Individual and Collective Private Enforcement of Competition Law: Insights for Mexico

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Foreword

This Report provides an overview of international practices regarding private damages claims in antitrust, with the goal of identifying options for Mexico to consider as regards the implementation of an effective private enforcement system for competition law. In Mexico, as elsewhere, competition damages are a form of non-contractual liability. The report refers throughout to the United States and the European Union as they are widely perceived to be the leading competition-related norm producers in the world. Examples of other jurisdictions are used to address specific issues, or when they may be relevant to Mexico’s specific situation.

This report was produced following a request by Mexico for a broad ranging analysis of international experiences in private claims for private damages, including collective actions; and of how these international experiences may be harnessed by Mexico if it were to try to reform and increase the effectiveness of its private enforcement competition regime. This report does not deal with State liability that may result from regulations imposing barriers to competition identified within the context of an investigation initiated under article 94 of the LFCE.
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Executive summary

Mexico faces a significant challenge with respect to the effectiveness of its private enforcement competition regime. This is evident from the extremely limited number of private cases on competition matters – and, in particular, on competition damages – that have reached the courts to date.

Competition laws employ multiple tools for enforcement. Ideally, the various enforcement mechanisms should support each other and, taken together, achieve effective deterrence in the most efficient way. While both public and private enforcement can deter anticompetitive conduct, the objectives and incentives underpinning public and private enforcement are different.

Public enforcement primarily pursues the public interest in competitive markets by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate and ultimately punish infringements of the competition law. Public enforcement is not directly concerned with the compensation of damages suffered by the victims of anticompetitive conduct – reparation for such damages is traditionally the province of civil liability and private enforcement.

Private plaintiffs do not sue under competition law in order to improve the general welfare: they sue in order to pursue their own interests. However, the activity of private plaintiffs has an indirect deterrent effect on anticompetitive activities by allowing courts to stamp out anti-competitive conduct that was not detected or investigated by competition authorities. Furthermore, public enforcement is also perceived as being less effective than private enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristic. Some regimes – most notably the US – go as far as relying on private enforcement as the main tool to deter competition infringements.

It is important to strike the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated system in which numerous factors contribute to the complementary goals of deterrence and compensation. Identifying the right balance of public and private enforcement is key to ensuring that private enforcement: (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and that could discourage socially beneficial conduct.

The correct balance will depend on the individual characteristics and sanction mix of each jurisdiction. In systems where public enforcement by administrative entities predominate – such as Mexico – it is common to adopt measures to ensure that private enforcement does not negatively influence public enforcement. These include rules restricting access by private parties to the competition agencies investigation file; the protection of leniency-related documents and information against disclosure to parties in private competition proceedings; the granting of immunity or limiting the liability of leniency applicants; and
rules protecting the confidentiality of sensitive information even in public versions of infringement decisions. In addition, it is also common to allow or require competition agencies to provide support to courts or to intervene in competition cases. Given Mexico’s adoption of an administrative system that privileges public enforcement, similar measures should be adopted in the context of its efforts to promote private enforcement.

Before reaching this point, however, the first step towards implementing an effective private enforcement system is to consider what types of procedural mechanisms will be made available to private parties in their attempts to obtain damages (or other remedies) from infringers of competition law. An initial distinction can be made between judicial litigation and out-of-court dispute resolution mechanisms.

With respect to judicial litigation, the distinction between individual and collective claims is particularly relevant for competition damages claims. The harm suffered from competition infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases, damages suffered by each potential claimant can be very low and, where a claimant can only bring a competition claim individually, the costs and effort of filing a claim will probably outweigh the potential gains from a successful claim. Consequently, there is little incentive for individual victims to bring actions for compensation in respect of “atomised” damages.

To help overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress – usually either opt-in, opt-out or mixed systems. In Mexico, class actions are recognised in article 17 of the Constitution and regulated in the Federal Code of Civil Procedure (article 578 to article 626). Today, however, with the potential exception of representative claims brought by COFECE and IFT, class action suits cannot be used in claims for damages arising from competition infringements.

Collective redress mechanisms provide a solution to the economic obstacle faced by individual claimants whose claims are too small to support the cost of litigation – by aggregating a large number of individual claims into a single action. This aggregation also allows defendants (and courts) to save the time, energy, and resources required to litigate hundreds or thousands of individual claims – particularly in the context of opt-out claims. At the same time, however, class actions are a complex and costly way of achieving the goals of compensation and deterrence. In some cases, they might lead to speculative, opportunistic claims and excessive litigation. In order to serve the efficiency of justice and protect against frivolous litigation, systems that adopt opt-out class actions insist that the admissibility of the claims should verified at the earliest possible stage of litigation and that cases which do not meet the conditions for collective action and manifestly unfounded cases be dismissed as soon as possible.

A second type of tool for dealing with competition claims is out-of-court dispute resolution mechanisms, which allow victims to settle cases quickly and easily on a voluntary basis. Given the costs and uncertainty of litigation, and the complexity of competition-related damage claims, most systems try to promote resolution of claims out of court. Three main mechanisms can be found around the world: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration. While a constitutional reform in 2007 allowed the use of out-of-court dispute resolution mechanisms in Mexico, the conditions to apply such mechanisms are lacking. The main obstacle seems to be that while out-of-court dispute resolution mechanisms are regulated at the state level, competition is a federal matter and the applicable laws seem to require private enforcement matters to be addressed by judicial courts.
While the existence of procedural avenues to vindicate a right to compensation is a necessary element of any system of redress, it is not sufficient to ensure the system’s effectiveness. Instead, the effectiveness of any system of redress often depends on removing practical obstacles to the bringing of a claim – e.g. by allowing collective redress actions. However, given the expense and difficulty of claiming competition damages, the effectiveness of the system often depends on mechanisms that allow for sharing the risk and cost of bringing a claim, or that reduce the costs of bringing a successful claim. A number of mechanisms that operate to this effect have been adopted, to differing degrees, in various jurisdictions. These include: (i) third-party funding; (ii) success-based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement. These mechanisms seem to be untested in Mexico.

Once the mechanisms to bring competition claims are set up, a subsequent question concerns who should be able to start such claims. Economic injuries have a way of rippling through markets, creating larger numbers of victims than the typical contract or tortious dispute. In addition to consumers, the victims may also include competitors, suppliers, and firms operating in complementary markets. This creates a broad range of potential claimants. There are rules on standing for non-contractual liability – e.g. on capacity and on the existence of some “interest” or “genuine grievance” – that determine who has standing to sue. These rules are usually purposefully vague, and hence do not really allow for the exact identification of who does or does not have the standing to sue. As a result, an important question in most jurisdictions is who should have the standing to bring a claim in the private enforcement of competition law, and whose loss is too “remote” to allow them to start judicial proceedings.

Different jurisdictions approach this matter differently, mainly because of the different objectives underlying their private competition enforcement regimes. In the United States, where the main objective of private enforcement is to punish and deter competition infringements, only direct purchasers and suppliers have standing to sue. Importantly, this means not only that other victims are unable to sue, but also that the infringing party is unable to argue that the claimant did not suffer loss because it passed the economic impact of the competition infringement onto others. If the goal of private competition enforcement is primarily compensation, as is the case in Europe and in Mexico, every entity that may have suffered loss as a result of the infringement is a potential claimant. Importantly, this means that both indirect purchasers (as a claimant) and infringing parties (as a defendant) may argue that a direct purchaser passed on all or part of its loss. This ensures not only that all losses are compensated, but also that compensation is correctly allocated to all levels of the supply or distribution chain.

In practice, however, the possibility of a victim claiming damages in compensatory systems hangs on the rules on causation that apply, which may limit the extent to which a loss may be said to flow from a competition infringement. Rules of causation such as those adopted in Mexico, which require the harm to flow directly and immediately from the competition infringement, may prevent indirect purchasers or other types of victims from being granted damages for loss.

With respect to the identification and treatment of potential defendants, most legal systems adopt similar approaches. Most notably, private competition enforcement regimes routinely: impose joint and several liability on companies that have infringed competition law, coupled with mechanisms for defendants to then claim a contribution for damages between themselves; adopt rules that alleviate the burden on the claimant to prove fault in
antitrust private litigation so as not to make it excessively difficult or practically impossible to exercise the right to compensation; and adopt mechanisms to promote the settlement of cases out-of-court. There is also a widespread trend to protect public enforcement by limiting the liability of leniency applicants. In Mexico, some mechanisms related to joint and several liability and to the easing of proof of fault seem to be place, but there is an absence of specific tools to protect leniency applicants in subsequent private litigation or to promote out-of-court settlements.

The main area of international divergence regarding defendants in competition claims relates to who should be the addressee of a damages claim. Two main approaches can be found. According to the first approach, the autonomy of corporate bodies and legal form must be respected. As a result, a damage claim should be brought against the exact corporate entity that committed an infringement, except if lifting the corporate veil is allowed. A second approach focuses on the economic reality underlying the corporate entity that infringed competition law, and looks at the corporate group as a potential defendant. There is some lack of clarity in Mexico as to which approach should apply.

Non-contractual liability will usually arise if a number of requirements are met, namely: (i) unlawful conduct (illegality), either strict or with fault; (ii) the presence of damages (which must be quantified); and (iii) a causal link between the breach and the damages.

A basic distinction should be made as regards how the occurrence of a competition infringement can be demonstrated. On the one hand, there are actions that follow a finding by a competition authority that an infringement occurred. As a result of this decision, there already is evidence that an infringement has occurred, and the parties may only have to prove that they suffered damage as a result of the infringement (“follow-on claims”). However, private parties may also start damages claims even in the absence of public enforcement. In these cases, the claimant will have to prove that an infringement occurred in order to obtain damages (stand-alone claims”). While it is clear that follow-on claims are allowed in Mexico, there are doubts about whether stand-alone claims are allowed under Mexican law.

Absent any specific provision to the contrary, follow on claimants must establish the existence of an antitrust infringement - i.e. they have to re-establish the same facts and circumstances on which the competition authority relied for its infringement decision. Allowing claimants to rely on the findings of a competition authority allows them to focus on showing that they suffered actual damages from the anti-competitive conduct and on the quantification of such harms. This can be achieved by granting legally binding effect to competition authorities’ decisions in follow-on private actions. These effects can vary along a spectrum from an infringement decision sufficing to establish that an infringement has occurred in the context of claims for damages, to the infringement decision having prima facie evidentiary value than an infringement occurred, to the decision not having any additional evidentiary value in private competition cases. In Mexico, an infringement decision can be used to establish that a competition infringement occurred in subsequent follow-on claims for damages.

Even when a decision by a competition authority has binding effect, applying it in damage claims is not necessarily straightforward. Decisions of the competition authority usually include extensive and detailed explanations of the competition law infringement sanctioned by the authority. Deciding which elements of the decision are binding, or have additional probatory value, are questions that can raise practical difficulties. Some of these difficulties may be eased through statutory provisions and case law. As a rule, the effect of the infringement decision only extends to subsequent damages actions for the same antitrust
violation as found in the decision (i.e. same geographic scope, duration, etc.). Mexico does not seem to have rules on this matter.

When seeking damages for infringements of competition law, claimants must not only establish that an infringement occurred – they must do so in a timely fashion. Rules limiting the time during which a potential claimant can bring an action for damages create legal certainty, which is why they exist in all legal orders. However, limitation periods can also create considerable obstacles to the recovery of damages depending on their duration, on when they start, and on whether or not the duration period can be suspended. In particular, ‘short’ limitation periods that begin to run from ‘the moment the infringement started’ and which ‘cannot be suspended’ may render the right to seek compensation practically impossible. To ensure that the right to compensation can be enforced, limitation periods should not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to him; and (c) the identity of the infringer. Additionally, specific limitation periods may also be required to bring follow-on claims after an infringement decision is adopted. In Mexico, limitation periods are very short. The general rules further set out that the limitation period begins to run from the moment that loss has been caused, which may be ill suited for secretive anticompetitive activities. This is made clear by doubts about whether the right to claim follow on damages in Mexico will have prescribed in those situations where the public investigation only began after the limitation period expired.

Competition cases are particularly “fact-intensive”. As a rule, the burden is on the claimant to prove damages, if not the infringement. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. Evidence needed by the claimant to make its case is often in the hands of the defendants, of third parties, or of the competition authority. The difficulties faced by claimant in obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions

This helps explain why public versions of cartel decisions are very important for damage claimants. Damage claimants view the public version of the infringement decision as an important potential source of evidence, and have an interest in getting swift access to a version which is as detailed as possible. To address the difficulties faced by claimants when bringing claims for competition law damages, private enforcement regimes have also developed mechanisms that allow potential claimants to gain access to the evidence necessary to successfully plead a private damages case. Such mechanisms include: (i) mechanisms for disclosure of evidence in the possession of defendants or third parties; (ii) access to competition agencies’ files; (iii) access to settlement documents; (iv) rules on expert evidence. Mexico mostly lack such mechanisms, as private competition cases will follow the normal rules of evidence for civil claims.

Evidence in competition claims is necessary to establish that loss flowed from a competition infringement, and to quantify damages – i.e. causation and quantum. As regards causation, courts may find significant difficulties when trying to establish it in competition cases: markets are complex institutions and competition infringements very

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1 In stand-alone claims, evidence will also be necessary to establish that an infringement took place.
often impact on sophisticated supply chains working in highly complex market structures, which make the identification of causative links particularly difficult. In order to address this, legal regimes around the world have adopted rules and mechanisms that are specific to the operation of causation in competition cases. These mechanisms vary across countries, and include the adoption of legal and evidentiary presumptions, modifications to the allocation of the burden of proof, relaxing the standard of proof, and borrowing from the content of infringement decisions. In Mexico, it is required that the harm be caused directly and immediately by the competition infringement, and causation is subject to the generic legal and evidentiary rules governing non-contractual liability.

As regards quantum, i.e. the quantification of loss, this is subject to considerable limits as to the degree of certainty and precision that can be achieved. In the specific circumstances of any given case, the appropriate approach to quantification must be determined under the applicable rules of law. Relevant considerations may include, alongside the standard and burden of proof applicable, the availability of data, the costs and time involved, and the balance between these costs and the value of the damages claim at stake.

Given difficulties in quantifying harm, courts will usually only be able to arrive at best estimates relying on assumptions and approximations. This can be done in a number of ways. On the one hand, there may be legal rules allowing or setting up mechanisms for the estimation of damages. The legal system may also modify the burden of proof, adopt presumptions of harm, or lower the standard of proof required for the quantification of harm flowing from a competition infringement. These mechanisms are justified by a general principle of effectiveness of judicial action, which requires that damages actions should not be rendered practically impossible or excessively difficult. On the other, there are a number of economic tools developed throughout the years for the purpose of estimating damages, and it may be possible for courts to benefit from the assistance of a specialised bodies. Damages in Mexico seek to compensate for loss suffered, in line with the rules applicable to non-contractual liability more generally. The victim must prove that it suffered the amount of loss for which it claims damages, and there are no mechanisms that seek to facilitate the estimation of damages.

