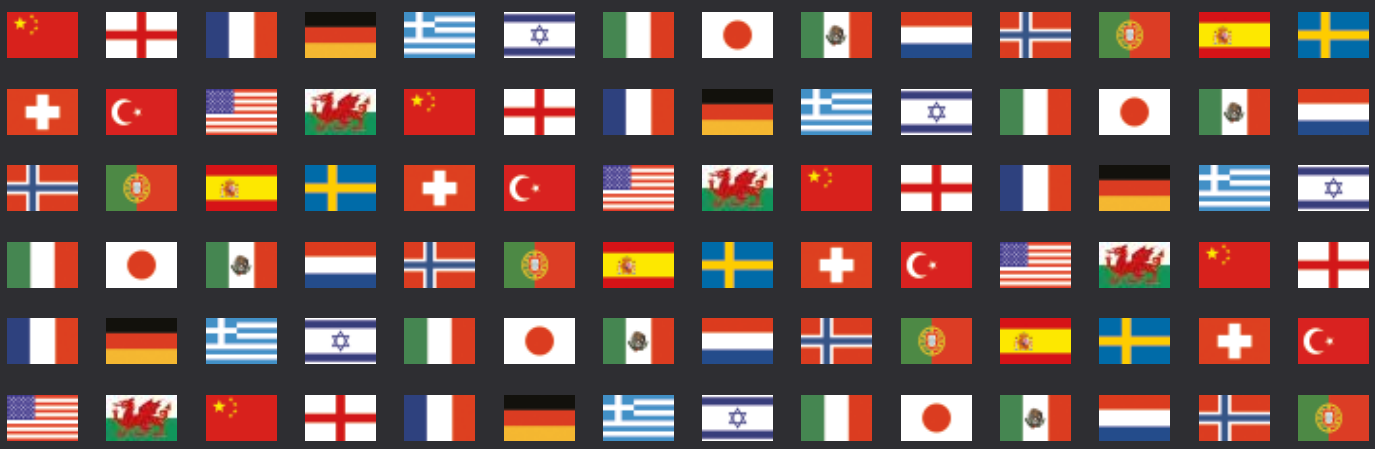
Private Antitrust Litigation 2020

Contributing editor
Francesca Richmond



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Getting The Deal Through

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Francesca Richmond
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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and Portugal a new global overview.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In Switzerland, competition law is primarily enforced by the competition authority. These investigations are governed by administrative law. The reasons why the administrative procedure is more attractive are threefold:

- in civil proceedings, the cost risk is substantial;
- the claimant bears the burden of proof, whereas in the administrative procedure, the Secretariat of the Competition Commission has several measures and tools to gather evidence (such as dawn raids, requests for information, etc); and
- it can be difficult to calculate the loss suffered by the claimant (eg, a company who was harmed by a price cartel needs to establish the price for which it would have been able to purchase products and services without the price cartel).

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions in Switzerland are provided by statutory law (see question 3).

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust actions in Switzerland are governed by articles 12 to 17 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act). Article 12 of the Cartel Act governs the remedies that are available to a claimant, including the elimination of or desistance from the hindrance, damages and satisfaction or the surrender of lawfully earned profits. Article 13 prescribes the enforcement of the right to elimination and desistance and article 15 sets forth an obligation for the civil courts to refer questions on the lawfulness of a restraint of competition to the Competition Commission (articles 14 and 16 to 17 were repealed with effect as of 1 January 2011).

The Federal Act on Swiss International Private Law of 18 December 1987 (SIPLA) governs international private antitrust actions. Paragraph 1, article 137 of SIPLA provides that the applicable law shall be the law of the state in whose market the direct effect of the restraint of competition on the claimant occurs.

On 22 February 2012, the Swiss Federal Council submitted its draft for a number of amendments of the Cartel Act to parliament for approval. The proposals submitted to parliament for consideration included the recognition of legal standing to final consumers and the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities. On 17 September 2014, parliament rejected the proposed revisions to the Cartel Act in their entirety. The Federal Council plans to modernise the merger control regime. It remains unclear whether other provisions of the Cartel Act shall be revised as well.

Furthermore, it is worth noting that there are several initiatives and motions pending that could have an impact on private antitrust actions (see question 38).

