Arnhem-Leeuwarden, judgment of 5 February 2019, ECLI:NL:GHARL:2019:1060 (*EWD/Otis e.a.*).

Funding aspects

The enforcement of claims for damages resulting from competition law infringements by way of collective actions or claims aggregation is closely linked to the question of litigation funding. Any representative entity, lead plaintiff or claims aggregator operating in the field of competition law damages claims must in general be in a position to cope with the high costs and cost risks of potentially long-lasting litigation. In practice, this results in a situation where collective actions as well as actions enforcing aggregated claims are often funded in cooperation with third-party litigation funders.

For third-party litigation funders, the funding of antitrust cases is attractive for several reasons:

- They typically arise in a 'follow-on' situation where an infringement has been established by a competition authority.
- The bundling of claims combined with an integrated data collection and economic analysis does not only increase chances to successfully quantify and enforce claims, but also to achieve a critical mass required to merit funding.
- The collective enforcement helps to turn complex claims into valuable assets, including statutory interest accruing as from the date when the damage was caused until the end of the proceedings.
- Owing to the 'loser pays rule', which is the norm across the EU, claims aggregators, representative entities as well as third-party funders have an incentive to ensure a careful *ex ante* selection of cases. Typically, cases undergo an in-depth legal and economic due-diligence process. In combination with the follow-on situation, this minimises the risk of unmeritorious claims.
- Specialised claims aggregators with a proven track record will be able to obtain more advantageous funding terms, which is beneficial for all companies that sell or entrust their claims to the entity.
- Collective claims and claims aggregation practically allow for access to justice in relation to damages claims that otherwise would be foregone.
- In Europe-wide cases, aggregated claims can be enforced in the respective best-placed jurisdiction. Collective mechanisms available in one jurisdiction may provide for the possibility to opt-in for damaged companies or persons from other jurisdictions.

In view of the considerable costs inherent in competition damage actions and the requirement for specific legal and economic know-how, EU Member States should ensure that consumer organisations that are entrusted with the role of a qualified entity have access to sufficient public or private funding in order to be in a position to bring an action on an equal footing with defendants.

Considerations on the choice of forum

Although actions for damages resulting from the infringement of EU competition law are increasingly brought before the courts of virtually all EU jurisdictions (e.g., in the *Trucks* cartel case), claimants for the moment still seem to prefer certain jurisdictions; for example, the Netherlands, Germany and the United Kingdom.

As a matter of fact, in Europe-wide cartel cases any claimant *has* to choose between jurisdictions where the courts according to the EU Regulation 1215/2012 (Brussels I) and Lugano Convention²¹ are competent. Hence, forum shopping is 'undoubtedly permitted'.²² However, the right choice is not always straightforward, notably in cases where cartel members have their seat in multiple countries and damages have been caused to victims across Europe.

The factors to be considered in the choice of forum are manifold. Existing procedural law differences between the EU Member States are significant, while the consequences of the choice are far-reaching. Only at first glance the answer looks simple, when a claimant is asked to 'exercise that option in a manner he considers most suitable and advantageous'.²³

The following factors are regularly decisive when enforcing aggregated claims:

- the availability of specialised courts or chambers with adequate personnel, technical and organisational resources to effectively deal with complex and voluminous antitrust cases;
- the overall duration of court procedures, taking into account potential possibilities for defendants to artificially delay procedures;
- the approach of judges in managing complex antitrust cases; for example, through proactive case management hearings (e.g., in the Netherlands, the United Kingdom and Finland);
- the existence of relevant precedents and case law in a given jurisdiction;
- the appropriateness of the rules on evidence and disclosure regarding antitrust damage claims;
- the possibility to submit electronic data and documents in foreign languages; and
- the costs and cost risks associated with antitrust litigation, taking into account the applicable cost rules and costs of potential third-party interveners.

Two observations can be made in this respect. Firstly, there still remains a great deal of work to be done in many EU Member States to allow for truly effective enforcement of antitrust claims. Secondly, there are considerable differences between jurisdictions. Some of them have seized the opportunity of attracting international antitrust cases to their courts and have gone beyond the minimum standards of the Damages Directive. This also applies to the possibility of the aggregation of claims, be it by way of assignment at material level or at procedural level by way of collective actions.

21 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1; Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

22 AG Mengozzi, Opinion in case C-98/06 *Freeport* ECLI:EU:C:2007:302, para. 38; see also Amsterdam Court of Appeal, *CDC v. Kemira* [2015] ECLI:NL:RBAMS:2014:3190.

23 AG Jääskinen, Opinion in case C-352/13 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335, para. 89.

Appendix 1

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Brazil, Japan and Mexico.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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