In practice, and in addition to the identification of harm actually suffered, the amount that a claimant may obtain in damages proceedings can depend on a number of factors. A first factor is the relationship between loss suffered and the amount of damages award – and particularly whether damages are compensatory or punitive, and whether passing on is allowed as a defence or as the basis of a claim. A second factor concerns the mechanisms that address the difficulties created by the passing on of harm down the economic chain, such as whether passing on is allowed, presumptions of passing on or judicial duties to estimate passing on. A third factor is interest and its impact on the final amount of damages. Compensation for damages caused by an infringement of competition law is often claimed after a significant delay, sometimes many years after the damage has been suffered. As such, the rules on the calculation of interest – e.g. whether it is simple or compound, when it begins to run – may be crucial to determine whether damages sufficiently compensate for loss. A fourth factor concerns rules that may reduce the amount of damages that an infringing party is liable for in order to promote and protect public enforcement. There are jurisdictions that have considered necessary to reduce the civil liability of successful leniency applicants in subsequent damages actions to preserve the attractiveness of leniency programmes. In Mexico, the principle of compensation would seem to require passing on to be taken into account by courts, but it is unclear under which legal framework this may take place. Furthermore, interest applies in line with general non-contractual
liability rules, and no special treatment is foreseen for leniency applicants who are liable for private competition damages.

In light of the comparison between international best practices and Mexico as regards private competition enforcement, this Report concludes with a number of recommendations for Mexico as it seeks to implement a fair, effective and manageable system of private competition enforcement. These include, among others:

- Clarifying that stand alone claims for competition damages are allowed in Mexico, and that no prior infringement decision is required for such a claim to be brought;
- Clarifying that the specialised administrative courts are responsible for hearing private competition enforcement claims, including damages claims, and endowing these courts with the necessary powers and resources to fulfil this function.
- Amending the rules on standing, causation, liability, passing on and damages quantification in order to enable victims of anticompetitive conduct to obtain redress for damages suffered.
- Adopting rules of evidence suited to the complexities of competition law, including rules that ensure that it is possible for claimants to access evidence necessary to bring successful claims.
- Adopting institutional mechanisms to simplify the resolution of competition damages claims, such as promoting settlements and alternative dispute resolution (ADR) mechanisms, adopting rules on the binding effect of infringement decisions in subsequent damages claims, creating presumptions of harm and passing on, allowing courts to estimate the amount of damages, and adopting collective redress mechanisms that ensure that competition claims are, inasmuch as possible, all brought together in a single court and in as few cases as possible.
- Adopting opt-out collective redress actions for (some) competition claims, while devoting great care to ensure that such actions are manageable and subject to appropriate control.
- Adopting rules to ensure that competition damages claim have a realistic prospect of being brought, such as adopting sufficiently long limitation periods, creating incentives for third-parties to incur risks associated with assisting victims in bringing competition claims, ensuring the timely publication of competition infringement decisions and the disseminating of their content, and adopting judicial costs rules that promote the bringing of legitimate claims with reasonable prospects of success.
- Adopting measures that protect the effectiveness and integrity of public enforcement, such as protecting leniency and immunity applicants, and preventing or limiting the disclosure of certain elements in the competition agency’s file;
- Adopting measures to ensure the coherence of public and private competition enforcement.
Introduction

The present Report was produced as the result of a request by Mexico for a broad ranging analysis of international experiences in private claims for private damages, including collective actions; and of how these international experiences may be harnessed by Mexico if it were to try to reform and increase the effectiveness of its private enforcement competition regime. This report does not deal with the State liability that may result from regulations imposing barriers to competition identified within the context of an investigation initiated under article 94 of the LFCE.

Competition laws employ multiple tools for enforcement. These can include the imposition of monetary or criminal penalties on corporations, civil and criminal sanctions on individuals – such as jail time, pecuniary penalties or disqualification orders –, and injunctions. To these tools should be added obligations to pay damages for loss caused by anticompetitive conducts. Private actions for antitrust damages often operate alongside public enforcement to deter anticompetitive conduct, while also seeking to “compensate” the victims of cartelization.

A frequently used model of optimal deterrence defines the optimal expected sanction, in line with Gary Becker’s seminal works on the economic analysis of crime prevention (Becker,(n.d.); Becker, 1968). An optimal sanction should force a firm to internalize the social costs of its behaviour. Hence, the optimal damages award should equal the external harm done by the cartel – i.e., the net harm to persons other than the cartelists. Therefore, in an ideal world the recoverable damages should equal the deadweight loss borne by persons other than cartelists, plus the cartel overcharge (Posner and Easterbrook, 1981, p. 550).

In addition, as the likelihood that a cartel will be detected and that a victim will subsequently (successfully) sue for damages is less than one, the actual damages awarded should be adjusted upward: net harm to others ÷ (Probability of detection × Probability of successful damages action or settlement) (Franck et al., 2017, pp. 12-13).

Ideally, the various enforcement mechanisms should support each other and, taken together, achieve effective deterrence in the most efficient way. Public enforcement is not directly concerned with the compensation of damages suffered by the victims of cartelization.

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anticompetitive conduct – reparation for such damages is traditionally the province of civil liability and private enforcement.

However, private enforcement has played a leading role in competition enforcement in only a few jurisdictions, and particularly in the United States. Instead, in most jurisdictions competition law developed primarily as an administrative enforcement tool. In jurisdictions where administrative enforcement predominates, the competition authority plays a central role in enforcing competition law, and effective competition enforcement relies almost exclusively on the capacity and ability of competition authorities to detect, investigate, sanction and ultimately deter anti-competitive behaviour. While private enforcement has to date played a minor role in these jurisdictions (OECD, 2015, pp. 3-4[5]), it can nonetheless provide a safety net for when public enforcement fails (Franck et al., 2017, pp. 12-13[4]). At the same time, private and public enforcement play different, if complementary roles.

In Mexico, until very recently there had not been any successful damage claims for infringements of competition laws since the Federal Law of Economic Competition (FLEC) came into effect in 1993. The main reason for the low level of private damage claims is that victims could claim damages only after a final decision of the competition authority had determined the existence of an infringement of the competition law. The new Mexican Competition law was enacted in 2014, and, as a result, actions for competition damages may only be introduced once the competition authorities’ decisions are no longer subject to judicial review. After some delays caused by doubts about which court – whether general civil or specialised competition District Courts (juzgados) – had jurisdiction to hear competition damages claims, the first competition infringement action is now underway. It was brought by IMSS, the Mexican Social Security Institute, against a number of pharmaceutical companies that were found by the Mexican competition authorities to have colluded to raise prices through bid rigging. 4 As we will see below, a very recent decision has for the first time led to an award of competition damages.

In order to obtain information on international experiences and on how to implement an effective private enforcement system that complements its public enforcement system against infringements of competition law, Mexico has asked the OECD to prepare the present report.

This Report provides an overview of international practices regarding private damages claims in antitrust, with the goal of identifying available options for Mexico to consider as regards the implementation of an effective private enforcement system for competition law. Throughout the Report, reference will be made to the US and the EU, which are widely perceived to be the leading competition-related norm producers in the world. Examples of other jurisdictions will be used to address certain specific issues, or when they may be relevant to Mexico’s specific situation.

The Report is divided into two main sections, each of which is in turn divided into individual chapters. The first section contains a high level analysis of the main private enforcement systems around the world. It contains chapters describing the overall background and rationale for private enforcement, and general descriptions of the most relevant private enforcement systems across the world (Chapter 1); discussing the interaction between public and private enforcement (Chapter 2); and providing an overview of Mexico’s non-contractual liability regime which would apply to most competition

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4 See below at Chapter 3.3.2.
damages claims (Chapter 3). The second section looks in more detail at the various constitutive elements of private enforcement regimes. This section comprises chapters focusing on the mechanisms for obtaining private redress, such as individual claims and collective redress mechanisms (Chapter 4); out-of-court compensation mechanisms (Chapter 5); practical options to ensure the effectiveness of damages claims (Chapter 6); standing to claim for damages (Chapter 7); rules applicable to defendants in such claims (Chapter 8); the means through which it is established that a competition law infringement took place (Chapter 9); the relevant rules of evidence (Chapter 10); the rules regarding the causation of damages (Chapter 11); the measure and quantification of damages (Chapter 12); and a final section describing the main economic methods that may be used to calculate damages arising from an infringement of competition law (Chapter 13). The Report then concludes with a section containing policy recommendations for Mexico.
Part I. Overview of Private Enforcement Systems

This first, short section provides a high-level overview of the main competition private enforcement systems around the world. It contains chapters describing the overall background and rationale for private enforcement, which also contains summary descriptions of the competition private enforcement systems most relevant for the purposes of this report (Chapter 1); a discussion of the interaction between public and private enforcement (Chapter 2); and an overview of the current situation in Mexico regarding claims for damages and non-contractual civil liability (Chapter 3).
Chapter 1. Private Enforcement at a Glance

1.1. Background and rationale for private enforcement

If by private enforcement we mean reliance on competition law by private parties in litigation, there are arguably three types of private actions involving competition law: (i) where competition law is used as a ‘shield’, i.e. as a defence against a contractual or other type of claim; (ii) where competition law is used as a basis for claims for injunctive relief, including interim relief; and (iii) where competition law is used as a basis for claims for damages (Wils, 2017, p. 46). The present report focuses solely on claims for damages, even though much of what is relevant for such claims may also be relevant for other types of private enforcement of competition law.

While both public and private enforcement can deter anticompetitive conduct, the objectives and incentives underpinning public and private enforcement are different. Public enforcement primarily pursues the public interest in competitive markets by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate and ultimately punish infringements of the competition law (OECD, 2015, p. 36; Wils, 2009, p. 8). Private plaintiffs do not sue under competition law in order to improve the general welfare: they sue in order to pursue their own interests (Hovenkamp, 2005, p. 58).

In itself, this situation is not different from that of other areas of the law – and the bringing of private claims can be perceived as a public good, a form of identifying more anticompetitive practices than a pure public enforcement system would be able to and of increasing the costs of engaging in anticompetitive practices. Even though claimants bring private claims based on the harm they believe to have suffered, they are still contributing to public interest objectives by allowing courts to stamp out anti-competitive conduct. In that respect, both private and public enforcement contribute to safeguarding the public interest in competitive markets (OECD, 2015, p. 37).

Private enforcement seeks to provide compensation for victims of competition infringements (Roach and Trebilcock, 1996, p. 480). While some have criticised compensation as an objective of competition law (Schwartz, 1981, pp. 31-32), under most tort systems compensation is a natural consequence of an illicit act that caused damage to a victim. But private enforcement can also play a role in deterrence.

It has been argued that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable as through public enforcement (Becker and Stigler, 1974). The role of private parties is particularly important in jurisdictions that rely greatly on private claims to ensure antitrust enforcement and to close the so-called “enforcement gap” created by the perceived inability of public enforcement authorities to effectively deal with all cases due to resource constraints. As a result, such systems often have deterrence-oriented features – such as the award of treble damages under US law. Even in jurisdictions that rely mainly on public enforcement and where the objective of private enforcement is merely to ensure compensation, the possibility of private enforcement is thought to
contribute to the deterrent effect of competition law by adding to the costs and risks incurred by wrongdoers (OECD, 2015, p. ara. 3[12]).

In addition to giving rise to an “enforcement gap”, public enforcement is also perceived as being less effective than private enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics (OECD, 2015, p. ara. 4[12]). A private party who has suffered a loss as a result of a competition law infringement may be in a better position, and may have better information, to enforce the law than a public official. Closer proximity to the infringement may mean that the costs of detecting possible violations and gathering evidence may be lower for private parties than for public enforcers (Roach and Trebilcock, 1996, p. 480[9]).

This is not to say that private enforcement does not have its critics. When compensation exceeding the social costs of the illegal activity is required to deter defendants, this will create incentives for a higher than optimal number of individuals to seek such compensation, to act as private enforcers, and to devote their own private resources to the detection and prosecution of illegal anticompetitive conduct. This would increase the probability of detection, but could also result in over-enforcement and deterrence above socially optimal levels (Posner and Landes, 1975, p. 15[13]; Schwartz, 1981, p. 9[10]). However, the prevailing view is still that optimal enforcement requires public and private enforcement to be combined harmoniously. Rather than abandoning private enforcement, it is required that the damages awarded to claimants and the proceedings leading to their award be fine-tuned so as not to divert more private resources than what is socially optimal to the enforcement of public goods (Roach and Trebilcock, 1996, p. 476[9]; Jones, 2016, p. 11[14]).

A more serious concern is the use of private enforcement strategically. Competitors have incentives to use competition law strategically as part of their business strategies. As a consequence, the procedures for the enforcement of competition law must be carefully designed to prevent their capture by business (Brodley, 1995, pp. 45-46[15]).

A last advantage of private enforcement is that it provides a means to control public enforcement. It provides protection against the capture of public enforcement bodies: “Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies” (Mashaw, 1975, p. 33[16]). It also serves as an important means of ensuring that public enforcers’ decisions not to prosecute do not carry excessive costs if mistaken, and does so in a way that does not impose costs on the public purse – because the litigation, and hence the enforcement of competition law, will be pursued by a private party (Roach and Trebilcock, 1996, pp. 482-483[9]).

1.2. Overview of existing systems

1.2.1. The US system

The United States is the OECD jurisdiction which has the longest and most extensive experience with private antitrust enforcement (OECD, 2015, p. 4[15]). From the outset, Congress contemplated that private parties would play a central role in the enforcement of private enforcement at a glance

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5 Quoted in (Roach and Trebilcock, 1996, p. 481[9]).
the Sherman Act. Indeed, Senator Sherman believed that individuals should act as “private attorneys general,” and that the antitrust laws should encourage such enforcement (Cavanagh, 1986, p. 782[7]).

In order for damages to be awarded, the Clayton Act requires that there be a violation, that the plaintiff show causation and an appropriate injury, and that the damages be provable with sufficient clarity (Hovenkamp, 2005, p. 66[8]). The central feature of private antitrust remedies is its provision for treble damages, which allows plaintiffs in all cases to recover “threefold the damages by him sustained.” Successful antitrust plaintiffs may, in addition, recover attorneys’ fees and, in certain circumstances, pre-judgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages, i.e. each defendant is liable for the full amount of damages even if several defendants jointly engaged in the unlawful conduct (Antitrust Modernization Commission, 2007, p. 243[18]).

The number of private claims in the US seems to fluctuate over time in correlation with the attitude of the courts towards private antitrust claims and the level of government enforcement (OECD, 2015, p. 4[5]). Under Section 5 of the Clayton Act, a final decree in favour of the government in any public enforcement proceeding shall be prima facie evidence of an infringement in any subsequent private action on the same claim. Until the 1950s, there were few private antitrust cases. The number of private antitrust actions began to rise significantly in the 1960s and peaked in 1977. Subsequently, the amount of new private antitrust filings declined significantly, perhaps as a reaction to developments in case law restricting the use of per se rules and expanding the reach of the rule of reason. Unlike per se rules – under which a conduct is deemed automatically unlawful – the rule of reason requires plaintiffs to rely more substantially on economic evidence in order to demonstrate the anti-competitive effects of the relevant conducts.

