CLAIMANTS' GUIDE TO

Antitrust/Competition Litigation in the European Union

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Contents

Introduction

If you have suffered loss and damage through anti-competitive behaviour, this guide is designed to provide you with an understanding of the process for recovering compensation before the national courts of an EU Member State.

Legislative changes at both an EU and national Member State level are likely to make it easier and more cost effective than ever before to seek redress when you have been a victim of a breach of competition law.

Anti-competitive behaviour comes in all shapes and sizes. Whether it is carried out by the conduct of a more powerful competitor or in consequence of a cartel arrangement, such behaviour is a major obstacle to the effective operation of competitive markets. Not only is it unlawful but it also costs businesses billions of Euros every year.

Recent years have seen a significant increase in the number of private competition actions brought before the EU national courts with the claimants obtaining fast and effective redress for breaches of competition law.

Injunctions can be obtained in days and damages can be very substantial often running into millions of Euros.

What is Competition Law?

Competition Law (or antitrust law as it is known in the US) aims to ensure that all businesses compete fairly on their individual merits.

The EU competition rules are found in Articles 101 & 102 of the Treaty on the Functioning of the European Union ("TFEU"). The EU rules apply if there is an appreciable effect on competition and trade between Member States of the EU. Similar rules exist in the national competition law of the Member States and are applicable if their effect is national in nature. In the UK, the competition rules are contained in Chapter I & II of the Competition Act 1998 (CA1998). Both the EU and UK rules contain broad based prohibitions on restrictive agreements and abusive conduct by dominant companies.

Competition is enforced by regulators such as the European Commission, or at a national level by national competition authorities such as the Competitions & Markets Authority in the UK or the Bundeskartellamt (German Federal Cartel Office) in Germany. These regulators have the power to investigate and impose substantial fines and other penalties on companies that breach the law.

However, regulators do not have the power to award compensation to aggrieved companies that have suffered loss and damage due to anti-competitive conduct. Nor are they able to provide, where relevant, quick and effective injunctive remedies in the way the courts can.

Regulators have finite resources and do not have the time or the manpower to investigate every single infringement case. Therefore they prioritise their scarce resources. This inevitably means that many deserving cases do not get taken up by the regulators leaving the complainant without any adequate recourse. It is for these reasons that companies are finding it increasingly important and effective to bring proceedings themselves before the national courts of an EU Member State.

How to Spot Anti-Competitive Behaviour?

There are many different forms of anti-competitive behaviour and each of them can affect companies and markets differently.

A good place to start is to review decisions of competition authorities condemning cartel or anti-competitive conduct in the markets in which you operate. These can tell you a lot about the type of behaviour which is being carried out in your market [in had the infringement not taken place].

Other tell-tale signs of anti-competitive behaviour are where normal economic conditions or trading patterns are inexplicably interrupted or suffer unexplained positive or negative movements.

Here are some common examples of potential anti-competitive behaviour:

- coordinated price increases by your suppliers;
- refusal to supply essential goods or services;
- a refusal to licence intellectual property rights on reasonable terms;
- imposing different prices for equivalent transactions; and
- fixing or enforcing resale price maintenance.

How will damages be calculated?

The European Commission actively encourages private enforcement litigation to allow victims to claim compensation and compliment the enforcement of breaches by the various competition law regulators. In the leading case of Crehan, the Court of Justice of the European Union, Europe's highest Court, confirmed that Member States must allow claims for compensation for breaches of Articles 101 and 102 of the TFEU.

Although EU Member States' national laws on the calculation of damages will differ, the basic rule is that damages for breach of the competition rules should be designed to put the claimant in the position it would have been in had the infringement not taken place. To estimate its damages, the claimant will need to construct a counterfactual scenario to represent the market conditions which would have existed in the absence of the unlawful conduct, and then compare the data gained against the data obtained from the infringement situation.

The following two examples illustrate how damages are likely to be calculated.

Price fixing by a cartel

Company A buys a raw material from Company B. Unbeknownst to A, Company B is engaged in a cartel with Companies C, D and E. All companies in the cartel have fixed prices at above-market levels. The basic measure of damages for Company A will be the difference between the cartel price and what would have been the normal competitive price. However, Company A's damages may be reduced if it has passed on some of these inflated purchase costs to the ultimate consumer. This is called the "passing on" defence. In addition, Company A can recover damages in respect of any sales it may have lost due to the higher prices it was forced to charge consumers as a result of the actions of the cartel.

Company A estimates that the cartel has been going on for two years, during which time it has purchased on average one million units per year. A has been charged €20 per unit, rather than the fair market price of €10 per unit. Therefore A's loss is likely to be €20 million (i.e. €10 million per year for two years). In addition, Company A has evidence that it has lost a substantial contract with a new customer due to the artificially inflated prices forced upon it by the operation of the cartel. The contract was worth €2m in profit. Therefore Company A would be entitled to receive an additional €2 million as compensation for loss of profit on these sales. Company A's total recovery would be in the region of €22 million plus interests and costs.

