PRIVATE LITIGATION GUIDE

THIRD EDITION

Editors
Nicholas Heaton and Benjamin Holt

Private Litigation Guide

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This article was first published in November 2021
For further information please contact insight@globalcompetitionreview.com

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.latinlawyer.com

ISBN 978-1-83862-586-3

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

Acknowledgements

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

Advokatfirman Vinge

Allen & Overy LLP

Bryan Cave Leighton Paisner LLP

CDC Cartel Damage Claims Consulting SRL

Charles River Associates

Cooley LLP

Cuatrecasas

Dentons

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Slaughter and May

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Wolf Theiss

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Introduction

Nicholas Heaton and Benjamin Holt[1]

We are delighted to edit a further edition of the GCR Private Litigation Guide. Part I of the Guide includes 10 chapters written by leading practitioners, exploring in depth the key themes raised in competition litigation across the globe, such as jurisdictional considerations, class actions and damages. These chapters explore different perspectives on key issues, including views from the standpoint of both claimant and defendant and from different parts of the world.

Part II of the Guide contains an invaluable summary of the position on a jurisdiction-by-jurisdiction basis to allow quick access to key information and a cross jurisdictional analysis. It takes the form of a series of questions covering the most critical private litigation issues. Experienced practitioners in eight countries have supplied digestible, targeted responses to these questions. The Guide presents these insights in an accessible manner that lets users focus on specific issues and compare them across jurisdictions.

This Guide reflects the remarkable growth of private competition litigation across the world. Indeed, 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 with regard to key issues.

The landscape is continuing to evolve at pace.

In Europe, three distinct trends are evident. First, the effect of the EU Directive on competition damages claims, implemented by Member States in 2016 and 2017, is now being felt. Some jurisdictions in which there had previously been little private competition litigation have seen a dramatic growth of claims, such as Spain. By requiring Member States to ensure that law and procedures meet minimum requirements, the Directive has no doubt gone a long way to meet

1 Nicholas Heaton and Benjamin Holt are partners at Hogan Lovells.

the objective of facilitating claims. Although those minimum requirements are now met in all EU jurisdictions, it would be a mistake to think this has resulted in a harmonised approach. In fact, there is variation in the way in which the Directive has been implemented and there remain significant differences between the regimes in Member States. Claimants, defendants and their lawyers need to be on top of these. However, just as a degree of harmonisation is achieved within the EU, the UK's departure from it as a result of Brexit will throw up fresh challenges in this area. The second trend is the expansion of different forms of class action in Member States. The opt-out regime in the UK is beginning to bite, with the first claim recently certified and many others waiting their turn, and 2020 saw the introduction of new regimes in the Netherlands and Italy. These promise to change the dynamic in the EU yet again. The third trend is the developing depth of experience and a lengthening track record of judicial decisions on important issues in those jurisdictions in which private competition litigation has been more common for some time, such as the UK, Germany and the Netherlands.

In the United States, where private damages procedures are well developed, competition litigation has become increasingly high-profile and complex, and courts continue to grapple with various procedural issues related to competition lawsuits. Many of these disputes make their way to federal appellate courts and the US Supreme Court, where every decision has the potential to dramatically affect the law. In recent years, for example, the Supreme Court has weighed in on the interpretation of long-standing precedent prohibiting indirect purchasers from suing for damages under US federal law and addressed the appropriate analysis of two-sided markets in antitrust litigation. In addition, standards applicable to class actions have been hotly contested in lower courts in recent years, and a new round of disputes about the circumstances under which antitrust plaintiffs may certify a class is emerging as a key issue before appellate courts.

In other parts of the world, the story is more complex. For example, in Asia, private competition litigation levels generally continue to rise in Japan but have fallen from a recent high in China. South America, Brazil and Mexico now have laws in place to facilitate private competition claims, but actual litigation is still nascent. Canada has also seen recent important developments regarding certification of competition class actions, but has yet to see an award of damages at trial in such a case. Nevertheless, it is increasingly apparent that these jurisdictions, and others covered in this Guide, cannot be ignored in any assessment of the threats and opportunities private competition litigation brings.

Antitrust and competition practitioners, as well as corporate counsel, often require a basic understanding of the key aspects of private antitrust litigation in many different countries. For example, how does one bring a claim in the first

instance? What are the standards for collective actions? Can indirect purchasers collect damages and is a passing-on defence available? Different countries and different jurisdictions take a divergent approach to these and many other questions.

GCR has created this book to address this daunting task and to provide a method of comparing and contrasting specific issues and topics across jurisdictions. The Guide was developed in conjunction with the competition litigation team at Hogan Lovells, which has extensive experience litigating antitrust and competition claims in many jurisdictions.