In the early 1990s the number of private claims started to increase again, mainly as a result of follow-on claims that benefited from the success of the US Amnesty Programme and from an increase in government enforcement activity regarding criminal conduct (i.e. hard core cartels). More recently, however, the Supreme Court’s decision in Twombly adopted a stricter standard of “plausibility” that must be met before a private claim for damages arising from an antitrust infringement is allowed to proceed to the evidence discovery phase. This standard requires plaintiffs to plead sufficient facts to state a “plausible” claim for relief at an earlier stage in the proceedings (i.e. before they have had access to evidence disclosed by the defendant). This higher standard has been perceived as underlying a drop

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6 Stating that Senator Sherman expressed concerns about providing a remedy that would be “commensurate with (...) maintaining a private action”.


in private claims over the last few years. Nonetheless, private plaintiffs still filed 1,022 antitrust cases in federal district courts in 2016.

Figure 1.1. US private antitrust case (1950 to 2011)

Despite these fluctuations, it is commonly held: that private actions in the US represent at least 90% of all federal antitrust cases; that while private damages recoveries worldwide between January 1990 and August 2012 totalled USD 41.8 billion, $38.7 billion (or 93%) were collected in the United States; and that private damages far exceed the cartel fines imposed by the authorities.

1.2.2. The European approach

Competition law enforcement across Europe is primarily based on public enforcement, but recent years have seen a push to promote private enforcement, including damages claims. While it was settled in the 1970’s that competition provisions could be applied in disputes between private parties, these provisions were engaged mainly as a means to invalidate contractual provisions which parties disputed.

10 After the Twombly decision, the rate of dismissal of antitrust cases increased significantly. In 74% of 378 court decisions between 2007 and 2011, the plaintiff’s claims were dismissed at the pleading stage because they did not meet the Twombly “plausibility” standard.


12 Between 1990 and 2012, federal penalties totalled USD 11 billion while penalties imposed by the State AGs and other government agencies reached USD 4.8 billion. Settlements announced by private plaintiffs in North America total USD 41.8 billion – roughly 2.6 times the amount of penalties levied by government entities in North America.

13 See, as an early example of a dispute between private parties before the courts in which a competition provision was invoked as a defence, Case 127/73 BRT and SABAM EU:C:1974:25.
decision of the Court of Justice of the European Union (CJEU) in Courage that it was made clear that the “full effectiveness” of the prohibition of restrictive practices pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU) “would be put at risk if it were not open to any individual to claim damages for loss caused to him.”

While there is now a duty imposed by EU law on the EU’s Member States to allow damages claims for antitrust infringements, it is still the laws of individual Members States that govern such claims. Thus, damage claims are subject to national laws – and usually follow general principles of national tort law – subject to the proviso that the applicable rules must not render the right to claim damages “practically impossible or excessively difficult.” Nonetheless, the Commission adopted a Recommendation on 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (the ‘Collective Redress Recommendation’) which sought to establish principles which should be applicable in relation to collective actions regarding the infringement of competition law and other EU provisions (European Commission, 2013).

Despite these legislative developments, only few victims of competition infringements have been able to obtain compensation for damages in Europe, and access to collective redress mechanisms remains limited (European Commission, 2013, p. 3). During the period 2006-2012, less than 25% of the EU Commission’s infringement decisions were followed by damages claims. In an analysis it published in 2013, the European Commission described private enforcement in EU Member States as follows:

“Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only 7 Member States. In the 20 out of 28 Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision. Among those 7 Member States where actions were brought, the vast majority was brought in the United Kingdom, Germany and the Netherlands.” (European Commission, 2013, p. ar. 52)

The European Commission has invested in fomenting a “culture” of private enforcement of EU competition law. In order to increase the incentives to seek compensation before the courts, a Directive on Competition Damages was adopted on 26 December 2014. According to its Article 3(1): “Member States shall ensure that any […] person who has suffered harm caused by an infringement of competition law is able to claim and to obtain

15 Case C-453/99, Courage v. Crehan, EU:C:2001:465, para. 29. This principle was codified in Article 4 EU Cartel Damages Directive: “In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law.”
16 However, it seems that significantly more stand-alone cases are brought in Europe than follow-on claims. See (Lianos, Davis and Nebbia, 2015, p. 3) and Chapter 9. below.
In order to ensure that the right to full compensation is effectively guaranteed, the Directive puts forward a number of measures which intend to make it easier to bring successful competition damages claims, including rules on: (i) disclosure of evidence; (ii) the evidentiary value of infringement decisions adopted by national competition authorities in follow on claims; (iii) limitation periods; (iv) passing-on defence and standing of indirect purchasers; (v) quantification of harm; (vi) joint and several liability; and (vii) consensual dispute resolution (OECD, 2015, p. 7[5]).

1.2.3. Other Approaches

While the EU and the US provide the main templates for competition law claims for damages, a number of jurisdictions have adopted private enforcement systems with local characteristics worth describing. The jurisdictions below are presented as examples of the different ways in which a jurisdiction can adapt their private enforcement regimes to local circumstances.

United Kingdom

In 2015 the United Kingdom – which already had a functioning private enforcement regime in place – adopted a number of reforms with a view to promote the private enforcement of competition law. A number of reforms of these reforms distinguish the UK from other European jurisdictions. Such reforms include:

- Granting the specialist Competition Appeal Tribunal (the “CAT”), which up until then only had competence to hear follow-on claims, jurisdiction to hear stand-alone private damages claims as well;
- Creating an entirely new opt-out procedure for private damages claims. Under this procedure, a representative is entitled to bring a claim on behalf of a defined class of claimants, either on an opt-in or an opt-out basis. Up until this point, only opt-in claims were available. The CAT will certify whether an action is suitable for a collective action, whether it should be brought on an opt-in or opt-out basis, and whether the class representative is a suitable one.
- Creating a new ‘fast track’ procedure, which is intended to make it easier, quicker and cheaper for individuals and micro, small and medium-sized entities to seek redress for harm suffered as the result of anti-competitive behaviour;
- Promote Alternative Dispute Resolution (ADR) mechanisms. Although they are not mandatory, ADR mechanisms are a way to ensure that courts are used by claimants as a last resort. Proposed ADR mechanisms include the establishment of a new opt-out collective settlement regime within the CAT, which should allow businesses to settle cases quickly on a voluntary basis. The Competition and Markets Authority (CMA) was also given a limited role in certifying voluntary

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18 Through the Consumer Rights Act 2015 (the “CRA”) which amended the competition law regime in the UK as regards private actions as set out in the Competition Act 1998 (the “CA”).
Adopting mechanisms that ensure that private actions complement the public enforcement regime by maintaining consistency between the actions of the CAT and the CMA. The CAT is required to notify the CMA when private actions cases are initiated, while the CMA is able to act as an intervenor in private actions cases.

Brazil

Brazil has adopted both collective redress and double damages systems to ensure the right for compensation of consumers who have suffered from a competition infringement. Only governmental and publicly held entities are allowed to file such a claim, but local state and federal prosecutor’s offices can represent alleged victims and seek collective redress for anti-competitive conduct.

Although Brazil’s tort law normally only allows the award of single damage, victims of antitrust misconduct may seek the payment of double damages on the basis of Article 42 of Brazil’s Consumer Protection Code. In an effort to promote follow-on antitrust damage actions, in 2010 CADE included for the first time in a cartel decision an order that a copy of the decision be sent to potential injured parties to allow them to recover their losses. As a consequence, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country (OECD, 2015, p. 11[5]).

Spain

Although Spain had already adopted competition legislation in 1963, in reality there was no public enforcement until 1989. While it was theoretically possible for victims of anticompetitive violations to bring a claim for damages in court, they could only do so when an infringement decision became final and definitive. Given that there was no public enforcement until 1989, this meant there was no private enforcement either.

The legal reform of 1989, while kick-starting public enforcement, maintained the requirement that a prior final and definitive infringement decision must have been adopted before a damages claim could be brought before the courts. As a result, some of the first few successful competition damages claims based on Spanish Law reported were based on the 1991 Unfair Competition Act, which condemns business conduct in breach of market legal rules – including competition law provisions – as an unfair act (Marcos, 2014, p. 93[24]).

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19 The United Kingdom’s Competition and Markets Authority has released draft guidance on its new power to approve voluntary payments from lawbreakers to those harmed by their anti-competitive actions (https://www.gov.uk/government/consultations/redress-scheme-approval-in-competition-cases-draft-guidance).

20 Ley 110/63 de Represión de Prácticas Restrictivas de la Competencia, of 20th July 1963, Article 6.


Around 350 cases of private enforcement were brought in Spain from 1999 to 2016. However, the vast majority of these cases were not concerned with damages claims. Instead, the vast majority of them concerned contractual disputes in vertical relationships in which competition law was raised (either by the claimant or the respondent) as a ground for nullity and/or compensation for contractual damages. Almost half of all cases related to petrol supply agreements, and the overwhelming majority were stand-alone claims brought by businesses against other businesses (Marcos, 2014, pp. 96-98[24]).

It was only in 2007 that stand-alone claims for damages were allowed. Nowadays, and as concerns specifically damages claim, Spain broadly follows the European approach. The main example of a successful competition damages claim in Spain concerns a sugar cartel sanctioned by the Spanish competition authority. It was estimated that the cartel caused damages in excess of EUR 25 million (OECD, 2002, p. 97[25]). Private claims for damages were submitted by confectioners, and, in the end, EUR 5 million were awarded as damages (Marcos, 2015, pp. 212-213[26]).

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23 The EU Damages Directive was transposed by section II of Real Decreto Ley 9/2017, de 26 de mayo.
Chapter 2. The interaction of public and private enforcement systems

Competition systems comprise not only competition laws, but also the institutions that enforce them, such as competition law enforcement agencies and courts. There are also many other critical components that will influence the success of any competition policy system in securing deterrence and compensation, all of which are highly interdependent. Designing a competition system that will secure “optimal” deterrence and compensation will depend on each jurisdiction’s characteristics (Gavil, 2007[27]). One such characteristic is the respective roles of public and private enforcement.

Public enforcement can be defined as the enforcement of competition laws by a governmental body, for example a competition authority or a prosecutor, which will have the competence to detect and sanction infringements of competition rules. By contrast, private enforcement can generally be defined as litigation initiated by an individual, a legal entity, an organisation or a public entity (such as local government or a government agency) to have a court establish an antitrust infringement and order the recovery of the damages suffered, or to impose another type of injunctive reliefs. Private enforcement can be triggered by a stand-alone action or by an action which follows on from a public enforcement decision. In most jurisdictions, private enforcement preponderantly takes the form of follow-on claims (OECD, 2015, p. 3[5]).

There is broad agreement in the literature and in policy documents that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. At the same time, it is very important to strike the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated system in which numerous factors contribute to the complementary goals of deterrence and compensation.

A mixed system creates checks and balances in order to ensure that public and private enforcement complement, rather than undermine each other (Cavanagh, 2009, p. 808[28]). Identifying the right balance of public and private enforcement is key to ensuring that private enforcement: (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and that could discourage socially beneficial conduct (OECD, 2015, p. 3[5]).

This author identifies the following characteristics: (1) methods for detecting transgressions of the competition laws, such as investigative authority and leniency programs; (2) the procedural and evidentiary rules that guide agencies, parties, and courts in initiating competition law proceedings, collecting and presenting evidence, and evaluating claims; (3) the existence and scope of public and private rights of action; (4) rules and restrictions on antitrust injury and standing; (5) the severity of penalties, such as criminal sanctions and treble damages, and the scope of authority to impose other kinds of remedies; and (6) the costs of enforcement and public commitment to funding it.
This balance will depend on a number of factors, of course, but one of the most important is the local enforcement mix. In a few jurisdictions, and particularly in the United States, private enforcement has long played a central part in the competition law framework. These jurisdictions operate on the basis that private incentives for compensation are ideal tools for deterring competition law infringements, and private enforcement is thus the primary mode of competition enforcement or, at the very least, a crucial complement to public enforcement.\(^{25}\) In most jurisdictions, however, competition law developed primarily as an administrative enforcement tool that protects the interests of consumers against collusive practices as well as against abuses of market power by large companies. In jurisdictions with such an administrative enforcement system, competition enforcement bodies play a central role in enforcing competition law. Effective competition enforcement relies almost exclusively on the capacity and abilities of competition authorities to detect, investigate, sanction and ultimately deter anti-competitive behaviours. In competition law systems based on strong public enforcement, private enforcement has to date played a minor role (OECD, 2015, pp. 3-4\(^{[5]}\)).

We shall now review each system in turn.

### 2.1. Systems where private enforcement predominates

In the US, which is the leading example of a jurisdiction that grants a large role to the private enforcement of competition law, private parties are expected to act as “private attorneys general” and play a central role in the enforcement of the Sherman Act. In order to encourage enforcement, 


\[^{27}\]15 U.S.C. § 1 (authorising criminal penalties up to $100 million for corporate offenders, and up to $1 million and/or up to 10 years in prison for individuals); 18 U.S.C. § 3571(d)
the Federal Trade Commission (FTC) can seek broad injunctive relief to prevent future violations— including requiring the restitution of damages and the disgorgement of profits. Congress has also authorized the antitrust agencies to seek civil fines, but only for breaches of antitrust consent decrees, or for procedural violations such as a failure to file a pre-merger notification. In practice, however, while the DoJ has statutory authority to criminally prosecute violations of sections 1 and 2 of the Sherman Act, the scope of criminal enforcement has been narrowed over time to ‘hard-core’ price-fixing, bid rigging or market allocation cartels. For other antitrust violations, US public enforcement is in practice limited to prospective injunctive relief, leaving a deterrence gap to be filled by damages actions (Antitrust Modernization Commission, 2007, p. 296[18]). Congress has also authorized the United States to seek treble damages “[w]henever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws.”

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28 For substantive, non-criminal antitrust violations, Congress has authorised the DOJ and the FTC to seek equitable relief, including injunctions, temporary restraining orders, and “cease and desist” orders – see 15 U.S.C. § 45(b) (authorising the FTC to seek “cease and desist” orders against violators); 15 U.S.C. § 53(b) (authorising the FTC to seek temporary restraining orders and injunctions from the district courts); 15 U.S.C. § 4 (granting the DOJ the authority to “prevent and restrain violations of [the Sherman Act]”); 15 U.S.C. § 25 (granting the DOJ the authority to “institute proceedings in equity to prevent and restrain (...) violations [of the Clayton Act]”).

29 Courts generally have interpreted Congress’s express authorisation to seek broad equitable remedies, such as injunctions and restraining orders, as implied congressional authorisation to seek all equitable remedies—including restitution and disgorgement. In Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). the Supreme Court explained that: “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”

30 Courts can retain continuing jurisdiction over decrees filed by the DOJ pursuant to the Antitrust Procedures and Penalties Act (APPA or Tunney Act). A violation of those decrees “whether litigated or consent, is punishable as contempt of court for which severe penalties may be imposed”. The FTC may pursue similar fines pursuant to 15 U.S.C. § 45(f). See, e.g., United States v. Boston Scientific Corp., 253 F. Supp. 2d 85, 86 (D. Mass. 2003) (suit initiated by the DOJ on behalf of the FTC resulted in a $7 million fine against Boston Scientific for violation of a 1995 FTC Consent Decree).