Abuse of dominance

Company A is a computer manufacturer which sells a range of proprietary computer systems. It is also active in providing software and hardware service and support for its own equipment. Company B is in the business of providing hardware maintenance for competitors of Company A. It does not and cannot provide software maintenance.

Due to Company A's policy of tying the provision of hardware maintenance to the provision of software maintenance, Company B contends that it is suffering loss as a substantial amount of business is not available to it. Company B is prevented from maintaining any hardware supplied by A and is restricted in its ability to tender for hardware maintenance for those customers requiring a single company to provide both hardware and software maintenance.

The categories of loss for which Company B could be seeking damages would include losses resulting from any termination of pre-existing contracts that can be shown as a result of Company A's actions and also losses resulting from a reduction in the level of new business attributable to A's actions.

Where can I commence litigation?

Anti-competitive practices frequently span frontiers. If a company has suffered loss and damage as a result of unlawful conduct in several jurisdictions, where should it start legal proceedings?

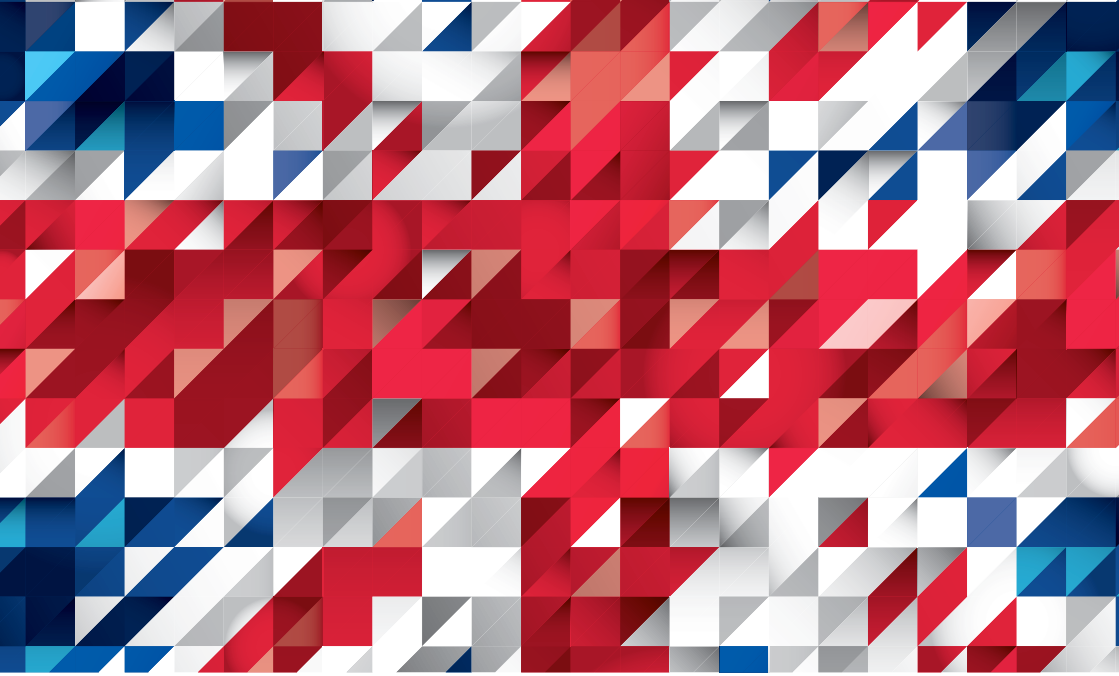
Determining which country has jurisdiction is often difficult. As a general rule, the country with jurisdiction is likely to be the one where the loss has been suffered. For example, even if most of the loss is not suffered in the UK, claimants often wish to pursue claims in England because of various procedural advantages such as obtaining a more favourable document disclosure order from the UK courts than in other jurisdictions.

In previous cases, the UK courts have been willing to accept jurisdiction where the claim is made against a UK-based subsidiary of the defendant regardless of where the loss has been suffered, as long as the case and the defendants have some direct connection with the UK.

There is an increasing trend of companies starting claims in the English courts even before the decision of the competition authorities has been published, especially where there are many defendants with European wide operations, to ensure that the UK courts will be seized of the claim.

This use of an English anchor defendant can be particularly useful if the parent company or other connected infringer of the harm is located outside of the EU. Under the Special Jurisdiction rules of Article 6 of the Brussels Convention on Jurisdiction, the claim against the EU/UK anchor defendant can be a method for bringing claims against multiple defendants, including those in jurisdictions outside the EU.

It is possible to bring private enforcement proceedings in each of the Member States of the EU. However, the procedural rules vary considerably between the Member States with many lacking claimant friendly disclosure rules to allow swift and easy recovery of significant damages. Experience shows claimants favour bringing proceedings in two principal jurisdictions; the United Kingdom or Germany.



Bringing a claim in the UK

How do I start a private competition law action?

The UK with its permissive rules on jurisdiction and its strong disclosure regime, is one of the most popular EU jurisdictions in which to commence proceedings. Its popularity is likely to increase further with the introduction of important new reforms which have introduced a new system of opt-out collective actions (or class actions as they are referred to in the US) into the UK for the first time.