The EU Damages Directive is not applicable in Switzerland and there are no concrete endeavours to implement its rules in domestic law after the rejected revision of the Cartel Act (Directive 2014/104/EU) (Antitrust Damages Directive). The EU Damages Directive differs from Swiss legislation in various aspects. For example, the Damages Directive governs the disclosure of evidence and states that national courts are able to order the defendant or a third party to disclose relevant evidence that lies in their control (article 5). Another example is the limitation periods for bringing an action for damages. According to article 10 of the Damages Directive the limitation periods are at least five years (see question 15 and 17 for the Swiss legislation).

Material and territorial jurisdictions of the civil courts in domestic antitrust cases are determined by the Civil Procedure Code (CPC) of 19 December 2008 (in force as of 1 January 2011) and cantonal law. Pursuant to article 36 of the CPC, the case shall be filed by the competent court at place of business of the claimant or the respondent or where the restraint of competition has occurred or had its effect. Cantonal law shall designate the specific court that has jurisdiction as sole cantonal instance for cartel law disputes. The 'single cantonal court' has an exclusive jurisdiction to order interim measures.

In international antitrust cases, a venue is determined by articles 2 and 5 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention 2007), or by article 129 of SIPLA if the convention is not applicable. Both the Lugano Convention and SIPLA provide for the same venues as the CPC, except for the place of business of the claimant, which is not available in international contexts.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

In Switzerland, private actions may be brought in cartel cases (horizontal and vertical infringement of competition) and cases of an abuse of a dominant position. Swiss law does not provide for private actions in merger control cases. A finding of infringement by a competition authority is not required to initiate a private antitrust action in a civil litigation in Switzerland.

If the competition authority finds an infringement, the civil court usually does not need to get an expert report about the legality of a restraint of competition.

Principally, the civil and the administrative procedures are separate. There is an academic debate whether a decision of the Competition Commission is binding. The prevailing doctrine is in favour of a binding effect to avoid contradictory decisions. In any case, the finding of infringement by the Competition Commission will have an impact on the private antitrust action, provided it covers the same time period.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

A claimant may bring an action before the civil court under the Cartel Act, provided that he or she is affected by the restraint, regardless of whether the restriction is directly aimed at the claimant or not. The person should be an undertaking under the Cartel Act. Undertakings (all buyers or suppliers of goods or services active in commerce regardless of their legal or organisational form (article 2 of the Cartel Act)) that encounter a restriction of competition have legal standing to bring a claim under the Cartel Act, irrespective of whether they are competitors, purchasers, suppliers or enterprises that operate in neighbouring markets. Therefore, indirect purchasers can bring an action before the civil court too. Final consumers, however, do not currently have standing to bring a private claim under the Cartel Act (see proposed but rejected revisions to the Cartel Act, question 3).

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

In Switzerland, a private antitrust action may only be brought against an undertaking. The Cartel Act qualifies all buyers or suppliers of goods or services active in commerce as undertaking, regardless of whether it is a corporation or an individual (see question 5). It is not necessary that the undertaking is domiciled in Switzerland. The Cartel Act applies to practices that have an effect in Switzerland, irrespective of their origin. According to recent rulings of the Federal Supreme Court, it is sufficient if behaviour outside Switzerland has an effect or could have an effect in Switzerland. Accordingly, the competition authorities may investigate conduct that occurred in a foreign jurisdiction and that has a possible effect in Switzerland. They need not prove that the behaviour has an actual or real impact on the Swiss market. Whether Swiss or foreign antitrust law must be applied by the Swiss court in a civil proceeding is subject to the relevant international treaties and private international law, such as the Lugano Convention 2007 or SIPLA (for the relevant courts and tribunals, see question 2). Bringing the same private antitrust actions (that is, same parties, same matter) before different courts is not possible in both domestic and international cases. If the same action is pending before two courts, the second court in Switzerland shall suspend its proceeding until the first has decided on its jurisdiction. In contrast, bringing connected private antitrust actions (different parties, but claims based on the same facts and grounds) before different courts is, in principle, possible. However, the second court may transfer the case to the first court provided the first court agrees.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

There is no rule applicable in Switzerland that would prohibit third parties from funding a private antitrust litigation procedure.

However, contingency fees are problematic. Pure profit-sharing schemes replacing the fees for the services rendered are prohibited. Nevertheless, it is now allowed to agree upon an additional remuneration in the case of a successful proceeding. For instance, it is possible to agree upon an hourly fee that would be increased if the result of the litigation meets defined criteria.

Jury trials

8 | Are jury trials available?

No. Jury trials are not available in Switzerland.

Discovery procedures

9 | What pretrial discovery procedures are available?