31 See, e.g., 15 U.S.C. § 18a(g)(1) (“Any person (...) who fails to comply with [Hart-Scott-Rodino Act (HSR Act) filing requirements] (...) shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section.”). Although 15 U.S.C. § 18a(g)(1) specifically refers to the DOJ’s ability to seek civil fines for non-substantive antitrust violations, the FTC can obtain civil fines for similar violations by asking the DoJ to initiate a proceeding on its behalf. See, e.g., United States v. Hearst Trust, Complaint for Civil Penalties For Failure to Comply with Premerger Reporting Requirements of the Hart-Scott-Rodino Act, No. 1:01CV02119 (Oct. 11, 2001) (complaint filed at the request of the FTC, which resulted in a $4 million civil fine against Hearst for its failure to comply fully with HSR Act requirements).

It has been argued that the authority of the US antitrust agencies to seek civil fines should be expanded beyond procedural violations, so that the antitrust agencies could seek civil fines for substantive, non-criminal antitrust violations, just as enforcers in the European Union and others countries do. Against this, it has been held that allowing the government to extract monetary remedies for substantive non-criminal antitrust violations – a role currently fulfilled by private plaintiffs seeking treble damages – could result in defendants making duplicative, excessive payments (Antitrust Modernization Commission, 2007, p. 284[18]).

It has also been suggested that federal antitrust agencies should increase the use of their equitable powers to obtain disgorgement and restitution remedies. In only eleven antitrust cases between 1980 and 2007 did the FTC seek equitable monetary remedies. The reason for this seems to be, again, that it is expected that defendants will have to pay treble damages, and that the imposition by the FTC of equitable monetary remedies is unnecessary and excessively onerous. Only in certain circumstances – e.g. when obstacles such as statutes of limitations, prohibitions against suits by indirect purchasers, or standing requirements hinder the filing of a treble damages suit – will the FTC seek monetary remedies (Antitrust Modernization Commission, 2007, p. 286[18]). In particular, the FTC has issued a Policy Statement on Monetary Equitable Remedies in Competition Cases (“the Policy Statement”) intended to provide the public with guidance as to when, in its prosecutorial discretion, the FTC will seek such relief. The Policy Statement identified three factors that will govern the FTC’s use of monetary equitable remedies: (1) whether the violation was “clear” (i.e., a reasonable party should expect its conduct to be found illegal); (2) whether there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and (3) whether use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.33

2.2. Systems where public enforcement predominates

The EU is the template of a system where public enforcement predominates. While recent efforts have sought to foment private actions, public enforcement greatly predominates: the enforcement of competition law is pursued mainly by the European Commission and, with greater emphasis since 2003, by the national competition authorities of the EU’s member states, which nowadays pursue most competition cases in Europe (Wils, 2017[6]).

As in the US, public and private enforcement co-exist. However, and unlike in the US where the enforcement agencies limit their sphere of action in order to reflect the priority of private enforcement, in the EU a number of rules ensure the primacy of public enforcement bodies and procedures over the interests of private litigants. For example, where the European Commission reaches a decision in a particular case which has also been brought in civil proceedings before a national court, the national court cannot take a decision running counter to that of the Commission.34 Furthermore, both national


34 Subject, naturally, to review of the European Commission’s decision by the Court of Justice of the European Union. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, Article 16(1).
competition authorities and the European Commission may, on their own initiative, submit observations on issues relating to the application of competition rules to a national court which is called upon to apply those provisions.35

The primacy of administrative agencies is also made evident by the existence of mechanisms for national competition agencies and the European Commission to provide support to courts. The European Commission has an obligation to transmit information it holds to national courts.36 Furthermore, national court may ask the Commission for its opinion on questions concerning the application of EU competition rules on economic, factual and legal matters.37

Since public enforcement is the predominant enforcement mode across the world, similar mechanisms of interaction between administrative and judicial bodies can be commonly found. For example, in the UK private actions are a complement to public enforcement. When private claims are brought, the CAT is required to notify the CMA. The CMA has the explicit authority to act as an intervener in private actions cases, while the CAT also has the power to stay cases under investigation by a competition authority (OECD, 2015, p. 8(5)). Similarly, in Australia the competition agency (ACCC) is empowered to intervene in any private proceedings brought under the Competition and Consumer Act 2010 – even if, unlike the CMA, the ACCC needs to obtain court leave to intervene.38 Furthermore, the ACCC may take representative action for compensation on behalf of those who have suffered loss by contravening conduct, and who consent to proceedings being brought on their behalf.39

2.3. Areas of tension between public and private enforcement

As noted above, a right balance between public and private enforcement must be found in order to optimise competition law enforcement overall. While the ideal balance in each jurisdiction depends on local characteristics, it is possible to identify a number of topics which generally give rise to tension between private and public enforcement. Some of these are identified below; however, since these will be discussed in greater detail in Part II below, at this point their description is cursory.

2.3.1. Access to competition agency file

Private claimants need access to the necessary evidence to prove their claim. In the case of follow-on claims, most of this evidence will be in the possession of the competition

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35 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, Article 15(3). The Regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court.

36 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54), para. 21.

37 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54), para. 27.

38 See s. 163 CCA 2010.

39 See s. 87 (1B) CCA 2010.
authority. Appropriate access rules may favour private actions as they allow claimants to access documents important for their case. However, access to the competition agency’s file may imperil an ongoing investigation, may detract from honest and open co-operation by defendants in such investigations, and may even be illegal in the case of privileged or confidential documents. As a result, legal regimes may prevent the disclosure of elements in the competition agency’s file, or make the level of access to those elements depend on the type and nature of the relevant information and documents – including the time and conditions under which they are made available (OECD, 2015, pp. 27-28[5]).

2.3.2. Leniency and access to leniency documents

Advocates of public enforcement often display concerns over the potential impact of private enforcement on leniency applications. Leniency applications have become a crucial avenue for uncovering secret cartels, and there is a concern that exposing potential applicants to civil liability will reduce the incentives of potential leniency applicants to come forward. This risk is compounded by the possibility of access to leniency documents by potential claimants, which may further detract from the effectiveness of the leniency program itself. If leniency documents could be made public, this would mean that a company could avoid a public fine only by exposing itself to an increased risk of private claims. These claims could, in turn, lead to liability for damages exceeding the amount of the fine – which would be compounded by the leniency applicant’s additional exposure to joint and several liability damage claims. Given the importance of leniency for successful public enforcement, the OECD has previously said that it is extremely important that the design of the private enforcement system takes into account the fundamental need to preserve the effectiveness of these programmes (OECD, 2015, p. 23[5]).

2.3.3. Civil immunity of leniency applicants

As a general principle, the right to full compensation would imply that the immunity recipient should not be shielded from damages actions or from any reduction of its liability in follow-on actions. However, to preserve the attractiveness of leniency programmes, some jurisdictions have considered necessary to reduce the civil liability of the successful immunity applicant in subsequent damages actions. For example, in the US an immunity leniency applicant is only subject to single – instead of treble – damages, on condition that he also co-operates with private claimants in their damage actions against the remaining cartel infringers. Similarly, the EU Damages Directive limits the civil liability of the immunity recipient to the damages caused by it to its direct or indirect purchasers or providers, exempting it from the rules on joint and several liability. For a concise example of this differentiated treatment, see Art. 6 and 7 and the EU Damages Directive.

Section 213(b) of the 2004 Antitrust Criminal Penalty and Reform Act, Pub L No, 108-237

However, in Europe the other injured parties can only claim damages from the successful immunity applicant when they show that they cannot obtain full compensation from the other undertakings that were involved in the same infringement. The amount of the contribution of the successful immunity applicant must not, in any event, exceed the amount of harm caused to his own direct or indirect purchasers or providers. See EU Damages Directive, Art. 11(4) to 11(6).
The reason for adopting such rules is that immunity applicants are exposed to greater risks of private actions than companies which have not applied for leniency. Having applied for immunity, the successful applicant would normally have no legitimate interest in appealing against the decision of the competition authority which would become final right away—and often much sooner than the infringement decision against the other infringing parties. When combined with the (legal or factual) binding effect that an administrative decision finding a competition infringement may have, the leniency recipient will be an especially ‘easy target to sue’ in follow-on damage claims. Additionally, because of joint and several liability, the claimant might claim substantial damages well in excess of the amount of the damage caused by the immunity applicant alone. This may affect the incentives of companies to apply for immunity, and hence may require a tempering of the right to full compensation in the interest of protecting public enforcement.

2.3.4. Content of published infringement decisions

Infringement decisions are made public in a variety of ways. Decisions can be quite rich with information that can be very useful for a private plaintiff who is planning to bring a damages claim. However, the public version of competition authorities’ decisions is often heavily ‘redacted’ to protect confidentiality rights of the parties involved in the proceeding. In the absence of effective disclosure mechanisms, the prospects of success of follow-on claims may to a large extent depend on the information made available in infringement decisions. There is therefore a tension between a competition authority’s duty and incentives to preserve the confidentiality of commercially sensitive information—in order to facilitate interactions with infringing parties, to maintain their incentives to co-operate in the investigation, and to avoid providing information to market participants that may facilitate collusion—and the interest of potential claimants in gaining access to that information in order to be able to bring a successful damages claim. As a result, there are public interest reasons in support of competition authorities disseminating widely the content of decisions establishing an infringement of competition law—but there are also other reasons for the protection of sensitive or confidential information contained in those decisions (OECD, 2015, p. 36[5]).

Chapter 3. Damages claims in Mexico: An introduction

The present chapter provides a succinct outline of the Mexican regime as concerns the private enforcement of damages claims for infringements of competition law. It will begin by describing the legal framework for such claims, including those provisions that regulate non-contractual civil liability claims more generally and those that regulate competition damages in particular. A second section will review the generic regime of non-contractual civil liability claims in more detail, before a third section reviews the specific requirements for competition damages claims.

3.1. Overview

As shown at the beginning of this report, redress for harm suffered as a result of anti-competitive behaviour is traditionally the province of civil liability. In the case of Mexico, this area is mostly regulated by Article 134 of the Federal Law on Economic Competition (Ley Federal de Competencia Económica, LFCE), which will be analysed in detail in this chapter. Before looking at this regime in detail, however, Mexico’s generic non-contractual liability regime will be explained.

Mexican legislation uses various laws and codes to regulate damages claims. The principal legislation at federal level is the Federal Civil Code (Código Civil Federal, CCF), in particular Articles 1910 to 1934 bis, which provide for civil liability arising out of unlawful conduct. The following types of civil liability mechanisms are also covered at federal level: (i) in criminal matters (civil liability ex delicto), Articles 30 to 39 of the Federal Penal Code (Código Penal Federal, FPC); (ii) state liability (Federal Law on State Liability (Ley Federal de Responsabilidad Patrimonial del Estado, LFRPE)); (iii) environmental civil liability (involving many laws, including in particular the Law on General Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente, LGEEPA), the Federal Environmental Liability Law (Ley Federal de Responsabilidad Ambiental, LEFRA) and the General Law for the Prevention and Integral Management of Waste (Ley General para la Prevención y Gestión Integral de los Residuos, LGPEGIR)); (iv) collective damages claims mechanisms (Articles 578 to 626 of the Federal Code of Civil Procedure (Código Federal de Procedimientos Civiles)); (v) damages claims for unfair competition (Article 6 bis of the Commercial Code (Código
At present, the challenge facing Mexico in terms of damages claims for anti-competitive practices is considerable. This is due not only to the complexity of obtaining redress for loss in this particular area of law, but also to the historical difficulties the civil liability system has faced as an instrument that seeks to indemnify, compensate or provide redress for damage or loss more generally (Zamora et al., 2005, pp. 520-530[29]). Various causes underlie this situation.

One such cause arises out of the restrictions the legislature imposed year after year on the amount of damages which can be awarded, which compared to other countries were too low to motivate victims to go through the respective legal procedure. However, this has begun to change. In recent years, the federal courts have systematically declared unconstitutional certain legal provisions that restricted the amount of damages victims could claim.

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43 Article 6 bis. “Traders shall carry out their activity in accordance with honest industrial or commercial practices, and shall therefore refrain from engaging in acts of unfair competition which: I. Create confusion in any way whatsoever with respect to the establishment, products or industrial or commercial activity of another trader; II. Damage the reputation of the establishment, products or industrial or commercial activity of another trader by means of false claims; III. Mislead the public as to the nature, means of production, characteristics, suitability for use or quantity of products, or IV. Are provided for in other laws. Civil actions arising out of unfair competition may be brought only when a final decision has been obtained in the administrative courts, where applicable.” (Emphasis added.)

44 Article 134. “Persons who have suffered damage or loss arising out of a monopoly practice or unlawful concentration may bring legal proceedings in defence of their rights before the courts specialising in economic competition, broadcasting and telecommunications until the decision of the Commission becomes final.”

45 Despite more litigation in this area in recent years, as other authors have pointed out.

46 Since 1945, for example, civil legislation has referred to labour law on matters concerning personal injury, so that rather than personal injury law covering losses not compensated under labour law, all cases were dealt with under labour law and only minimum subsistence damages were awarded. (See Article 1915 of the Federal Civil Code, and its equivalents in State Civil Codes which refer to the Federal Labour Law.) The amount of non-pecuniary damage first established in 1928 was set at a third of the pecuniary damage that may have been proven. Although since 1982 this has no longer been the case at federal level, it continues to apply in a number of federal bodies.

47 See in this respect amparo appeal 75/2009, SCJN, which declared unconstitutional Article 14(II) of the Federal Law on State Liability, with respect to the maximum amounts of compensation the State may be sentenced to pay for non-pecuniary damage. Amparo appeal 3236/2015, SCJN, which declared unconstitutional a series of principles of Civil Liability Law on the Protection of Privacy, Honour and Self-Image in the Federal District held that: “In view of the above considerations, it is concluded that the decision appealed should be revoked and that relief should be granted to the complainant, and the chamber responsible should issue a new decision in which it refrains from applying the principles declared unconstitutional because they breach the right to full redress and fair compensation, and on the basis of the guidelines set out in this final judgement should calculate the amount of the damages award.” See also direct amparo 30/2013, SCJN, which
This chapter seeks, firstly, to provide a general explanation of the civil liability system in Mexico, taking as a model the approach adopted in the Federal Civil Code and the most important judgments handed down in this area, both by the Collegiate Circuit Courts (Tribunales Colegiados de Circuito, TCC) and the National Supreme Court of Justice (Suprema Corte de Justicia de la Nación, SCJN). Secondly, it will describe the system of competition damages.

3.2. Non-contractual civil liability in Mexican civil legislation

Civil legislation in Mexico recognises the following sources of obligations: (i) contract; (ii) unilateral declaration of intent; (iii) unlawful enrichment; (iv) the management of third party’s affairs; (v) those arising out of unlawful conduct; (vi) hazardous activities; and (vii) the law.48 Of these sources, those that have been more developed in the doctrine and case law are, firstly, (i) contractual and, secondly, (v) unlawful conduct.