Collective actions are court proceedings where there is more than one potential claimant of a particular defined class of claimants. One person will be bringing the claim to court on behalf of the affected class. Damages, if awarded, will be awarded to all the members of the class of claimants leading to a potentially higher level of damages than in a singular claim.

A company seeking to start proceedings in the UK has one of two principal ways of doing so; a follow-on action or a stand-alone action.

A follow-on damages action is where the claimant seeks to rely on a previous infringement decision by the European Commission or national competition authority in order to seek redress for any damage it can prove it suffered as a result of the infringement.

Follow-on actions are designed to be cost effective and a speedy process to obtain damages without the need to re-prove liability. Consequently, follow-on actions are more attractive options for claimants than stand-alone proceedings.

Stand-alone actions involve commencing legal proceedings before any decision has been taken by a competition regulator. The claimant will be required to prove that the defendant has infringed competition law and will have to assemble its own documentary evidence where necessary, by obtaining documents in the defendant's possession through the legal disclosure process.

Following the adoption of the Consumer Rights Act 2015, it is now possible to commence either follow-on or stand-alone actions on an opt-out collective action basis. Opt-out collective actions can be started by individuals, businesses or consumer representative organisations. If the putative class is accepted by the court, this will mean that all defined members of the class of claimants identified in the action will be presumed to be part of it and entitled to a share of damages (if any) unless they specifically opt-out of the collective action.

What are the likely costs of litigation?

Costs of fighting a stand-alone competition action can be significant. However, the amount of damages eventually awarded in a successful case are likely to dwarf your legal costs. The costs of each case will need to be assessed individually but costs can often exceed £1 million per party, including experts' and court fees.

Follow-on actions are much cheaper, and are a fast way of recovering damages without going through the complex court procedures of disclosure and needing to prove the issue of liability. Follow-on actions, as a general rule, tend to be in the region of 40% (or more) cheaper than stand-alone actions.

In a successful action, you can also recover a significant proportion of your own legal and experts' costs from the unsuccessful party. In English proceedings, the court will usually order that the loser should pay the legal costs of the successful party. In practice, this usually means that the winner will recover two thirds of its overall actual costs.

On the other hand, if a claim is unsuccessful, the claimant will normally be exposed to paying two thirds of the successful defendant's costs. This prospect must be considered at the outset. Insurance may be available to cover the worst case scenario and to deal with possible adverse consequences.

How long will it take?

The time-frame involved in bringing a claim will, like the costs of the action, depend upon the facts and complexity of the case itself.

A significant part of the costs relate to the preparatory stages prior to the issue of proceedings, such as obtaining expert economic or forensic accounting evidence which are needed for the letter before action.

Actions started in the High Court or in the Scottish Court of Session on average take two to three years. In the case of follow-on actions before the Competition Appeal Tribunal (CAT), actions can be shorter, sometimes in the region of 12 months. The duration will depend a lot upon the amount of satellite litigation in any given case (these are applications to the court to resolve legal issues ancillary to the substantive action). Most actions, however, do not go all the way to trial, but settle out of court.

What remedies are available?

The principal remedies available to a claimant are:

- Compensatory damages – calculated to compensate the claimant for any loss or damage suffered as a result of (or in connection with) anti-competitive practices;
- Injunctions – awarded by the High Court or the CAT in order to restrain or prevent an on-going or anticipated breach of competition law.

How can I get the evidence I need?

No claim can succeed unless it is based on solid evidence. Obtaining this evidence is a critical issue in any action. In most cases, the claimant will not start off with all the evidence it needs in its possession. It will need to seek certain documents from the defendant through appropriate disclosure orders. The UK Civil Procedure rules contain strong disclosure requirements which are claimant friendly.

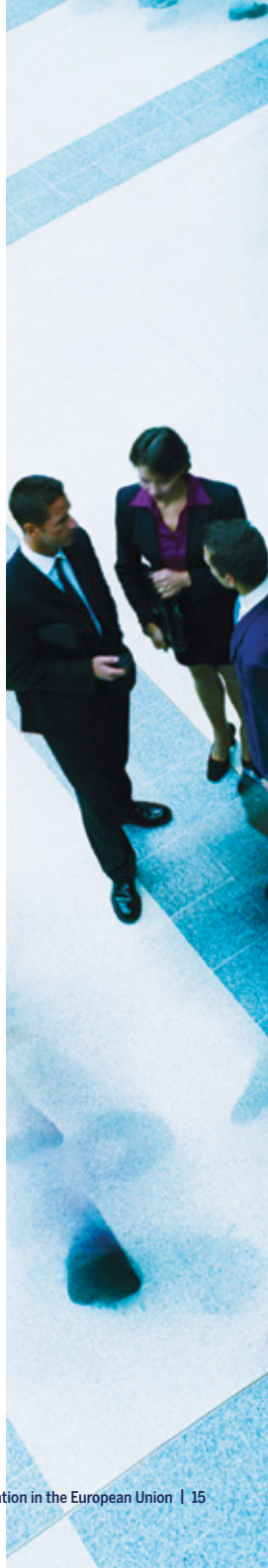
For follow-on actions, many of the documents required will be made public by the investigation of the competition authority.