Common-law-style discovery procedures are not available in Switzerland. Swiss law does not provide for pretrial discovery procedures. There is no general right for the (potential) claimant to request that the defendant produces documents or other relevant information. The parties have to rely on the evidence in their hands, and they may ask for witness interrogations and interrogations of the parties. However, there is a special procedure for the preliminarily collection and securing of evidence if the applicant demonstrates an interest worthy of protection, or if the evidence-gathering process would be substantially more difficult or not possible at a later stage (see article 158 of the CPC).

Admissible evidence

10 | What evidence is admissible?

The claimant may base its claim on any available evidence, including:
- documents (contracts, letters, printouts of emails, etc);
- witness statements;
- expert opinions;
- evidence by interrogation of the parties; or
- evidence by inspection.

These are the means of evidence that are normally admitted in civil proceedings. In case of antitrust law damages cases, expert opinions are of great importance with regard to the calculation of a possible fine.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Swiss law generally recognises the attorney-client privilege, where all information is protected if such information derives from the

professional representation of the respective party by an external attorney. The following conditions have to be met for a document to be protected from search and seizure during dawn raids:

- the attorney must be entitled to practise before Swiss courts in accordance with the Attorney Act of 23 June 2000. The concept of legal privilege does not extend to in-house counsels;
- only profession-related activity such as litigation and legal advice are protected; and
- the documents need to be issued in connection with a mandate. Pre-existing evidence that was originally not prepared for attorneys is not protected.

Trade secrets are protected under Swiss civil procedural law, as well as in proceedings before the Swiss Competition Commission. Parties may request the non-disclosure of documents containing such trade secrets.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

There is no specific statutory provision under Swiss law condemning infringements of competition law. In this respect, there is no restriction of private actions regardless of whether there has been a prosecution under competition law or criminal law (ie, fraud in connection with an infringement of competition). Furthermore, affected plaintiffs may seek indemnification within the criminal procedure. The judgment of a criminal court is not binding upon a civil judge with respect to guilt and the determination of the damage.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence obtained in proceedings before the Swiss Competition Commission or in criminal proceedings may be used in civil proceedings without limitation. However, all documents relating to leniency applications may not be copied or otherwise duplicated by the involved parties. The authority holds that the access to such leniency files is limited to consultation on the premises only (eg, see the case involving road construction companies operating in the canton of Aargau: *RPW 2012/2 Zwischenverfügung vom 10 August 2011 in Sachen Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau betreffend Akteneinsicht*, 264 ss). In addition, the Swiss Competition Commission does not disclose documents submitted by leniency applicants to civil courts. Apart from this, leniency applicants are not protected from litigation and may be subject to follow-on litigation as any other party involved in an administrative proceeding.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The court may suspend proceedings if it finds it in its wide discretion appropriate, therefore, a party may request the court for a stay at any time. The proceedings may be suspended in particular if the decision depends upon, or is likely to be influenced by, the outcome of other proceedings. Another generally accepted petition for a stay consists in settlement negotiations of the involved parties.

Article 15(1) of the Cartel Act obliges civil courts to obtain an expert opinion from the Swiss Competition Commission if the legality of a restraint on competition is questioned in the course of the civil proceeding (the Federal Supreme Court is relieved from this obligation). However, the expert opinion is not binding on the civil judge, and there has been an example in the *Etivaz* case confirmed by the Federal Supreme Court, where the court ruled against the expert opinion of the Swiss Competition Commission.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The plaintiff bears the burden of proof and must therefore demonstrate that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor (including the tortfeasor's culpability). Therefore, any plaintiff, including direct or indirect customers, must prove and quantify its damage. A court takes its decisions on the balance of probabilities.

The Swiss Cartel Act provides for rebuttable presumptions of certain hard-core horizontal and vertical agreements that such agreements lead to the elimination of effective competition. The most recent judgments of the Federal Supreme Court no longer require the Swiss Competition Commission to take an effects-based approach for hard-core restrictions. According to the Federal Supreme Court, even undertakings with low market shares can get sanctioned if they have participated in a hard-core restriction (see question 38).

The defendant has a duty to allege the passing-on damage, but the ultimate burden of proof in connection with the quantification of damages remains with the plaintiff. If the undertaking harmed by an unlawful restraint of competition cannot establish the exact amount of damages, the judge estimates and assesses the amount at his or her discretion.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Procedures regarding interim measures in antitrust matters are usually treated within one to six months from the filing of the application.

The ordinary procedure before the first instance lasts usually between 12 and 24 months, depending on the complexity and the workload of the court and the judges responsible for the procedure.