Chapter V of Book IV of the CCF is entitled On the obligations arising out of unlawful conduct. This source of obligations, which gives rise to what the doctrine refers to as non-contractual civil liability, will be the focus of this chapter.

3.2.1. Contractual and non-contractual liability

Both contractual and non-contractual liability can give rise to actions for damage to property or to a third party. While parts of Mexican and comparative legal doctrine in this area have argued that both types of liability should be treated in a unified fashion (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 768[30]),49 in this report the traditional division between them will be maintained. This is furthermore the approach taken by Mexico’s courts of law.50

See CCF Articles 1792 to 1936.

Arguing otherwise (Díez-Picazo, 2011, pp. 227-229[115]).

See, in this respect, the conflicting line of precedent 93/2011 between the First Collegiate Civil Court of the First Circuit (Primer Tribunal Colegiado en Materia Civil del Primer Circuito) and the Collegiate Civil and Labour Court of the Tenth Circuit (Tribunal Colegiado en Materias Civil y de Trabajo del Décimo Circuito), 26 October 2011: “According to the theory of civil liability, anyone who causes harm to another person is required to repair it. Such harm may be caused by failure to comply with a contract or breach of the general duty of all persons not to cause harm to another. Thus, while in contractual liability, the parties are bound prior to the fact giving rise to liability, in non-contractual liability the link arises out of the committing of the harmful acts. Contractual liability thus arises out of an agreement of wills that has been broken by one of the parties, while non-contractual liability arises out of failure to comply with the generic duty not to affect third parties. Meanwhile, for contractual liability to exist, it is merely necessary for a party to fail to comply with the agreed obligation, while non-contractual liability may involve objective or subjective liability. Subjective liability is based on a psychological element, either because the intention to cause harm exists or because of lack of care or negligence. By contrast, in objective liability the subjective element, i.e. blame or
In general, damage or loss caused by practices affecting free competition arises in connection with spontaneous relationships in which there is no prior agreement between the party causing and the party suffering the detriment, without prejudice, of course, to the fact that many anti-competitive practices engaged in by the offending undertaking may be the result of an agreement with other undertakings. The natural environment in which such damage is studied is therefore “non-contractual liability”, which will be analysed below.

3.2.2. Subjective non-contractual civil liability (tort of negligence) and objective non-contractual civil liability (strict liability)

In the past 100 years, two systems for attributing damages have coexisted in the area of non-contractual civil liability: subjective (tort of negligence) and objective (strict liability).\(^{51}\)

In the case of Mexico, these two systems are provided for in Articles 1910, 1913 and 1914 of the CCF. Articles 1910 and 1914 require fault as the basis for non-contractual civil liability, while Article 1913 is based on the idea of risk associated to the use of mechanisms, instruments, apparatus or substances which are intrinsically hazardous. Under Mexican law, therefore, for a person to be liable for harm or injury caused to another person – apart from the existence of the harm itself and causation – that person must have committed an act contrary to public order which caused harm to another person, by acting unlawfully (Article 1910), or making use of inherently hazardous mechanisms even if they have not acted unlawfully (Article 1913). Otherwise, each party will bear the risks of loss, with no right to compensation (Article 1914).

The system of liability for damages in the case of anti-competitive practices is based precisely on the unlawful nature of the conduct of the party causing the damage, as specifically stated in the third paragraph of the above-mentioned Article 134 of the LFCE:\(^{52}\)

“With the final decision handed down in the procedure followed in the form of a trial, the unlawful nature of the conduct of the undertaking concerned for the purposes of the action for damages shall be deemed to be proven.” (Emphasis added.)

\(^{51}\) See footnote 50 supra.

\(^{52}\) As discussed below, however, Article 102 of the LFCE can be interpreted as establishing the possibility of claiming damages for conduct revealed in the context of a procedure for waiving or reducing a penalty. This may have implications on the burden of proof of the unlawful conduct, since, with respect to Article 134 of the LFCE, the law presently provides a parameter for the identification of the unlawful nature of the conduct – the COFECE or IFT resolution itself – and it is unclear whether such a parameter is applicable in the context of Article 102 of the LFCE.
The appropriate approach for analysing damage caused by anti-competitive practices is therefore as fault-based liability. The criterion for attribution is not that the undertaking engages in risky or hazardous activities in accordance with Article 1913 of the Civil Code for the Federal District (CódigoCivil para el DistritoFederal, CCDF), not because it may not do so, but because the acts or omissions giving rise to the obligation to provide redress for damage to competition must be a result of the unlawful behaviour of the undertaking.

The elements that have traditionally been associated to this liability are the following:

- act or omission of the person who causes the loss;
- fault in the broad sense, which is understood to involve both negligent and intentional conduct;
- damage, whether material or non-material;
- a causal link between the unlawful act or omission and the damage arising from it.\(^53\)

In a number of decisions, the trend in the case law regarding the elements of civil liability has been to consider only three such elements (conduct or behaviour by act or omission, harm and causal link). From this perspective, fault is a qualifying element of the unlawful act and takes the form of a criterion for attribution of that act, but is not identified as an additional autonomous element of civil liability. In the interest of clarity of the analysis, each of the four elements set out above will be analysed below in turn.

**Act or omission**

Generally, the act or omission must simply fall within the sphere of control of the person causing the harm. The root of civil liability lies in human conduct.\(^54\) Normally, this behaviour involves positive conduct – as shown at the beginning of Article 1910 of the CCF: “Any person who, acting unlawfully […]” (emphasis added) – for example, by making a comment which insults another person or engaging in behaviour which affects free competition in the markets. Cases in which the harm is caused by omission, such as not helping a person in a serious condition who has no chance of receiving assistance other than from the person present, are more exceptional.

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\(^{53}\) This is also the understanding of the SJCN: “Non-Contractual Civil Liability in Medical and Health Matters. Updating It in Connection with Department Managers of a Hospital. In the area of civil liability in medical and health matters, for a person who took part in a medical procedure to be declared liable for damages, there must be a culpable act (either positive or by omission), damage and a causal link between the negligent medical act and the damage […]”. Direct amparo 51/2013. Alfonso Franco Ponce (his estate). 2 December 2015. Unanimous opinion of four votes in favour from the Judges: Arturo Zaldívar Lelo de Larrea, who reserved the right to explain his concurring opinion, José Ramón Cossío Díaz, who reserved the right to explain his concurring opinion, Jorge Mario Pardo Rebollo and Alfredo Gutiérrez Ortiz Mena. Court Clerk: Miguel Antonio Núñez Valadez.

\(^{54}\) Only situations involving absolute force that deprive a person of their awareness or have unforeseen consequences, such as an epilepsy attack involving a person who had previously been diagnosed with that condition, are excluded.
As regards conduct which affects free competition, it will usually be the case that it requires positive conduct by the undertaking, with a clear purpose: to have an effect on free competition, as will be seen in section 3.3.2 below.

**Fault**

Article 1910 of the CCF, referred to above, states in this respect: “Any person who, acting unlawfully or immorally, causes harm to another person shall repair that harm, unless they can demonstrate that it arose as a consequence of the fault or inexcusable negligence of the victim.” The concept of unlawful conduct referred to in the above-mentioned provision includes both the negligent or careless action of the person causing the harm (fault in the strict sense), and their intentional conduct, i.e. when they intend to cause detriment to the property or person affected. Mexican doctrine states: “Anyone who acts with the intention of causing harm is deceitful, while anyone who causes harm through carelessness is negligent” (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 398). This refers to a scheme of proven fault. The fault or unlawful nature of a conduct must be established by the victim who is claiming compensation. The liability of the party responsible for the harm can be excluded, however, if they prove that the harm came about because of gross negligence on the part of the victim. Gross negligence means aggravated fault: for liability to be excluded, the victim’s gross negligence must be proven.

Findings of anti-competitive practices require unlawful conduct on the part of the person causing the loss or harm. As provided for in Article 1 of the LFCE, the system of free competition is a matter of public policy and social interest which applies to all areas of economic activity and is furthermore generally applied throughout the country. According to Article 1830 of the CCF, breaches of public policy laws give rise to unlawful acts, the committing of which entitles the persons affected to claim compensation for damage under Article 1910 of the CCF. In the context of the special regulation of damages claims provided for in Article 134 of the LFCE, the Federal Competition Commission (Comisión Federal de Competencia Económica, COFECE) and the Federal Institute of Telecommunications (IFT) are responsible for declaring that the undertaking has acted unlawfully. Once COFECE or IFT has made the declaration and it becomes final (i.e. when

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55 The SCJN has said in this regard: “NEG&LIGENCE: CONCEPT AND CASES IN WHICH IT ARISES. Negligence arises in cases in which the party responsible did not want the loss to occur but nevertheless causes harm by failing to comply with a duty of care on their part. For liability to exist, therefore, the damage caused must be accompanied by a duty of care towards the victim on the part of the party responsible, without that duty reaching the extreme of requiring heroic acts from all persons; hence the care that must be taken into account is the ordinary care of an average or reasonable person. Only in cases in which the non-contractual damage arises as a consequence of the provision of a service must the care to be expected be that of a professional, i.e. that of a person who has the average abilities to perform that profession.” Direct _amparo_ 30/2013. J. Angel García Tello and others. 26 February 2014. Five votes in favour from the Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, who reserved the right to explain his concurring opinion, Alfredo Gutiérrez Ortiz Mena, Olga Sánchez Cordero de García Villegas and Jorge Mario Pardo Rebolledo, who reserved the right to explain his concurring opinion. Reporting Justice: Arturo Zaldívar Lelo de Larrea. Court Clerk: Ana María Ibarra Olguín. Period: Tenth Period. Register No. 2006877. Level of Jurisdiction: First Chamber. Type of Thesis: Discrete. Source: Judicial Weekly Gazette of the Federation. Book 8, July 2014, Volume I. Area(s) of Law: Civil. Opinion: 1a. CCLXXI/2014 (10a.). Page 154.
no legal remedy is accepted), the parties that have suffered harm due to the anticompetitive practices or unlawful concentration addressed in the decision may bring the appropriate legal proceedings before the specialised courts. Nevertheless, the findings made in an infringement decision which has become final cannot be challenged in the damages claim. The unlawful conduct will have been established by COFECE’s or IFT’s final decision condemning anticompetitive behaviour or an unlawful concentration, thereby enabling the claimant to rely on the decision as documentary evidence to establish one of the elements of the civil liability action – i.e. the unlawful behaviour or conduct. The decision does not exempt the claimant from the burden of proof regarding the two remaining elements of the action: the harm and the causal link between that harm and the anti-competitive act.

It should be pointed out, however, that Article 102 of the LFCE establishes the possibility of claims for damages being brought for anticompetitive conduct revealed in the context of a leniency application or a commitments procedure. By virtue of this procedure, the competition authority grants immunity from or a reduction in a fine in exchange for commitments to suspend, suppress or correct the corresponding practice or concentration. Under Article 16 of the Constitution, the decision to grant leniency must be duly justified, but it is not required that the decision make explicit reference either to the existence of the conduct investigated or to the degree of participation of the addressee undertakings. The LFCE therefore opens the possibility of bringing a claim for damages in relation to conduct that has not been established by COFECE or IFT. In this case, it is understood that such a claim would not arise out of Article 134 of the LFCE but directly out of Articles 1830 and 1910 of the CCF, and that that the assessment of whether an anticompetitive act occurred would remain in the hands of the judge, although the judge could use the reasoning provided in such a decision as further evidence to determine the existence of the unlawful act. This would therefore be regarded as a “stand-alone” claim.

In the light of the case law described in detail below, which appears to set forth that the adoption of a decision by the competition authority on the unlawful nature of the conduct is an essential requirement for bringing a competition damages claim, it is doubtful that this type of action will succeed. Whatever the correct interpretation is, at present there are practical difficulties and uncertainty in determining whether entities that have benefited from the granting of leniency or of reductions in penalties can be subject to an obligation to provide compensation for damages. It would be advisable for the legislature to specify whether it is in reality possible to claim redress for loss in relation to conduct that has been subject to a decision to grant immunity or a reduction in the amount of a penalty, and, if appropriate, to provide the parties with all the means necessary to ensure that claims of this type can be effective.

Harm

It is now generally accepted that the damage or loss that must be compensated under civil liability comprises material damage or patrimonial damage, on the one hand, and non-material or non-patrimonial damage, on the other. The former is provided for in Article 2108 (actual damage or simply damage) and Article 2109 of the CCF (loss of earnings or loss), while non-material damage is regulated in Article 1916 of the CCF.

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56 Guía de los procedimientos de dispensa y reducción del importe de multas [Guide to procedures for granting immunity from or reductions in fines], COFECE. Available at: https://www.cofece.mx/wp-content/uploads/2017/12/gua-0052015_disp_y_redmult.pdf.
- **Material damage or loss:**
  - **Actual loss.** Article 2108 of the CCF provides as follows: “Damage is taken to mean the loss or detriment suffered because of failure to comply with an obligation.” In general, such loss is reflected in a reduction in the net worth of the party affected. This usually arises out of unlawful conduct that threatens a party’s net worth (e.g. destruction of property through driver negligence), or an infringement of the physical integrity of persons who require medical treatment of some sort to recover. In terms of anti-competitive practices, this loss arises when the conduct concerned has an impact on economic agents, causing, for example, the collapse or bankruptcy of a company or the payment of a price premium by consumers.
  - **Loss of earnings.** Article 2109 of the CCF states: “The deprivation of any lawful gain that should have been obtained by complying with an obligation is deemed to be a loss.” Loss of earnings typically refers to lawful earnings the party affected no longer receives because of an unlawful act, such as the market share an undertaking is unable to obtain because of anti-competitive conduct.

Both types of loss can be compensated in the context of damages claims for violation of competition rules.

- **Non-material damage: punitive damages in Mexico (Article 1916 CCF).** Some jurisdictions recognise the award of competition-related punitive damages. In direct amparo 30/2013, decided by the SCJN on 26 February 2014, concerning the assessment of non-material damage, the SCJN issued two opinions in which the concept of punitive damages was recognised for the first time in Mexico. The Court stated that the punitive nature of damages claims arises out of a literal and teleological interpretation of Article 1916 of the Civil Code for the Federal District. This Article establishes the right to receive compensation for non-material loss. In determining the amount of such “compensation”, however, this article also establishes that a value must be attributed to the rights infringed, the degree of liability and the economic situation of the party responsible, among other things. In their sentence, therefore, the judge must consider not only the aspects necessary to redress the victim’s loss as far as possible, but also the fact that aggravating circumstances may exist that must be borne in mind in setting the amount of compensation. As can be seen, this concept focuses not only on redressing the damage to the victim’s assets, but also on making it possible to put a value on the degree of liability of the party that caused the damage.57

The following was also added in the decision:

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“Fundamental objectives in terms of social compensation are achieved by compensating for the damage. Firstly, by imposing the obligation to pay compensation on the party responsible, the victim obtains the satisfaction of seeing their desire for justice satisfied. Through compensation, therefore, the victim can see that the losses suffered also have adverse consequences for the party responsible. In addition, the compensation has a dissuasive effect on prejudicial conduct, which will prevent future unlawful conduct. The function of such a measure is therefore twofold, since people will avoid causing damage to avoid having to pay compensation, and it will be advisable from an economic point of view to defray all the costs required to avoid causing damage to other persons. This aspect of tort law is known as ‘punitive damages’ and falls within the right to ‘fair compensation’. ”

As can be seen, in terms of regulating non-material damage, the SCJN ensured that, within the criteria provided for by the legislature for determining the amount of compensation for such damage, some criteria authorise judges to raise the amount of compensation and thereby increase the liability of the party causing the damage. As pointed out at the beginning of this section, while in terms of anti-competitive conduct some jurisdictions do not seek to ensure compensation for non-material damage, there is no doubt that the criterion felt by the SCJN is sufficiently broad and could make it possible to claim punitive damages in addition in these circumstances.