Before the courts in stand-alone actions, the recent trend has been to require parties to disclose only pivotal documents rather than allowing the parties to collate a large volume of documentation which is only peripherally relevant.

A defendant can be required to produce evidence which is both helpful and unhelpful to its own case. However, the defendant may be able to withhold certain documents, such as those protected by the rules on privilege.

When can litigation be started?

For stand-alone actions, the basic rule is that proceedings must be commenced within six years (five years in Scotland) of the loss suffered by the claimant, but this may be lengthened if, for example, there has been fraudulent concealment of facts relevant to the case. For follow-on actions, proceedings must be commenced no later than five years from the initial decision or from the date on which a final appeal judgment on the decision is issued, or five years from the date on which the grounds for bringing the action arose, whichever is the later. Claimants can commence a follow-on action before the result of a final appeal is known where the defendant is appealing only against the size of the fine imposed by the competition authorities and where liability is not an issue.



For follow-on actions, this five year period will not begin before the infringement has ceased, and the claimant knows, or could be reasonably expected to know, of the anti-competitive behaviour and the fact that it infringes national or EU competition law, that this behaviour has caused harm to the claimant, as well as the specific identity of the infringer.

This period is also suspended when a competition authority begins an investigation or proceedings relating to the infringement which is the subject of the damages action, and this suspension remains in effect for at least a year following the final decision or the conclusion of the proceedings.

Recent UK reforms

The UK Government has committed itself to reforming the competition litigation landscape to make it easier for businesses and individuals to claim compensation against anti-competitive behaviour. The package of UK reforms contained in the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015 in some ways already go further than the reforms in the EU Damages Directive 2014 which was implemented in early 2017 by the Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

Examples of recent UK reforms include:

- **Single regulator:** The two competition authorities in the UK, the Office of Fair Trading and the Competition Commission, were combined into a new Competition and Markets Authority on 1 April 2014. The intention of this new authority was to create a powerful central competition regulator in the UK.
- **Stronger powers for a central competition court:** The Competition Appeals Tribunal (CAT) has become a more powerful centre for the hearing of competition claims in the UK. It now has the ability to hear all competition litigation cases and also impose injunctive relief and award damages. The CAT is also empowered to create a fast-track procedure for straightforward follow-on damages claims, and to make revisions to certain rules of procedure in order to better handle its new widened jurisdiction. This will help keep cases out of the High Court with a faster turnaround from bringing the claim to judgment and help build a specialised competition law court for the UK.

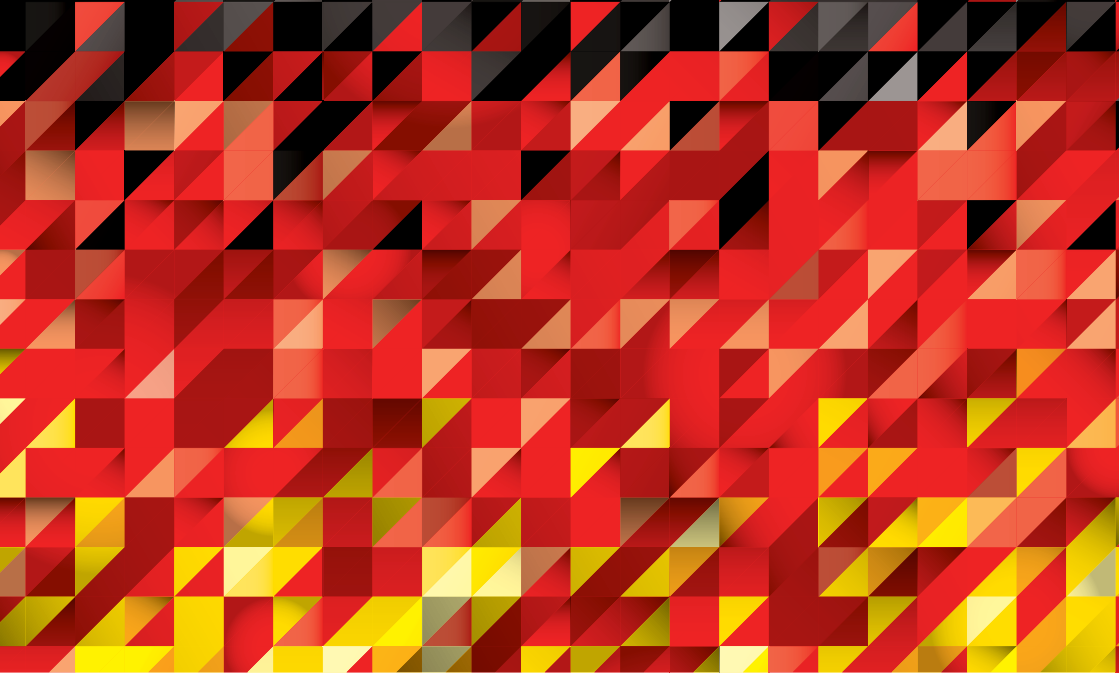
- **Opt-out collective actions:** In a major policy change the UK has introduced opt-out collective actions for the first time. Individuals or businesses can commence collective proceedings. As such, instead of individual aggrieved parties bringing their claims separately, a nominated representative (approved by the CAT) will bring the claim on behalf of a specified group of claimants, who will then share the award of compensation amongst themselves, if the collective action is successful.
- **Voluntary redress schemes:** The Consumer Rights Act grants the Competition and Markets Authority (CMA) the power to approve voluntary redress schemes, a statutory compensation programme which has been designed to provide the victims of an infringement the means with which to obtain compensation without needing to go to court. Parties that have infringed UK or EU competition law will be able to apply to the CMA to approve the terms of the redress scheme.