In case of an appeal to the Federal Supreme Court, the length of the procedure may easily take up to four years in total.

Limitation periods

17 | What are the relevant limitation periods?

According to tort law, a private antitrust action for damages or for remittance of profits becomes time-barred one year after the injured party has learned of the damage and, in any event, 10 years after the date on which the claim first arose. If the restraint of competition continues without interruption for a period of time, the limitation period runs from the moment the restraint of competition is abandoned. As of 1 January 2020 these time limitation periods change: Private antitrust action for damages or for remittance of profits will become time-barred three years after the injured party has learned of the damage and 10 years after the date on which the claim first arose. This will improve the plaintiff's position.

The EU Damages Directive is not applicable in Switzerland (see question 3).

Appeals

18 What appeals are available? Is appeal available on the facts or on the law?

A decision of the civil court of first instance is subject to appeal before the Federal Supreme Court. As a rule, the minimum amount in dispute is 30,000 Swiss francs. Additionally, the court will deal with cases below this threshold if a question of law is of 'fundamental significance'. However, only the court's findings of law and certain due process issues are subject to appeal. The court's findings of fact are basically not subject to appeal (unless a court of first instance made a manifestly incorrect or inaccurate appraisal of the facts).

COLLECTIVE ACTIONS

Availability

19 Are collective proceedings available in respect of antitrust claims?

In Switzerland, collective proceedings (such as a system of class actions in US law) are not available in respect of antitrust claims. In general, claims must be brought by individual plaintiffs. However, provided that the claims of different individual parties are based on similar facts or a similar legal basis, several plaintiffs may jointly bring proceedings against the same defendant. There might be some changes in this regard in the coming years.

On 2 March 2018, the Swiss Federal Council adopted a consultation draft which, among other things, seeks to strengthen collective redress. Companies should be able to reach an amicable collective settlement of a dispute with effect for all injured parties by means of a group settlement procedure. Furthermore, the draft proposes to allow collective actions for the collective enforcement of financial claims. These measures will allow companies to settle claims arising from mass claims in a single procedure with a representative plaintiff. The consultation process lasted until 11 June 2018. The Federal Council is now preparing its dispatch to parliament. Since the draft received mixed reactions, it is unclear which changes will prevail

Applicable legislation

20 Are collective proceedings mandated by legislation?

See question 19.

21 If collective proceedings are allowed, is there a certification process? What is the test?

See question 19.

Certification process

22 Have courts certified collective proceedings in antitrust matters?

See question 19.

Opting in/out

23 Can plaintiffs opt out or opt in?

See question 19.

Judicial authorisation

24 Do collective settlements require judicial authorisation?

See question 19.

National collective proceedings

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

With regards to collective proceedings, see question 19. In general, private actions cannot be brought simultaneously in respect of the same matter in more than one jurisdiction. A claim is only admissible if the dispute is not subject to a pending litigation elsewhere, in order to avoid multiple contradicting rulings. The CPC requires each canton to designate a court that shall have jurisdiction as sole cantonal instance for cartel law disputes. However, if there are multiple plaintiffs, it is possible that each of them brings its action to a different court.

Collective-proceeding bar

26 Has a plaintiffs' collective-proceeding bar developed?

No. See question 19.

REMEDIES AND LIABILITY

Compensation

27 What forms of compensation are available and on what basis are they allowed?

According to article 12 of the Cartel Act, a claimant may claim damages if a person unlawfully causes loss or damage to the claimant, whether wilfully or negligently. The rules for calculating damages are set forth in the Code of Obligation of 30 March 1911 and specified by the Federal Court Jurisprudence. Civil courts can award damages in the amount of the actual loss incurred by the claimant and caused by the tortfeasor, including both property loss and lost profits. It consists of the difference between the actual net position on assets and liabilities of the injured party at the time of judgment and the hypothetical net position on assets and liabilities at the time of the judgment, assuming that no restraint of competition occurred. The claimant bears the burden of proof, and it must be demonstrated that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor. Negligence by the tortfeasor is sufficient for this purpose. Article 137 of SIPLA provides that, if a claim for damages is based on foreign antitrust law, no award may be rendered by a Swiss court in excess of what would be available under Swiss law.

Alternatively, the claimant can petition the court to order the remittance of unlawfully earned profits by the tortfeasor (article 12 of the Cartel Act). Similarly, as with a claim for damages, the claimant bears the burden of proof and must demonstrate that the tortfeasor's earned profits are attributable to the unlawful restraint of competition, and that the tortfeasor acted with malice.