There are doubts, however, as to whether competition-related non-material damage can be claimed when the claimant is a company (body corporate or “legal entity”, according to the customary terminology in Mexico), or when the damage is economic, since the only concerns addressed in this judicial decision were reputation and the way how others regard the victim is affected by the unlawful conduct. The decision is, moreover, a non-binding isolated criterion of the First Chamber of the SCJN. It is not binding case law and represents a novel feature of the legal system in force in Mexico. Furthermore, it should be noted that the competition law does not have a scope which allows one to predict that claims where additional compensation is requested, by means of punitive or moral damages, will succeed. In other words, successful claims for punitive damages appear to be unlikely at this time.

**Causation**

The final element the victim must establish to obtain compensation for loss or damage is the causal link that must exist between the damage sustained and the unlawful conduct of
the party causing it. The general rule of non-contractual civil liability is that, to attribute damage to a person, that person must have caused the damage.60

Article 2110 of the CCF stipulates: “Harm must be an immediate and direct consequence of failure to comply with the obligation, whether it has been caused or necessarily should be caused”. Mexican case law is unanimous in considering that this provision contains the requirement of causation under Mexican law (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 702 et seq.[30]). The courts have also interpreted this issue in the same way.61

In the case of anti-competitive practices, the link of causation must exist between conduct classified as unlawful by the competent body (COFECE or IFT) and the harm alleged by the company or undertaking affected by that action. In this situation, the causal link may arise out of the text of Article 134 of the LFCE, in so far as it stipulates that the action can be brought by anyone who has “suffered damage or loss arising out of an anticompetitive practice or an unlawful concentration”.

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61 Direct amparo 7781/57. Register No. 272113. Sixth Period. Third Chamber of the SCJN. Judicial Weekly of the Federation, fourth part XX, page 63: “DAMAGE AND LOSS. The link between failure to comply with an obligation and the damages arising due to that failure should be so narrow that there can be no cause other than that which could also be argued as the origin of the harm. As stipulated by Article 2110 of the Civil Code, there must be an immediate and direct causal link between the conduct of the obligor and the occurrence of the harm.” In more recent arguments, however, it has also been argued that, in the case of non-contractual liability, the causal nexus arises out of the provision in Article 1910 of the CCDF (correlating with the CCF): see direct amparo appeal 4646/2014. Tenth Period. Register No. 160354. Tribunales Colegiados de Circuito. Type of Thesis: Discrete. Judicial Weekly of the Federation and its Gazette, Book IV, January 2012, Volume 5. Opinion: 1.4o.C.329 C (9a.). Page 4605.
3. The system of competition-related damages

3.3.1. Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos, CPM); Federal Law on Economic Competition (LFCE); Federal Economic Competition Commission (COFECE)

Article 28 of the CPM establishes a general prohibition on monopolies and monopolistic practices, and delegates to the legislature the determination of the terms and conditions under which such practices are to be sanctioned.62

Article 1 of the LFCE meanwhile states that the LFCE implements Article 28 of the CPM.63

Article 2 of the LFCE states that the law “seeks to promote, protect and guarantee free competition and participation, and to prevent, investigate, combat, effectively pursue, severely punish and eliminate monopolies, monopolistic practices, unlawful concentrations, barriers to free competition and participation and other restrictions on the efficient functioning of the markets”.

To ensure the above, the CPM and the LFCE have endowed specialised autonomous constitutional bodies – COFECE and the IFT, with respect to telecommunications and broadcasting – with exclusive responsibilities to “organise measures to eliminate barriers to competition and free competition, regulate access to essential inputs and order the privatisation of assets, rights, holdings and shares of undertakings in the proportions

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62 Article 28 of the Mexican Constitution:

“In the United Mexican States, monopolies, monopoly practices, small stores and exemptions from taxation in the terms and conditions established by the laws are prohibited. The same shall apply to prohibitions to protect industry. As a result, the law shall severely punish and the authorities shall effectively pursue any concentration or monopoly in one or a few hands of essential consumer goods with the intention of increasing prices; any agreement, procedure or cartel of producers, manufacturers, traders or service providers, however they may be established, to avoid free competition or competition between each other or to oblige consumers to pay exorbitant prices and in general anything which constitutes an undue exclusive advantage in favour of one or more particular persons to the detriment of the public in general or of any social class. [...] The State shall have a Federal Competition Commission, which shall be an autonomous body with legal personality and its own assets, the objective of which shall be to guarantee free competition and to prevent, investigate and combat monopolies, monopoly practices, concentrations and other restrictions on the efficient functioning of the markets, in the terms established by this Constitution and the laws. The Commission shall have the powers necessary to effectively fulfil its aims, including powers to order measures to eliminate barriers to free competition, regulate access to essential inputs and order the privatisation of assets, rights, holdings or shares in undertakings, to the extent necessary to eliminate anti-competitive effects.”

63 Article 1 of the LFCE: “This Law regulates Article 28 of the Constitution of the United Mexican States in matters of free competition and participation, monopolies, monopolistic practices and concentrations, which is a matter of public policy and social interest applicable to all areas of economic activity and shall be generally observed throughout the Republic.”
necessary to eliminate anti-competitive effects”. In making use of these powers, COFECE and the IFT may impose penalties on undertakings which have taken part in unlawful conduct, whether absolute monopolistic practices (Article 53 LFCE), relative monopolistic practices (Articles 54 and 55 LFCE) or unlawful concentrations (Article 62).

In addition, as has been mentioned, if the unlawful conduct has given rise to losses, a civil liability action may be brought, as provided for in the LFCE, Title VIII, Redress, Sole Chapter, Damages claims, Article 134:

“Persons who have suffered damage or loss arising out of a monopolistic practice or unlawful concentration may bring legal proceedings in defence of their rights before the courts specialising in economic competition, broadcasting and telecommunications after the decision of the Commission becomes final.

The limitation period for claiming payment of damages shall be suspended by the decision to open an investigation. With the final decision handed down in the adversarial procedure, the unlawful nature of the conduct of the undertaking concerned for the purposes of the action for damages shall be deemed to be proven."

3.3.2. Recent Private Competition Enforcement Cases

As referred in the beginning of this study, competition damages claims represent a mechanism that has been little used to date. Few claims have been made in this area under the current LFCE or under the former regulation, published in 1992. A process is currently pending before the Administrative Trial Court Specialising in Economic Competition, Broadcasting and Telecommunications (Juzgado Primero de Distrito en Materia Administrativa, Especializado en Competencia Económica, Radiodifusión y Telecomunicaciones). Meanwhile, three amparo procedures have been concluded which have dealt with this issue indirectly. Unfortunately, in none of these cases was a decision on the merits issued. There is a fourth procedure, which is not final yet as it can still be appealed, where the court awarded damages to victims of monopolistic practice. The five cases are summarised below.

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64 Article 10 of the LFCE provides as follows: “The Commission is an autonomous body with legal personality and its own assets which is independent in its decisions and functioning, professional in its performance, impartial in its actions and shall exercise its budget autonomously, its objective being to ensure free competition and participation, and to prevent, investigate and combat monopolies, monopolistic practices, concentrations and other restrictions on the efficient functioning of the markets.” (Emphasis added.)

65 The procedure followed in the form of a trial is regulated in Title II of the LFCE, Articles 80 to 85. The latter provides: Article 85. “The final decision shall contain at least the following: I. The appraisal of the appropriate evidence to establish the monopolistic practice or unlawful concentration or otherwise; II. In the case of a relative monopolistic practice, the determination that the undertaking or undertakings responsible have sufficient power in terms of this law; III. The determination of whether an order is given to ensure the final elimination of the monopolistic practice or unlawful concentration or its effects or the determination to carry out acts or actions the omission of which caused the monopolistic practice or unlawful concentration, and the means and time periods for establishing compliance with that determination before the Commission are ordered, and IV. The determination on the imposition of penalties.” (Emphasis added.)
Chicles

In the first case, by an application filed on 24 February 2006 at the central filing office of the Supreme Court of Justice of the Federal District (now Mexico City), Canel’s, S.A. de C.V. (formerly Chicles Canel’s, S.A. de C.V.) claimed the following from Cadbury Adams México, S. de R.L. de C.V. by ordinary commercial proceedings:

“I. A court order to the effect that Cadbury Adams México, S. de R.L. de C.V., incurred civil liability to Canel’s, S.A. de C.V., by engaging in unlawful conduct involving the implementation of an aggressive commercial strategy with the aim of removing my client from the market, as described in the particulars of claim. II. As a result, an order for Cadbury Adams México, S. de R.L. de C.V., to pay for losses and damage caused to Canel’s, S.A. de C.V., on the grounds of the conduct attributed thereto, the losses and damage being defined in this application and the bases for their quantification being specified; the respective amount shall be discharged in enforcement of the judgment. III. Payment of costs and expenses arising out of these proceedings.”

The claim was based on the fact that predatory pricing was not covered in the Federal Law on Economic Competition, by virtue of a declaration of unconstitutionality issued previously by the SJCN, sitting in plenary session, and that the claimant was therefore legally unable to comply with the requirement to obtain a prior declaration from COFECE on the existence of a monopoly practice (Guerrero Rodríguez and Ledesma Uribe, 2004[31]). Consequently, the decision in this case – to the effect that the complainant failed to comply with the requirement provided for in Article 38 of the 1992 LFCE (the equivalent of Article 134 of the current LFCE) – did not address whether a claim under this provision requires a prior final infringement decision by the competition agency, since the claimant assumed that the Federal Law on Economic Competition in force at the time of the acts did not regard predatory pricing as a monopoly practice, and accordingly based its liability claim on Article 28 of the CPM. The following was decided in response to this claim:

“CIVIL LIABILITY ACTION. CANNOT BE BASED ON ARTICLE 28 OF THE CONSTITUTION SINCE THE LATTER DOES NOT EMPOWER COURTS TO DETERMINE WHAT CONDUCT CONSTITUTES MONOPOLISTIC PRACTICES ON THE BASIS OF THE FACTS SET OUT BY THE PARTIES TO A DISPUTE.

In bringing civil liability proceedings, the court must examine and, where applicable, interpret the ordinary legislation to decide what is the legal hypothesis from which the allegedly unlawful nature of the act giving rise to the claim derives. This, however, does not imply that, on the basis of Article 1830, in combination with Article 1910, both of the Federal Civil Code, the court is empowered under Article 28 of the Constitution, in the assumed exercise of its judicial discretion, to establish that particular conduct constitutes a monopolistic practice giving rise to a damages claim. The function of the court is to select and apply a legal standard to the factual reality in order to be able to make a legally based determination, in the light of the final paragraph of Article 14 of the Constitution, though the first and second paragraphs of Article 28 of the Constitution do not indicate which cases constitute monopoly practices. Thus, if, when the facts at issue were raised, there was an omission in the legislation in relation to Article 10(VII) of the Federal Law on Economic Competition, by virtue of which the Supreme Court, sitting in plenary session, declared that legislation unconstitutional.

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66 Article 10(VII) of the 1992 LFCE was declared unconstitutional through an 8-2 vote of the National Supreme Court of Justice (SCJN), sitting in plenary session.
because it did not establish the parameters required to determine what conduct constituted monopolistic practices, it is not for that reason that the court is in a position to determine whether the conduct engaged in by the respondent should be classified as a monopolistic practice, since the unlawful nature of the conduct would not arise out of a general legislative description but out of a particular decision by the court that would transform it into a creator of a legal hypothesis. This would go beyond its judicial function, since Article 28 of the Constitution develops some of the principles relating to government control of the economy to ensure the country’s economic growth by means of various actions, including the prohibition of monopolies. However, it is left to the legislator rather than the judicial authorities to establish which conduct should be classified as monopolistic practices, irrespective of the criminal, administrative or civil scope that could be attributed to the classification specified by the legislative authority.

As can be seen from the court’s reaction to a claim based directly on Article 28 of the CPM, the possibility of establishing what conduct constitutes monopolistic practices is reserved to the legislator rather than to the courts. The court therefore found that the action was poorly formulated, in that Canel’s did not obtain the declaration of an administrative offence necessary to bring its damages claim. This decision is the basis for arguments that a competition authority’s prior declaration of unlawfulness is a requirement for competition damages proceedings. Some observers counterargue that this decision merely concluded that the basis for claiming damages identified by the parties in this case was not a monopolistic practice in the terms of the LFCE, and that, consequently, this decision does not constitute grounds to conclude that, in the light of the absence of a decision by the competition authority, competition damages cannot be claimed for loss.

**Big Cola**

In this case, a soft drinks producer brought a claim for damages against another producer which the competition authority penalised for having requiring “tienditas” [small stores] to sell its soft drinks exclusively, which prevented a new competitor from entering the market. Since the redress action was not successful in the ordinary courts, the claimant opted for commercial proceedings, while the judges felt that the civil courts should hear the case.

**Broadcasting and Telecommunications**

A third case involving damages and competition, albeit only indirectly, was heard by the specialised courts. This precedent does not arise out of a damages action, however. A number of undertakings submitted an *amparo* procedure against a decision by COFECE regarding an absolute monopolistic practice, in respect of which the First Collegiate Specialised Court (Primer Tribunal Colegiado Especializado) gave a final ruling denying

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68 *Ajemex* (Big Cola) – Direct civil *amparo* 121/2012, decided by the First Collegiate Court in Civil Matters of the First Circuit.
the appeal. In adopting its decision, the court published a version of the legal decision containing the facts of the conduct and the undertakings involved. These undertakings asked for the publication of the decision to be suppressed, but the court denied their request. The court ruled that the application was inadmissible because, in accordance with the law on transparency, access to public information and personal data protection, the removal of data is inadmissible when third-party rights may be affected. In this specific case, doing so would deprive third parties of the right to claim damages. To date, it is not known whether any third party has brought a damages action in relation to this monopolistic practice.

The thesis developed on the decision on the amparo is as follows:

“PERSONAL DATA. IN THE JUDGMENT DENYING THE AMPARO AGAINST THE DECISION PENALISING THE COMPLAINANT AND OTHER PERSONS FOR COMMISSION OF AN ABSOLUTE MONOPOLISTIC PRACTICE, THE CONDITIONS FOR THEIR PROTECTION ARE NOT REALISED.