Brexit & private competition law actions

The UK has become one of, if not, the leading venue in Europe for actions involving EU competition law claims. Through its membership of the EU it has benefitted greatly from being part of the European regime of jurisdictional rules ("the European jurisdictional regime") contained principally in the Recast Brussels and Rome II Regulations. This allows claims for breaches of the EU competition rules to be brought in the UK courts and ultimately for their judgments to be enforced throughout the EU.

As a result of the UK's vote to leave the EU, its future place within the European jurisdictional regime is in doubt. No changes to the powers and jurisdiction of the UK courts are likely to take effect prior to 2019 or such time as the UK actually leaves the EU. However it is hoped that, post Brexit, the UK's pre-eminent position as a venue for EU competition law claims will be preserved though its continued adherence to the European jurisdictional regime through the terms of the exit treaty agreed between the UK and the remaining 27 EU Member States.

Competition law claims brought before the UK courts under the Competition Act 1998 will be unaffected.



Bringing a claim in Germany

There is a strong modern record of private competition enforcement in the German courts. The German Government is committed to enforcing the law and strengthening the ability of market participants to claim compensation for anti-competitive behaviour.

How do I start a private competition law action?

Actions in Germany can be brought independently or following on from a regulator's finding of infringement. The action can be brought by any market participant under Section 1 of the Act against Restraints of Competition or under EU law if the participant believes they were affected by anti-competitive behaviour.

German courts are bound by findings of infringement by the German Federal Cartel Office, other national EU Competition authorities and those of the European Commission under Section 33b of the Act against Restraints of Competition. This means it is possible to claim compensation within Germany following infringement decisions from other Member States.

What are the likely costs of litigation?

Whilst the losing party will be responsible for the court fees and for the winning party's legal fees, these costs are limited according to a statutory compensation schedule. The costs of the litigation will be a matter of degree depending on the complexity of the case.

How long will it take?

A standard time would be two to three years to hear a case at first instance with appeals taking up to two further years following the first decision.

What remedies are available?

According to Section 249 of the German Civil Code, damages are assessed on a loss basis meaning they will not exceed the cost of the anti-competitive behaviour to the victim. German courts do not award punitive damages. There is a rebuttable presumption that the cartel infringements have caused damage to the market participants affected by the behaviour. (§ 33a Abs. 2 GBW-neu)

Interest on the damages is also available at five per cent above the basic rate of interest under Section 33 (3) of the Act against Restraints of Competition.

Interim injunctions are available to prohibit certain behaviour or practices and freeze the assets of those accused of anti-competitive behaviour.

How can I get the evidence I need?

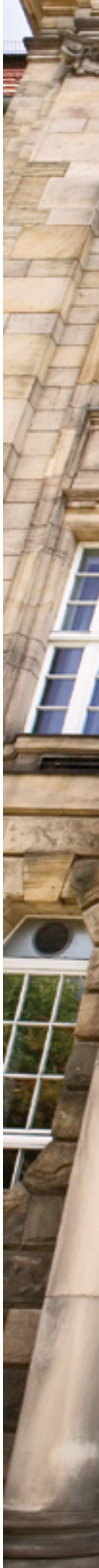
The burden of proof is on the victim to make the evidence available to the court. The evidence can consist of statements of experts, legal inspections, hearings of parties, documentary evidence and hearing of witnesses.

Having been traditionally more restrictive than the courts in the UK or the US, German competition law now recognises a process of disclosure/discovery if the claimant can furnish prima facie evidence for the existence of a damages claim. With this, it has become significantly easier for victims of antitrust violations to enforce cartel damages claims in front of German courts.

Although German Competition Law traditionally contains no broad concept of legal privilege protecting certain documents, documents which were submitted to the cartel authorities within a leniency procedure are not subject to disclosure.

When can litigation be started?

Five years is the limitation period for bringing the claim under Section 33h of the Act against Restraints of Competition, beginning with the end of the year the claim arose, the victim had knowledge or grossly negligent lack of knowledge concerning the infringement and the antitrust violation ended. Irrespective of such knowledge or lack of knowledge due to gross negligence, the limitation period for pursuing damages claims lapses after the 5 years since the claim came into existence. Damages are available for the 10 years predating the lodging of the claim. In cartel cases, the time limit for bringing a claim is frozen whilst investigations by a competition law authority by a EU Member State or the European Commission are ongoing under Section 33h (6) of the Act Against Restraints of Competition.