Part 1

Key Issues

CHAPTER 3

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

Till Schreiber and Martin Seegers[1]

Introduction

Private enforcement of competition law in Europe is driven in large part by collective actions or actions that aggregate the damage claims from multiple companies affected by the same competition law infringement. Follow-on damages actions based on forms of claims aggregation have been brought in various jurisdictions across the European Union, for example, in air cargo, hydrogen peroxide, lifts and escalators, sodium chlorate, paraffin wax, sugar and trucks. The cases led to landmark judgments by national courts, the Court of Justice of the European Union (CJEU) and to numerous out-of-court settlements resulting in significant compensation payments to corporate antitrust victims. In Germany, both the legislator and the Federal Court of Justice (AirDeal) in 2021 explicitly confirmed the claims aggregation.

In parallel, several EU Member States have introduced forms of group or class actions. In December 2020, the EU Directive 2020/1828 on representative actions was published, establishing a first pan-European framework for collective redress.[2] However, the collective mechanisms adopted across Europe still vary significantly: while in France, Italy (pre- and post-judgment) and Germany

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

2 Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers of 25 November 2020, [2020] OJ L 409/1.

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, Forex and, since May 2021, Apple), having left the European Union on 31 January 2020, and Portugal (e.g., in Mastercard), these mechanisms have not yet been used in the context of antitrust damages cases.

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

Practical difficulties to full compensation

The enforcement of antitrust damage claims is complex, 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 owing 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 and long-lasting litigation owing to the inherent legal and economic complexities;
- high costs for lawyers and economic experts, though the outcome of the process is uncertain;

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.

- 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.

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 one and the same 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]

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'.

Trend of aggregated and collective claims

Collective enforcement mechanisms have, essentially for policy reasons, been excluded from the Directive. Nevertheless, effective forms of collective approaches have substantially developed in practice, even 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 18 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 one and the same infringement assign their claims via claims purchase and assignment agreements 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 commercial terms are negotiated on an individual basis;
- 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; and
- the specialised company or entity ensures the overall funding of the case, including securities for costs.

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 claimant 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 rather rare and have not always been successful. One reason may be that 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

Second, 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. Member States that have decided to concentrate antitrust damage actions before specialised courts include Sweden, France and Italy. In other Member States, cases filed at different courts can be transferred to one court, such as in the Netherlands. 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.

Against the background of the experience in Trucks on 6 May 2020, the Spanish authority supervising the Judiciary published a reform proposal that 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. Though, 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, or 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. In December 2020, the UK Supreme Court in

Mastercard has issued its first judgment on the collective proceedings in competition damages claims, providing guidance on the legal requirements for the certification of a claim.[5] Following the rather broad interpretation of the Supreme Court, the UK Competition Appeal Tribunal (CAT) in August 2021 issued, subject to certain conditions, its first collective proceedings order.[6] The CAT has, in particular, required that class representatives must have sufficient funding, also covering potential adverse costs. In Forex[7] and Trucks[8] the CAT is dealing for the first time with carriage disputes, namely competing collective proceedings applications.

In Portugal, an opt-out collective claim has been filed, as well against Mastercard, by the consumer organisation Ius Omnibus on behalf of Portuguese consumers.[9]

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 entered into force.[10] 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, allowing the settlement of mass claims on an opt-out basis.

In Germany, on 1 November 2018, the law on the model declaratory action[11] 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

5 *Mastercard v Merricks* [2020] UKSC 51, para. 1. The class action was brought by Walter Hugh Merricks as representative claimant on behalf of 46 million consumers.

6 *Merricks v Mastercard* [2021] CAT 28, para. 1.

7 O'Higgins/Evans [2020] CAT 9.

8 Collective actions brought before the CAT 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'.

9 *MLex*, 3 December 2020, 'Mastercard hit with Portuguese consumer antitrust action for EUR400 million'.

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

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

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 consumers would have to subsequently file an individual damage action.

These collective, group or class actions are necessary to allow compensation of dispersed mass harm at the end-consumer level. The availability in practice of both claims aggregation models and effective collective claims procedures will help to ensure compensation also for consumers and allow access to justice.

The EU Directive on representative actions (2020)

On 25 November 2020, the European Parliament and the Council adopted the 'Directive on representative actions for the protection of the collective interest of consumers'.[12] The Directive is part of the New Deal for consumers' initiative, which the Commission started to bolster consumers' rights.[13] The Directive requires 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 under the 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 Directive. Those regulations and directives do not concern 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'.[14] Member States are, however, in the context of the implementation of the directive free to extend the scope of their representative action mechanism to competition law infringements.

Recognition of and requirements for claims aggregation

Contrary to class and collective actions, which are part of national or EU procedural law, the model of bundling damages claims takes place at a material law level. Given the practical importance, it is not surprising that the validity of the

12 Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers of 25 November 2020, [2020] OJ L 409/1.

13 Commission, COM (2018) 184 final – 2018/089 (COD).

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

assignments has been fundamentally attacked by defendants in the context of numerous actions across Europe. However, highest courts as well as legislators at the national and EU level have taken a clear stance in favour of the 'assignment model'.

Recognition by the Damage Directive

The role of the claims bundling model and the key role of claims aggregators was 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.'[15] 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.