Article 38 of the revoked Federal Law on Economic Competition and Article 134 of the current law recognise damages claims arising out of a monopolistic practice, and the exercise of such a right is impossible or extremely difficult if the offending conduct established and the identity of the undertaking responsible are not made known. Similarly, the second paragraph of Article 16 of the Mexican Constitution provides for certain exceptions to the processing of personal data which are developed in the respective laws, including when third-party rights are involved. In that respect, Article 120(IV) of the General Law on Transparency and Access to Public Information (Ley General de Transparencia y Acceso a la Información Pública) and Article 37(V) and (VI) of the Federal Law on the Protection of Personal Data in the Possession of Private Individuals (Ley Federal de Protección de Datos Personales en Posesión de los Particulares) stipulate that it is not necessary to obtain the consent of the data subjects to allow access to their confidential information when its publication is necessary to protect third-party rights. Likewise, both Article 120(I) of the former law and Article 10(II) of the latter stipulate that it is not necessary to have the consent of the individual data subjects to allow access to information contained in public registers or publicly accessible sources. This area of law has been updated in the event of a ruling granting amparo by virtue of the fact that Article 28(III) of the repealed legislation governing this matter states that the list publishing the rulings handed down by the amparo courts should be affixed in a visible location which can be easily accessed by the person tried, indicating the data it should contain, including the name of the complainant. Therefore, in the judgment that denies the amparo against the decision that penalises the complainant and other persons for engaging in an absolute monopoly practice, the conditions for protecting their personal data are not maintained, but by contrast a limit is put on that fundamental right, even when the individual has opposed its dissemination.”

IMSS

On 19 May 2006, COFECE asked the Mexican Social Security Institute (IMSS) for information and documentation on public tenders for the supply of medicines put out by the Institute in 2002 and subsequent years. Based on the information provided, the Federal Competition Commission (Comisión Federal de Competencia, CFC) began an ex officio enquiry on 3 August 2006 into the market for medicines, for which tenders were invited by the health sector in national territory. Subsequently, on 28 January 2010, the Commission issued a decision confirming an absolute monopolistic practice as provided for in Article 9(IV) of the LFCE by various legal entities, which in turn brought an appeal for reversal before the Commission itself, which was rejected on 10 June 2010. An amparo appeal was brought against the latter decision, which was heard by the SJCN – which made use of its authority to assert jurisdiction – in the amparo de revision 453/2012, decided on 8 April 2015.

In response to that determination, on 22 March 2017, the IMSS brought a claim for damages caused by the absolute monopolistic practice engaged in by the legal entities penalised. The amount claimed is MXN 95 600 000 (Mexican pesos) (around USD 4 780 000 at the current exchange rate). After being rejected a number of times by the civil courts due to lack of jurisdiction, and by the specialised courts due to formal error, the claim is currently being heard by the First District Administrative Court Specialising in Economic Competition, Broadcasting and Telecommunications, electronic proceedings 4/2017.70

It should be pointed out that the claim brought by the IMSS has opened a debate on which legal body has jurisdiction to hear competition-related damages cases, an issue that will be discussed in greater detail in section 3.3.6.

Telcel

On 13 September 2018, a Unitary Civil Court condemned Telcel to pay damages to its competitors for a monopolistic practice that took place between 2006 and 2012. The amount of damages to be paid is still unknown and will be determined by another Civil District Court. Telcel can still appeal this decision before a Collegiate Circuit Tribunal.

The origin of this case dates back to a 2011 decision from the CFC (former COFECE) that imposed a fine of 11,989 million MXN to Telcel for having abused its dominant position.

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70 The specialised courts were created by General Resolution No. 22/2013 of the Plenary of the Judiciary Council, published in the Official Journal of the Federation (Diario Oficial de la Federación, DOF) of 9 August 2013, in compliance with the order set down in the Decree published in the DOF on 11 June 2013, which amended and added a number of provisions to Articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Mexican Constitution in the area of telecommunications. Transitional Article Twenty-Two of the respective decree indicated that the Federal Judiciary Council should establish collegiate circuit courts and district courts specialising in economic competition, broadcasting and telecommunications within no more than 60 days of the entry into force of the above-mentioned revision.
in the market for mobile call termination in its own network. According to the CFC, Telcel was increasing its rivals’ costs by charging an interconnection fee for calls terminating in its network that was higher that the interconnection rate charged for calls done inside the network and the final rates that Telcel customers were paying for mobile calls.

The fine was afterwards cancelled in exchange for commitments proposed by Telcel and accepted by COFECE.

In 2014, a number of companies, including Total Play, brought a claim against Telcel for having violated the LFCE. In its decision, the Magistrate considered that, in its decision accepting the commitments, COFECE did not establish that the monopolistic practice never existed; to the contrary, COFECE examined the commitments of the infringer and considered that they were appropriate to stop the monopolistic practices and its effects. In addition, the Magistrate stated that it is not necessary for Total Play and other claimants to have been part of the companies that reported the anticompetitive conduct to COFECE to be able to claim damages.

3.3.3. Competition-related unlawful conduct and civil liability

The direct precedent of the obligation to pay damages for anti-competitive practices under the LFCE is a declaration by the competent bodies that such conduct is unlawful. It could be concluded from this – as many do – that, if these bodies do not classify the punishable conduct as unlawful, there will be no grounds for finding an undertaking liable for damages. For example, if, in the case of an investigation into a relative monopolistic practice, the undertaking investigated provides evidence to COFECE, as laid down in Article 55 of the LFCE, that the practice in question gives rise to “gains in efficiency and has a favourable influence on the process of competition and free participation that exceeds its possible anti-competitive effects and enhances consumer welfare”, there will be no grounds for declaring such conduct unlawful. The same applies if the Commission authorises a concentration in the terms provided for in Article 63 of the Law.

On the other hand, the determination by COFECE or IFT that the undertaking’s conduct affects free competition is the aspect that gives rise to possible civil liability under Article 134 of the LFCE, without prejudice to the claimant having to prove the damage and the causal link between such damage and the anti-competitive conduct, as will be explained below.

It should be noted that some observers believe that it is theoretically possible to claim damages for anti-competitive practices without the competent bodies declaring such conduct unlawful. According to that theory, the final paragraph of Article 102 of the LFCE provides that competition damages can be claimed for conduct revealed in connection with a procedure to dispense with or reduce a penalty. As a result, the LFCE appears to open up the possibility of bringing a damages claim for conduct that has not been found anticompetitive by a decision of the competition authority.

In this case, such a claim would not arise out of Article 134 of the LFCE, but directly out of Articles 1830 and 1910 of the CCF, and the court would be responsible for establishing whether the unlawful act occurred.

It could also be said that Article 134 of the LFCE provides merely one way to bring claims for competition damage, which applies when the authority followed the investigation procedure and imposed the respective penalty. However, the right to compensation arises directly out of the occurrence unlawful act, and the party affected is allowed to bring the claim alongside or even in the absence of enforcement actions of the competition authority.
Subordinating recognition of the existence of that right to compensation on an infringement decision by one of the competition authorities (COFECE or IFT) would be too restrictive, because the party affected could claim compensation only if the parties responsible had been investigated and penalised, and if that responsibility had been definitively confirmed. It could also be the case that such competition authorities might fail to exercise their powers to investigate complaints against some undertakings: the competition authorities could decide not to follow up on a complaint or fail to do so within a reasonable time. Such a decision could be duly reasoned decision or not, or the authorities may simply argue that they do not have the human and material resources required to undertake an investigation. In any event, refusal to begin the procedure could turn out to be arbitrary. In that context, the rejection of a damages claim from someone who declares that they have sustained losses due to anti-competitive practices because the body concerned has not previously issued a decision concerning that conduct would represent a denial of the fundamental right of access to effective judicial protection, as laid down in Article 17 of the Federal Constitution.

To date, however, there has been no legal ruling on whether damages can or cannot be claimed in the absence of a final decision by COFECE or the IFT.

3.3.4. Prior declaration of the Competition Agencies and the force of res judicata as a reflection of that declaration in the respective civil liability proceedings

Article 134 of the LFCE reads as follows:

“Persons who have suffered damage or loss arising out of a monopoly practice or unlawful concentration may bring legal proceedings in defence of their rights before the courts specialising in economic competition, broadcasting and telecommunications until the decision of the Commission becomes final.

The limitation period for claiming payment of damages shall be suspended by the decision to open an investigation.

With the final decision issued in the adversarial procedure, the unlawful nature of the conduct of the undertaking concerned for the purposes of the action for damages shall be deemed to be proven.”

In view of the speciality of COFECE and IFT, the LFCE has established a sequence for enforcing civil liability in this area. Firstly, in its final decision (Articles 85 and 120, third paragraph, of the LFCE) these technical bodies must establish the unlawful conduct of the undertaking subjected to the procedure in the form of a trial. Once that decision has become final, i.e. once the time limit for challenging it has elapsed without a challenge being made, or once all means of judicial appeal have been exhausted, persons who have suffered loss due to the monopolistic conduct or unlawful concentration may file the respective action for damages with the court specialising in economic competition.

In cases of actions for damages on the grounds of anticompetitive practices or unlawful concentration heard by the courts specialising in economic competition, Article 134 of the LFCE requires a final decision confirming that the anti-competitive conduct is unlawful. Nevertheless, as set out in section 3.2.2 and above, Article 102 of the LFCE appears to establish the possibility that damages can be claimed in cases in which COFECE or the IFT has granted a reduction in or immunity from a penalty and there is no prior final decision on the existence of unlawful anti-competitive conduct. As such, it is conceivable that actions for damages can be initiated without a final resolution of a competition authority.
under Articles 1830 and 1910 of the CCF. This has led some observers to conclude that stand-alone actions are admissible in Mexico.

In the compensation procedure established in Article 134 of the LFCE, the declaration by COFECE or IFT that the conduct of the accused party is unlawful – once the indirect amparo and, where applicable, judicial appeals before the courts have been exhausted – has the effect of res judicata. This means that the party claiming damages must prove the existence of losses (actual loss and loss of profit) – should they be entitled to claim them – and the respective causal link between the unlawful conduct already established and the damages claimed, in the terms set out in this chapter.

As is logical, to avoid the possibility that the right to obtain competition damages is illusory, the legislature has established that the decision to open an investigation by the competition authority (Article 69(I) of the LFCE) interrupts the limitation period, which is two years from the time of the unlawful act (Article 1934 of the CCF). Otherwise, practically all follow-on damages claims would prescribe before an infringement decision is issued. A particular question in this regard is what happens when the two-year period of limitation has elapsed and the investigating authority has not yet begun its investigation. In this case, and according to how the limitation works in civil matters, even when the infringement decision is issued subsequently, the claim for competition damages may already be time-barred. No judicial rulings have been issued on this matter.

3.3.5. Class actions in damages for competition infringements

On 29 July 2010, the following third paragraph was added to Article 17 of the Mexican Constitution:

“The Congress of the Union shall issue laws to regulate class actions. Such laws shall determine how those actions shall be applied, the corresponding legal procedures and the means of redress. Federal judges shall have exclusive jurisdiction to hear cases concerning these procedures and mechanisms.” (Emphasis added.)

The statement of reasons accompanying the reform stipulated in this respect:

“The principal purpose of this initiative is to include class actions and procedures in the Constitution as a means for the courts to protect collective rights and interests. The term ‘collective rights and interests’ includes diffuse, collective in the strict sense and individual rights and interests with a collective impact. We believe the inclusion of these actions in the Mexican legal order will represent a vital step towards improving access to justice for all Mexicans and inhabitants of this country, and towards a real possibility of enforcing many rights which currently cannot be appropriately exercised, protected and defended. This reform will ultimately support the construction of an effective State governed by the rule of law in which every person who has a right or interest can find the means to ensure that such rights or interests are properly protected and defended through the system of institutions for administering justice.

The ordinary legislature, both at federal and state level, will be responsible for the proper interpretation of the content and essence of this reform in order to ensure that agile, simple and flexible actions and procedures are established to allow collective protection of the above-mentioned rights and interests in the areas that have to be regulated, including but without limitation of those relating to the environment, ecological balance, sustainable development, use and enjoyment of public spaces, use and protection of publicly owned assets, free economic competition, accessible services, consumer and user rights,
In 2011, meanwhile, a Book Five, entitled “On class actions”, Articles 578 to 626, (published in the Official Journal of the Federation of 30 August 2011) was added to the CFPC (Federal Code of Civil Procedure). This Book provides for three types of action: “diffuse” (Article 581(I)), which seeks to redress damage caused to society; collective action in the strict sense (Article 581(II)), which focuses on redressing damage caused to society as a whole and individual damage to members of a group; and homogenous individual action (Article 581(III)), which has as its purpose to claim performance or the termination of a contract from a third party. According to Article 584 of the CFPC, the limitation period for the class action is three years and six months from the occurrence of the damage.

COFECE has the standing to initiate the above actions, as stipulated in Article 585(I) of the CFPC and Article 12(XXVIII) of the LFCE. The ITF is not identified in the CFPC or the LFCE as having standing to initiate class actions, though Article 6(XXXV) and Article 14 of its Articles of Association approve the bringing and promotion of class actions.

Since the entry into force of these provisions, no party has been ordered to pay damages for competition class actions. However, the legislation in this area already exists, and its use at any time either by COFECE, IFT or by the federal courts cannot be discounted. It should be acknowledged, nevertheless, that there is some uncertainty as to which courts or tribunals have standing to hear cases of actions for damages caused by anti-competitive conduct. For this type of action to be effective and to come into use, the procedure and the courts or tribunals with competence in this area will have to be clearly established in law. This issue is discussed in section 3.3.6.

Measures should also be taken which promote the organisation of individuals to protect and defend their rights on the one hand, and to ensure dissemination and better access to information on such rights on the other, so as to strengthen the exercise of citizenship and the civic duties of members of our community. The legislature should also create mechanisms allowing citizens to take part in legal procedures that allow members of the community to cooperate in better dispute resolution, particularly in the case of disputes involving a clear public interest.

In secondary legislation, care should be taken to ensure appropriate rules on standing to bring proceedings, non-individualised evidence, res judicata, effects of decisions, the funding of proceedings, objective civil liability, etc. which are compatible with collective actions and proceedings.

The courts, meanwhile, will be required to ensure that the principles of interpretation for class actions and procedures are compatible with the spirit of the latter and with protection of the rights and interests of individuals, groups or communities. This must mean that our courts will also have to begin to set standards and guidelines that help them in their work, since the current procedural paradigms are, in many respects, insufficient or even contrary to the spirit of collective actions and procedures. Initially, our courts will have to examine the spirit of such actions and procedures in line with interpretations made in other jurisdictions. They will also have to detach themselves from their essential function and adapt to the specific features of the Mexican procedural system.”

This Article still contains the previous title: “Comisión Federal de Competencia” rather than “Comisión Federal de Competencia Económica”.
3.3.6. Jurisdiction of federal courts (civil and specialised) to hear actions for competition damages

Under Article 134 of the LFCE, actions for competition damages are to be heard before courts that specialise in this area of law. As already stated, liability for damage caused by anti-competitive conduct is a form of non-contractual civil liability. However, the decision of the Federal Judiciary Council (Consejo de la Judicatura Federal) creating courts specialising in competition, only grants them administrative jurisdiction (the amparo procedure), and omits granting them the civil jurisdiction which is required for them to be able to hear damages claims. At the same time, the Law on Federal Judicial Power (Ley Orgánica del Poder Judicial de la Federación) empowers civil courts to hear and decide matters not referred to as falling within the competence of other district judges. There is therefore a lack of cohesion between the various legal texts and the decision of the Federal Judiciary Council, and a concomitant lack of clarity about whether actions for competition damages should be heard by civil courts or specialised courts.