Other remedies

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The other forms of remedy available in Switzerland consist of requesting injunctive or performance claims and declaratory relief (article 12 of the Cartel Act). Courts may also order interim remedies, suitable to prevent the imminent harm, in particular:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registered authority or to a third party;
- performance in kind; or
- the payment of a sum of money in the cases provided by the law.

However, the applicant must show credibly that a right to which it is entitled has been violated, or a violation is anticipated, and the violation threatens to cause not easily reparable harm to the applicant (article 261 of the CPC). Given that the harm resulting from anticompetitive behaviour might not be fully compensated by damages or the restitution for the unlawful profits, the interim measures constitute the main object of private civil enforcement.

An example of a private antitrust action that was brought successfully under the Cartel Act is a recent decision regarding an abuse of a dominant position in the cheese market. The Swiss civil courts considered whether the refusal to provide access to the defendant's caverns could constitute an abuse of dominant position in a case related to IP rights. Specifically, a producer of a type of Swiss cheese (called Etivaz), which is subject to an appellation of protected indication of origin regulation, requested access to certain caverns of the defendant (IP holder) in order to store its cheese during its ripening process. The Cantonal Court in Vaud confirmed in its decision the view of the Secretariat of the Competition Commission, ruling that the defendant's refusal to provide storage space in its caverns was not abusive pursuant to the Cartel Act. However, the Swiss Federal Court overruled the lower courts in its decision of 23 May 2013 (case 4A_449/2012) and held that the refusal to provide access to the defendant's caverns was based on unjustified reasons and, therefore, constitutes an abuse of a dominant position.

Punitive damages

29 | Are punitive or exemplary damages available?

Punitive or exemplary damages are not available in Switzerland, even if the court must apply foreign antitrust law.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Swiss tort law provides for interest on the damages award. Damages yield a 5 per cent minimum rate of interest from the moment of causation. The claimant is allowed to plead a higher interest rate.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

The direct sanctioning regime in case of infringements against article 5 (unlawfully agreements) or against article 7 (abuse of dominant position) was introduced in 2005. There are not many final and conclusive sanctioning judgments. Therefore, there are no decisions that deal with the question of whether fines imposed by competition authorities should be taken into account when setting damages. According to the general rules on the calculation of damages, the claimant has the right to seek full compensation. Therefore, most scholars in Switzerland reject the opinion that sanctions should have an influence on the level of the damage.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Legal costs include the fees for the court procedure and the cost of external counsel. Costs are imposed on a pro-rata basis to the parties in accordance with the success of each party.

The successful party is entitled to recover the cost of external counsel. However, the courts do not usually accept the full amount charged by counsel for the winning party.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Yes. If two or more undertakings have infringed competition law and caused damage (eg, in horizontal cartel cases or abuse of collective dominance), then they shall be jointly and severally liable.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

If several undertakings have caused the damage together, each undertaking is jointly and severally liable for the total damage. If one of these undertakings has compensated more than its portion, it can take a recourse action against the other undertakings involved in the infringement. Such claims are pursued after a judgment or settlement or in the same proceedings as the principal claim.

Passing on

35 | Is the 'passing on' defence allowed?

The Federal Supreme Court has not yet decided whether the passing on defence is allowed in private antitrust litigations. However, according to general tort law principles, the plaintiff cannot ask for more than full compensation of the damage suffered. If the damage is reduced because increased price levels have been passed on to the customers, then the plaintiff should only be entitled to seek for compensation for this reduced loss. As the EU Damages Directive is not applicable, the general principles regarding the burden of proof for the passing-on defence apply (see question 15).

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

According to article 41 of the Code of Obligations of 30 March 1911, four conditions must be met in order to establish liability for compensation claims:

- the claimant must have suffered damage;
- the defendant's act that caused the damage was unlawful;
- there is a link of proximate causation between the wrongful act and the damage; and
- the defendant was at fault (ie, it acted intentionally or negligently).

Therefore, the respondent may try to defend itself by alleging that no damage was suffered out of infringement, the absence of causality between the damage and the restraint of competition or the absence of fault. Additionally, the judge may reduce the amount of compensation if the claimant's behaviour caused the damage to increase or not to diminish.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Pursuant to paragraph 3, article 124 of the CPC, the court may at any time during the civil proceeding attempt to achieve an agreement between the parties. The court may schedule a special hearing or submit to the parties a written proposal for a settlement. The settlement can cover all claims or only a part of the claims. The parties may also at any time try to negotiate a settlement by their own volition and without the knowledge of the court. In that respect, an administrative proceeding before the competition authorities may also be settled amicably (article

29 of the Cartel Act). However, in this case, such a settlement does not, in principle, release the tortfeasor from being sanctioned. Moreover, it may result in a reduction of the sanction.