Actions pursued by claims aggregators have resulted in a multitude of groundbreaking 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 and jurisdiction aspects.[16] The claims aggregation or bundling model thus contributes to the achievement of the main objective of the CJEU and legislators regarding private enforcement, namely legal certainty and the effective compensation for infringements of the EU competition rules.

Recognition at the 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 bundle a multitude of antitrust damage claims by way of assignment.

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15 EU Parliament, Collective Redress in Antitrust, 2012, p. 37.

16 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*.

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.

Similarly, it is established case law of the Dutch courts that cartel victims can assign their claims to a litigation or claims vehicle that bundles those claims into a single action. In 2014, the Court of Appeal in Amsterdam[17] regarding the follow-on action brought by claims vehicle EWD against members of the 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[18] found that the assignments between the shippers and the claims vehicle Equilib were not contrary to public morals or public policy: '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.[19] Equally, the Court confirmed by judgment of 4 February 2020 in the Sodium Chlorate cartel case that the claims for damages resulting from the cartel have been validly assigned to CDC Project 13.[20]

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 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

17 Amsterdam Court of Appeal, judgment of 7 January 2014, ref. 200.122.098/01.

18 Ref. C/13/486440/HA ZA 11-944.

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

20 Ref. C/13/500953/HZA 11-2560.

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.'[21]

Special legal requirements and the German *AirDeal* judgment (2021)

Depending on the jurisdiction and concrete form under which a claims aggregator operates, specific regulatory provisions might be applicable.

In Germany, for example, requirements under the Legal Services Act (RDG) – which internationally is rather unique – might be relevant. The RDG sets out obligations for non-lawyer providers of out-of-court legal services in relation to the personal ability and reliability, know-how and financial means as well as the obligation to formally register with the judiciary. After doubts stemming from some lower-instance judgments[22] declaring assignments void, despite the fact that the claims aggregator was registered under the RDG, the Federal Court of Justice in its landmark AirDeal judgment in July 2021 confirmed the validity of the bundling and joint enforcement of damage claims on a larger scale also under the RDG.[23] In parallel, the German legislator in summer 2021 reformed the RDG and took the opportunity to clarify that the above-mentioned case law by lower courts is not in line with the RDG. The legislator explicitly confirmed the bundling of antitrust claims, their joint enforcement also in court and the funding of such legal actions by third-party litigation funders. Therefore, previous case law by lower courts that resulted in a dismissal of actions by claims aggregators owing to a lack of standing is not in line with AirDeal and the RDG reform. This applies in particular for the widely debated judgment by the Regional Court Munich I of 7 February 2020 in financialright claims relating to the Trucks cartel that considered the claims assignment invalid, as the bundling model would exceed the scope of the RDG. The legislator has rebutted such narrow interpretation and confirmed the approach of the Federal Court of Justice in its LexFox judgment

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

22 Regional Court Munich I, judgment of 7 February 2020, ref 37 O 18934/17 – *financialright claims GmbH* (trucks cartel, pending appeal); Regional Court Hannover, judgment of 1 February 2021, ref 18 O 34/17 (sugar cartel, 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 an infringement of the RDG.

23 Federal Court of Justice, judgment of 13 July 2021, ref II ZR 84/20 – *AirDeal*.

of November 2019 requiring a rather 'liberal understanding of the notion of debt collection service', taking into account the fundamental rights of service providers and assignors as well as changed realities of life.[24]

Outside the RDG, German courts have required that claims aggregators purchasing claims from a multitude of persons damaged by competition law infringements need to have the documented financial means to pay the potential adverse costs for court proceedings at three instances, at the time of concluding the claims purchase and assignment agreements.[25]

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 fulfil these requirements, they risk having their action dismissed as unsubstantiated. 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.[26] 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) nor the underlying documentation regarding the individual damage.

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 by third-party litigation funders.

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24 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.

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

26 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.).

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 of 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 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 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 Convention[27] are competent. Hence, forum shopping is 'undoubtedly permitted'.[28] 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'.[29]

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.

27 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.

28 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.

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

Two observations can be made in this respect. First, 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. Second, there are considerable differences between jurisdictions. Some jurisdictions have seized the opportunity of attracting international antitrust cases to their courts and have gone beyond the minimum standards of the Directive. This also applies to the possibility of the aggregation of claims, be it by way of assignment at material level – for which now also the German Federal Supreme Court provided more legal certainty – or at procedural level by way of collective actions.

APPENDIX 1

About the Authors

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Till Schreiber is managing director of CDC. He manages operations and is responsible for the strategy in some of the largest antitrust damage actions in Europe. Since joining CDC in 2007, Till has steered the claims acquisition process across the EU and has negotiated settlements in CDC's damage actions in Germany, the Netherlands and the Nordic countries. Prior to joining CDC, Till practised as a competition lawyer for six years in a leading international law firm in Brussels, Cologne and Madrid. In this role, Till represented companies from various industry sectors in pan-European antitrust and cartel investigations. Till studied law at the universities of Bonn, Cologne, Barcelona and London and published a doctoral thesis on international competition law.

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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 Austria, China and Japan.

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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ISBN 978-1-83862-586-3