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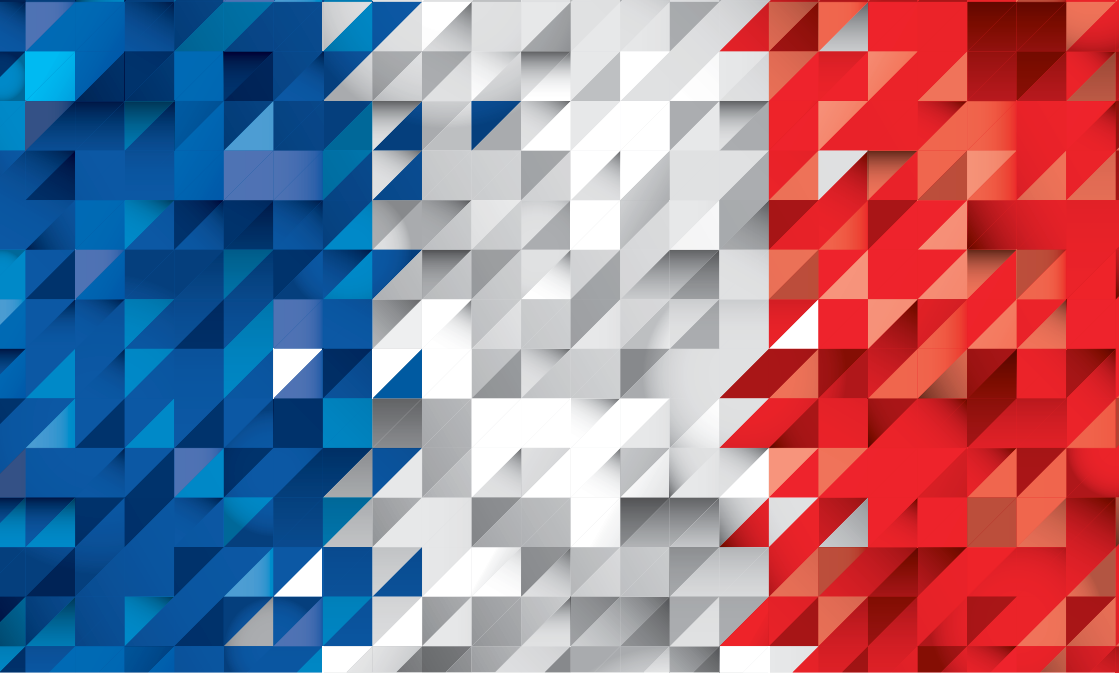


Bringing a claim in France

How do I start a private competition law action?

Competition litigation claims to recover damages can be brought as either follow-on litigation or as stand-alone actions.

It is important to note that stand-alone actions can be stayed by the judge, often at the defendant's request, pending a ruling, or an opinion, to be delivered by the French Competition Authority (*"Autorité de la Concurrence"*).

Prior to 2005, the competent courts were the general civil or commercial courts. However, since then, specialised courts have been created in major cities of France, with exclusive jurisdiction over competition law actions (the "Specialised Courts"). Furthermore, criminal proceedings may be brought when a person has deceitfully taken a personal and decisive part in the implementation of anti-competitive practices or an abuse of a dominant position.

A Bill introducing a French restrictive version of U.S. class actions ("actions de groupe") was passed in February 2014. Under this new form of action, consumers who are victims of a breach of competition law, who have suffered loss and damage, may bring follow-on actions before national courts (a prior definitive ruling by the French Competition Authority is required) and only through consumer associations acting in a representative capacity.

What are the likely costs of litigation?

The costs of competition litigation will vary depending on the technical nature of each case. The absence of a UK or US-style full disclosure process and witness cross-examination no change tends to limit the legal costs in comparison with other jurisdictions.

Under French law, a number of expenses pertaining to the proceedings – such as the quantification of damages or market assessment by court-appointed experts – are borne by the losing party. Lawyers fees are, however, not included in such expenses, but may be awarded to the prevailing party by the judge as a matter of equity. When awarded, the amount of lawyers fees are representative rather than fully compensatory.

How long will it take?

The duration of the action will vary depending on the complexity of the case, and the associated use of parties' and court-appointed experts. The duration will also be dependent on whether a stand-alone or a follow-on action is brought, and also whether the action is stayed.

Approximate times for actions in France are one to two years to hear a case at first instance with appeals taking up to two further years following the first decision.

However, fast-track summary proceedings are available before the Specialised Courts for urgent matters calling for immediate interim remedies.

What remedies are available?

Claimants must demonstrate a nexus between the defendant's breach of competition law and the loss and damage caused to the claimant such as increased costs or loss of profits or sales.

Under French law, the underlying principle is to restore claimants to the position they would have normally been in had the fault not occurred, thereby excluding punitive damages.