Civil antitrust matters may be resolved before an arbitral tribunal. Domestic arbitration is normally governed by the CPC, while international arbitration is governed by SIPLA.

UPDATE AND TRENDS

Hot topics

38 Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

As mentioned above (see question 3) there are different initiatives and motions pending that could affect private antitrust actions. One of the most important ones is the prohibition of price differentiation initiative (the Fair Prices Initiative). This initiative aims to crack the 'Swiss island of high prices'. The initiative proposes to introduce an obligation for entities based outside of Switzerland to sell products and services to Switzerland-based customers at the same prices as they sell such products and services to local customers. The initiative also proposes to introduce the concept of relative market power into Swiss law. The concept of relative market power would strengthen private antitrust actions because the plaintiff would no longer need to prove that the defendant has a dominant market position. Instead, a position of relative market power would suffice. However, the Federal Council has drafted an indirect counter-proposal to the Fair Prices Initiative. The counter-proposal also provides the introduction of a provision in the Cartel Act on relative market power, but limited to preventing misconduct by companies in cross-border competition. This means that no private antitrust actions could be taken in domestic business cases concerning relative market power. The dispatch on the Fair Prices Initiative and the Federal Council's indirect counter-proposal was published on 29 May 2019. The initiative and its counter-proposal have not yet been discussed by the parliament. Furthermore, it is generally known that the State Secretariat for Economic Affairs is considering further amendments of the Cartel Act. The strengthening of private antitrust actions is one of the key areas in which the authority has evaluated amendments. However, so far, there only exists an unofficial white paper with provisional proposals.

Another important matter is the definition of significant competition restraints within the Cartel Act. In 2012, the Competition Commission concluded that the general importer Altimum SA had dictated minimum sale prices for mountain sports equipment (headlamps, harnesses, helmets, ice picks, etc) to its retailers at least from 2006 to 2010, which prevented the retailers from competing for prices in the Swiss market. In 2015, the Federal Administrative Court approved Altimum SA's appeal and annulled the decision of the Competition Commission. With its judgment of 18 May 2018 the Federal Supreme Court partially upheld the appeal filed against the ruling of the Federal Administrative Court and confirmed the relevance of its *GABA/Elmex* decision, according to which agreements falling under article 5, paragraphs 3 and 4 of the Cartel Act are significant competition restraints within the meaning of article 5, paragraph 1 of the Cartel Act by their very nature. No effect of such agreements needs to be demonstrated. The statements of the Federal Supreme Court are relevant for private antitrust litigation, since the burden of proof for the claimant is lower in cases of such hard-core restrictions. There is a parliamentary motion of Council of States member Olivier Français pending that aims to reverse the effects of the *GABA/Elmex* decision. The motion's object is to ensure that unlawful restraints of competition are determined according to both qualitative and quantitative criteria. The Federal Council has recommended to reject the motion. The Council of States has referred the motion to the competent commission for preliminary consultation.

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Finally, the Federal Administrative Court issued two decisions concerning the right of third parties to access the files of proceedings after completion of an investigation (RPW 2018/1 p. 178, BVGE A-6315/2014 and RPW 2018/1 p. 194, BVGE 2016/22). In these cases, the Competition Commission granted access to the files to the extent that they relate to tenders affected by unlawful competition agreements in which the applicant was the competent purchasing body (public entity) and insofar as this does not reveal information disclosed by the leniency applicant. One party affected by the completed investigation challenged this disclosure. The Federal Administrative Court weighed the interests of each party. It stated that the applicant's interests were to be given high priority, in particular as far as its involvement as a victim of antitrust restraints was concerned. According to the Federal Administrative Court, the above-mentioned interests also coincide in principle with the public interests of the competition authorities, namely, to investigate infringements of antitrust law, to impose appropriate sanctions and to compensate for damages. The efficiency of antitrust law is thus also enhanced by the fact that the victims of cartels pursue their interests and exercise their rights. The Federal Administrative Court upheld the decisions of the Competition Commission. With regard to private antitrust litigation, access to the files is of great importance, as this information can be used to examine possible civil claims.

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