If there is more than one defendant, claimants may claim damages from any of them, as they may be held jointly and severally liable for the damage suffered.

How can I get the evidence I need?

The burden of proof of course lies with the claimant.

There are a certain number of measures pursuant to which claimants may obtain evidence: inter alia, at the pre-trial stage, court-authorised forced

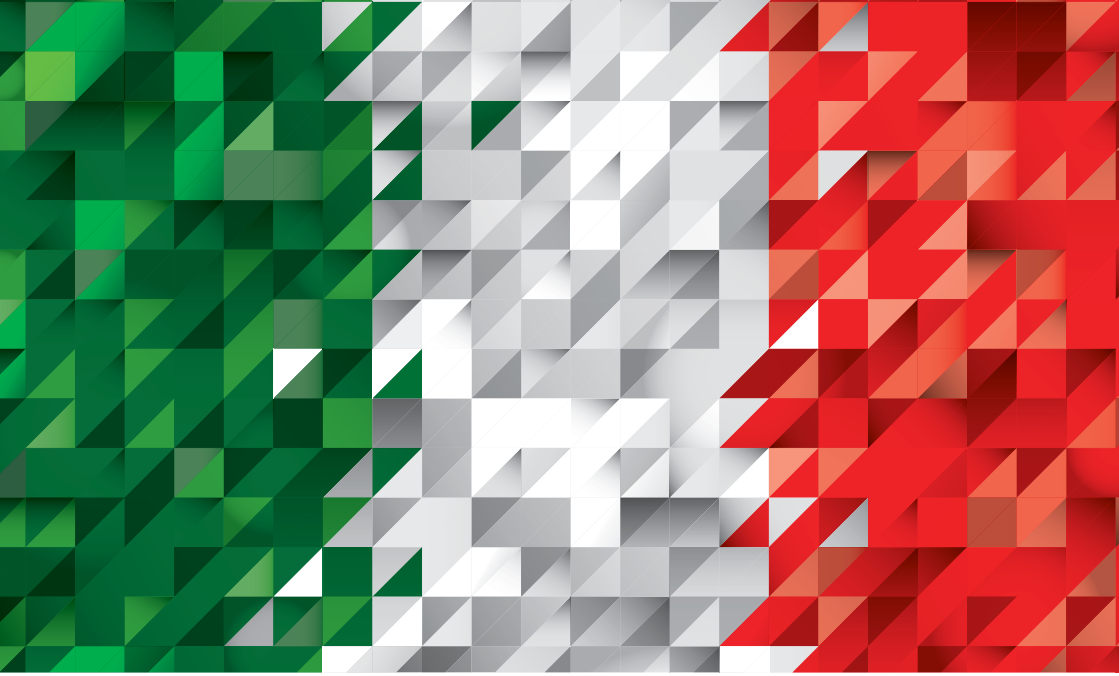
collection of evidence from opposing parties (or third parties) upon ex parte request, or, during the proceedings, interlocutory motions filed to obtain from the judge an injunction, subject to daily fines, ordering the defendant to disclose non-privileged documents which are relevant to the claim and proportional to the needs of the case.

Furthermore, it is possible for a judge to order all necessary measures of inquiry, such as the appointment of an expert.

Finally, since 2012, the French Commercial Code allows, upon a judge's request, the disclosure of documents collected by the French Competition Authority during a prior investigation (leniency documents excluded).

When can litigation be started?

Private competition law actions before the Specialised Courts fall within the general statute of limitations of five years after knowledge of the behaviour resulting in the damage arose, while actions before criminal courts have a shorter limitation period of three years, running from the date of the offence.



Bringing a claim in Italy

How do I start a private competition law action?

In Italy any consumer or business can bring a stand-alone or follow-on action for breach of the competition rules before a number of specialist Italian Competition Courts. Competition Courts are only entitled to declare the alleged anti-competitive agreements (or individual terms) void and/or award damages. However, they cannot impose fines on the undertakings involved in the anti-competitive conduct. Fines are only imposed by the Italian Competition Authority and/or the Administrative Courts.

What are the likely costs of litigation?

There are no special rules about legal expenses for competition proceedings. In line with the usual practice under Italian law, the losing party will bear all the costs of the lawsuit. How much these will be will normally depend on the value and the complexity of the case. Sometimes legal costs can increase because of the number of the parties involved or the duration of the case.

How long will it take?

On average, these proceedings will take four years before the Court hands down its judgment at first instance. Any appeal is likely to take at least three years to be decided. A final and further appeal to the Italian Supreme Court (Corte di Cassazione) usually lasts a further three years.

What remedies are available?

Private competition law actions can have an anti-competitive agreement or (if separable), an offending contractual term, declared null and void. Private actions can also declare the behaviour of a dominant company abusive. In both situations, the court can award damages. According to Section 1223 of the Italian Civil Code, damages arising from any anti-competitive behaviour are limited to the loss of profits suffered by the relevant undertaking or consumer. Punitive damages are not permitted under Italian law.

Competition proceedings can be brought up to ten years from the date of the agreement containing the alleged anti-competitive provisions and up to five years from the date any anti-competitive conduct occurred.

In addition, prior to the case going to full trial, the Italian courts are entitled to issue interim injunctions in urgent cases where there is the probability of irreparable damage being caused by the anti-competitive conduct in question.

How can I get the evidence I need?

According to Section 2697 of the Italian Civil Code, the burden of proof is on the claimant to provide evidence of the alleged anti-competitive conduct and the damages caused. In such claims the Italian courts frequently appoint an expert witness in order to quantify the loss. In addition, Section 210 of the Italian Civil Procedure Code entitles the parties to require the disclosure of relevant documents possessed by the other party or third parties.

When can litigation be started?

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Settlements

Generally, about 50% of all actions settle out of court without the need to issue proceedings. This matches our experience. A robust, well-reasoned, solicitors letter before action – together with a detailed calculation of the likely damages to be sought in any subsequent proceedings – usually focuses minds sufficiently to bring about a beneficial settlement.

Defendants may also be anxious to avoid the risk of a court finding they are dominant in any of their markets. Such a finding could have serious ramifications for their business and trading/licensing policies.

EU Reform

The EU has agreed far reaching changes to the competition law landscape to encourage more competition litigation. The EU Damages Directive 2014, together with non-binding guidelines on collective redress and the calculation of damages by national courts, sought to impose minimum rights and standards in each Member State to facilitate private litigation. The legislation to be implemented into national Member State law by the end of 2016.

Reforms implemented at EU level include:

- **Proof of Liability:** Infringement decisions of a national competition authority in another Member State serve as prima facie evidence that an infringement occurred and the decision can be assessed along with other forms of evidence in the court where the damages claim is brought.

- **Access to Evidence:** Where a claimant has provided adequate justification as to the plausibility of its claim, national courts are now empowered to order the defendant or third parties to disclose relevant evidence. Where this necessitates disclosing confidential information, national courts must have measures to protect this information, such as restricting access to a select few individuals. This is a radical reform for countries which hitherto have not had any system of disclosure.

- **Time Limits:** A time limit of at least 5 years within which claimants can bring actions for damages is prescribed under the Directive. This period will be suspended if a competition authority starts proceedings so that victims can choose to wait until the public proceedings are finished before starting a claim to commence action. With the exception of stand-alone claims, the time limit will not begin before the infringement has ceased, and the claimant knows or could be reasonably expected to know of the anti-competitive behaviour and the fact that it infringes upon national or EU competition law, that this behaviour has caused harm to the claimant, and the specific identity of the infringer.

- **Damages:** Victims are entitled to receive full compensation for both actual loss suffered and also for lost profits and interests. This will allow compensatory but not punitive damages. Once a claimant has established that they have suffered harm, national courts are empowered to quantify this harm, and the legislation encourages national competition authorities to assist with this exercise. In cartel cases there has now been introduced a rebuttable presumption that a cartel causes harm, which should have the effect of reducing the claimant's costs, since they are now not required to prove that cartels cause higher prices. National courts are required to ensure that the compensation awarded does not exceed the overcharge harm caused at each level of the consumer chain.

- **Facilitating Indirect Purchaser Claims:** Indirect purchasers are entitled to claim compensation if they can show that they have suffered a loss as a result of the infringement. There is a rebuttable presumption that the direct purchaser passed on the overcharge to the indirect purchaser. The introduction of this presumption is to encourage indirect purchasers to bring forward claims before the courts.

- **Joint & Several Liability:** The infringement of competition law through joint behaviour (such as cartel activities) will result in the parties responsible being held jointly and severally liable for the entire harm caused (with SMEs excepted). The claimant can bring a claim against one or against several of the infringing entities until they have been fully compensated. Any infringer will be responsible for all damages caused by the infringement. However those infringers which have obtained immunity from fines under the leniency procedure will be required to only compensate their own direct or indirect customers.

- **Leniency documents:** Members of a cartel can approach public enforcement bodies to seek immunity from, or a substantial reduction in, fines in return for their full cooperation with the investigating authority. Following the EU reforms, documents obtained under regulatory leniency procedures will be protected from disclosure throughout the EU. Cartel members who used the leniency programme will still however be liable for damages to their own direct and indirect customers, but will not be jointly and severally liable for

all damages like the other cartel members, unless full compensation cannot be obtained from those other members.

- **Passing-on defence:** Provides the defendant with the opportunity to argue that a claimant that is a direct customer has passed onto their own customers the whole or part of the overcharge resulting from the infringement, and as a result the claimant is not entitled to damages, or they should only be entitled to a smaller amount that is more reflective of the actual level of harm that has been suffered by the claimant.

- **Collective dispute resolution:** Forms of CDR, such as out-of-court settlements, arbitration, mediation, conciliation and so on, are promoted by the Directive, and it is encouraged that as many victims and infringers are included in these processes as possible.

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The process of competition litigation requires the expertise of experienced practitioners with in-depth specialist knowledge of competition law matters and shrewd tactical acumen. It also calls for a team with a proven track record of handling large-scale and document-intensive litigation.

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