This lack of clarity was reflected in the IMSS case of a claim for damages in relation to proceedings IO-003-2006, in which COFECE penalised a number of pharmaceutical companies for collusion in IMSS public tenders for the purchase of insulin and serum from 2003 to 2006.

In September 2016, the IMSS presented its first damages claim before the federal civil courts against the undertakings sanctioned in this case. The claim was rejected for lack of jurisdiction. At appeal before a Unitary Court, the lack of jurisdiction of the civil courts was confirmed, and the action was referred to the specialised courts. The IMSS submitted its claim to the first specialised district court, which rejected it on formal grounds, and then to the second specialised district court. Finally, the first specialised district court accepted to process the claim and, on 25 July 2017, made interim orders to seize the assets of pharmaceutical companies that were involved in this absolute monopolistic practice. The IMSS estimates the damage caused to the institution at MXN 662 million.

To ensure that actions for competition damages are effective, greater clarity must be ensured with respect to the courts that should hear these claims. If it is felt that the specialised courts are competent in this area, as Article 134 of the LFCE seems to indicate, it would be advisable to clarify this by means of a decision issued by the Federal Judiciary Council. Although claims for competition damages are actually civil liability actions,

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General RESOLUTION 22/2013 of the Plenary of the Federal Judiciary Council on termination of the duties of the Juzgados Cuarto y Quinto de Distrito del Centro Auxiliar de la Primera Región [Fourth and Fifth District Courts, First Region], and their change into Juzgados Primero y Segundo de Distrito en Materia Administrativa Especializados en Competencia Económica, Radiodifusión y Telecomunicaciones, located in the Federal District, with territorial jurisdiction throughout the Republic. On termination of the duties of the Tribunales Colegiados Segundo y Tercero de Circuito del Centro Auxiliar de la Primera Región [Second and Third Collegiate Circuit Courts, Auxiliary Centre for the First Region] and their change into the Primer y Segundo Tribunales Colegiados de Circuito en Materia Administrativa Especializados en Competencia Económica, Radiodifusión y Telecomunicaciones [Second and Third Collegiate Circuit Courts for Administrative Matters, Specialising in Competition, Broadcasting and Telecommunications], located in the Federal District and with territorial jurisdiction throughout the Republic. Also its address, date of commencement, duty rules and system for receiving and distributing business between the courts indicated. Also the change in the name of the common mailing office of the Centro Auxiliar de la Primera Región.
nothing prevents them from being heard by the courts specialising in competition matters. This happens with other types of liability, such as government financial liability. In these civil liability cases, the State is the liable party, and cases are heard by administrative courts.

3.4. Conclusion

The system of competition damages claims laid down in Article 134 of the LFCE operates similarly to the generic Mexican liability regime outlined at the beginning of this chapter. The major difference in the field of competition is the fact that the system of damages claims may, pedagogically speaking, be described as being divided into two parts. The first part is developed by COFECE and the IFT in the terms already explained, whereby these bodies must establish the unlawful conduct of an undertaking. This then constitutes proof that an undertaking has acted unlawfully. The second part of the system requires that claims be heard by specialist courts to determine whether loss was suffered (in the case of the IMSS, for example, the impact on its net worth of the specific losses brought about by pharmaceutical company collusion to raise prices). However, and as mentioned above, there is no absolute certainty as to which courts have jurisdiction to hear these cases. The causal link between the unlawful conduct (pharmaceutical company collusion, to continue using the IMSS case as an example) and the damages claimed must also be established. However, the LFCE also appears to establish the possibility of damages also being claimed in cases in which COFECE or the IFT have merely granted a reduction in immunity from a penalty but have not firmly established whether unlawful anti-competitive conduct is involved. It could also be said that Article 134 of the LFCE merely sets out one avenue to bring a claim for damages sustained due to an anti-competitive conduct, but that this avenue does not exhaust the possibilities for bringing such a claim. According to this interpretation, it is conceivable that actions for damages may be brought without a prior infringement decision by a competition authority under Articles 1830 and 1910 of the CCF. This has led some observers to conclude that stand-alone actions are admissible in Mexico.

In terms of the link of causation and the damages claimed, both must be proven in accordance with the general rules governing non-contractual civil liability. The Mexican system of non-contractual liability closely resembles the systems of liability for damages arising out of anti-competitive conduct in other jurisdictions, an issue examined in Part II of this study.
Part II. Elements of Private Enforcement Systems

This section will look at the main elements of a competition private enforcement system, with a focus on damages claims. The method that will be followed throughout is to identify the main constitutive elements of a private competition claim in turn – who can claim damages, what procedural avenues are open to claimants, etc. –, and compare the approaches adopted and the challenges faced by the main jurisdictions when addressing that specific element.

The relevant elements have been grouped in different chapters, each of which looks at different aspects of a competition private enforcement regime. The chapters focus, respectively, on the mechanisms for obtaining private redress, such as individual claims and collective redress mechanisms (Chapter 4); out-of-court redress mechanisms (Chapter 5); practical measures to ensure the effectiveness of damages claims (Chapter 6); standing to claim for damages (Chapter 7); the means through which it is established that a competition law infringement took place (Chapter 9); the relevant rules of evidence (Chapter 10); the rules regarding the causation of damages (Chapter 11); the measure and quantification of damages (Chapter 12); and a final section describing the main economic methods that are used to calculate damages arising from infringement of competition law (Chapter 13).
Chapter 4. Judicial Redress Mechanisms

The first step when implementing a private enforcement system is to consider what types of procedural mechanisms will be made available to private parties in their attempts to obtain damages (or other remedies) from infringers of competition law.

An initial distinction can be made between judicial litigation and out-of-court dispute resolution mechanisms. Judicial mechanisms are reviewed in this chapter, while out-of-court mechanisms, such as mediation or arbitration, will be discussed in Chapter 5.

For cases brought before judicial courts, an additional distinction which is particularly relevant for competition damages claims is between individual and collective claims. In this chapter we look at each type of judicial action in turn, before looking at models that combine elements of both.

4.1. Individual claims

Infringements of competition law can cause loss to a large number of people, including customers, rivals, suppliers, and even firms operating in related markets. The most likely claimants in a competition claim are consumers, who paid more than they would have absent an infringement of competition law. As a result, consumers are virtually everywhere granted standing to sue for damages arising from such an infringement. However, civil actions brought by consumers face serious limitations which suggest that standing to claim should be extended to other parties. In many competition law infringements, loss to consumers may only become apparent after the illegal conduct has done a great deal of harm – or when the harm may be hard to reverse. This is not necessarily the case in the event of price fixing, but may arise in other types of infringement – particularly exclusionary practices such as price fixing, exclusionary rebates, deceitful patent claims, etc. For this type of infringement, consumer injury only occurs late in the infringement, or even only after the infringement has ceased. Furthermore, consumers typically lack information about what occurs in the upstream parts of the market. This makes consumers rather late detectors of infringements (when they are able to detect the conduct at all), and argues in favour of allowing other categories of victims – predominantly rivals of the infringing businesses – to bring claims as well (Hovenkamp, 2005, pp. 68-69[8]). The matter of who can sue for damages in antitrust claims is relatively complex, and ultimately depends on the applicable rules on standing. This matter is discussed in greater detail in Chapter 6 below.

An additional problem with individual claims brought by consumers is that individual consumers may only suffer a small loss each. The harm suffered from competition infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases, the amounts of the damage suffered by each potential claimant can be very low and, if claimants can only bring antitrust suits individually, the costs and efforts of filing an individual claim will most likely outweigh the potential gains from a successful claim. Consequently, there will be little incentive for
individual victims to bring actions for compensation in respect of “atomised” damages. In order to overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress (OECD, 2015, p. 20[3]). These mechanisms will be reviewed in the next section.

4.2. Collective redress

According to previous work by the OECD:

"[c]lass actions, collective actions, or other forms of actions that allow the aggregation of a large number of small claims for damages can be an important element in a competition regime that seeks to effectively deter anticompetitive conduct. They can be a useful form of deterrence. In particular with respect to hard core cartels, class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated. Without such a system, recovery of damages would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages” (OECD, 2007, pp. 16-17[32]).

Collective actions, and class actions in particular, have many advantages. They have a greater deterrent effect than individual actions, as infringers will often have to pay stiff damages to claimants as a result. This is a consequence of the way class actions provide a solution to the economic obstacle faced by individual claimants whose claims are too small to support the cost of litigation – by aggregating a large number of individual claims into a single action. This aggregation also allows defendants (and courts) to save the time, energy, and resources required to litigate hundreds or thousands of individual claims – particularly in the context of opt-out claims. The reaping of these benefits will be more limited for opt-in actions because they are not, conceptually speaking, collective actions at all. Opt-in actions are merely a form of joinder which is unable to fully address the collective action problem that opt-out actions seek to address. (Geradin, 2015, pp. 1087-1089[33]; Waller and Popal, 2016, pp. 50-51[34]).

Nonetheless, critics have argued that opt-out class actions are a complex, costly and unproven way of achieving the goals of compensation and deterrence. In some cases they might lead to speculative, opportunistic claims and excessive litigation (OECD, 2015, p. 10[12]) (European Commission, 2008, pp. 2-4[35]). In order to serve the efficiency of justice and protect against frivolous litigation, when opt-out class actions are adopted some systems insist that the admissibility of the claims should verified at the earliest possible stage of litigation and that cases which do not meet the conditions for collective action and manifestly unfounded cases must be dismissed (European Commission, 2013, pp. aras. 8-9[36]). However, the use of admissibility requirements carries the risk of making the whole procedure more lengthy and cumbersome, and thereby to restrict access to collective redress mechanisms as a whole (European Commission, 2018, p. 6[37]).

An additional challenge relates to the tension between the class-inclusiveness of class actions and the individual nature of harm suffered. It is often in the interest of claimants to extend the class as much as possible because this may be crucial to the viability of bringing a claim. On the other hand, a collective action can only be brought by reference to a set of individual claims with common characteristics. The concept (and legal test) of commonality is thus often a crucial element in the decision to allow a collective action to proceed (Johnson and Leonard, 2007, pp. 341-342[38]). In class actions related to competition issues, an important challenge for claimants is to establish that all members of a class suffered the same type of harm. For example, while there may be a presumption
(based on economic theories) that direct purchasers of a cartelised product will have paid an overcharge, the question of whether a collective action can be brought on behalf of all of them will depend on the legal standard for commonality. It may be that there is commonality merely because an individual was a direct purchaser; or it may be further required that there is an underlying structure underpinning differentiated prices, so that the harm suffered by class members can be identified via a common method or by reference to common evidence (Burtis and Neher, 2011[39]); or it may be required that the common characteristics of a class are such as to allow an approximately correct allocation of the damages according to individual loss (Johnson and Leonard, 2007, pp. 343-345, 353-356[38]).

Furthermore, courts may pursue inquiries with different degrees of intensity regarding whether the adduced evidence, and economic methods and models, will allow harm to be proved by reference to class-wide evidence (Page, 2005, pp. 307-308[40]).

In other words, the issue of commonality is ultimately not merely about the identification of common elements between the victims. Instead, the selection of what elements are to be used to determine whether individual claims share enough commonalities is ultimately about balancing the compensatory (or deterrent) goals pursued by the tort system with the limitations that may be introduced to this system in order to ensure the effectiveness of damages claims. The identification of a threshold at which the disparity of individual interests is such as to override the commonalty of claims – and hence, to prevent a class from being certified – will ultimately depend on this balancing exercise.

In practice, very few countries outside the United States and Canada have extensive experience with class actions or collective redress mechanisms in competition cases. Many countries, however, have shown an interest in establishing collective redress mechanisms as part of their private enforcement regimes.

At EU level, the recently adopted EU Directive on Antitrust Damages Actions does not include a collective redress mechanism – thereby leaving the question on whether to adapt such mechanisms to individual Member States. Until 2011, only three countries in Europe (Portugal, the United Kingdom, and Sweden) had introduced mechanisms for collective redress. Since 2011, however, more than half of EU countries have introduced new legislation on collective redress (OECD, 2015, p. 20[5]; European Commission, 2018, p. 3[37]).

In practice, however, affected persons that could theoretically rely on collective redress mechanisms in European jurisdictions tend not to use them – due to the rigid conditions set out in national legislation, the lengthy nature of procedures, and to perceived excessive costs in relation to the expected benefits of such actions (European Commission, 2018, p. 20[37]). In order to address this, the EU has issued a Recommendation encouraging Member States to set up a national system of collective redress based on opt-in principles.

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74 For an example, see Walter Hugh Merricks v MasterCard [2017] CAT 16, paras. 67, 79-89, where a collective action was not allowed partially on the grounds that it was not possible to estimate individual loss through reasonable and practicable means which could be used as the basis for distribution of the damages between individual claimants.

75 Some EU jurisdictions (Bulgaria, Denmark and Portugal) have established opt-out collective redress regimes, while others (Austria, Finland, France, Hungary, Italy, Poland, Spain, Sweden amongst others) have opted for an opt-in system of one form or another.
Such actions should be brought by certain entities, which are restricted with a view to ensure the expertise of representative entities and their capacity to deal with complex cases, to ensure high-quality services for claimants, and also protect defendants against frivolous actions (European Commission, 2018, pp. 3-4[37]). As such, class representatives should fulfil the following criteria: (i) they should have a non-profit nature; (ii) there should be direct relationship between the objectives of the class representative and the issue of collective redress; and (iii) the class representative should have sufficient legal capacity and financial resources to represent multiple claimants. Additionally, public authorities should be required or encouraged to conduct collective action on behalf of victims. (European Commission, 2013, pp. aras. 4 and 8-9[36]) In spite of this Recommendation, several Member States have not introduced collective redress mechanisms in their national system, and divergence between the Member States in terms of the availability and the nature of collective redress mechanisms persists (European Commission, 2018, p. 4[37]).

As noted above, there are two main models for collective redress: an opt-in model and an opt-out model. More recently, intermediate models between pure opt-in and opt-out have begun to emerge. We shall now review each of them in turn.

4.2.1. Opt-in actions

In an ‘opt-in’ collective action, victims must expressly elect to join a claim as members of the represented group. The outcome of a court decision in such a claim is legally binding only on the victims who opted into the claim – meaning that an individual who did not opt-in will not benefit from the outcome of the collective action. Instead, those who do not opt-in will be allowed to pursue their own individual claims even should the collective action fail (OECD, 2015, p. 19[5]).

A number of examples of opt-in mechanisms can be found in Europe (European Commission, 2013, pp. aras. 21-24[22]). In the UK, a legal reform in 2002 allowed damages claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement. In order for the representative body to bring an action on behalf of consumers, it needs their express consent (Rodger, 2013, p. 109[41]). In France, an opt-in collective action mechanism has been introduced, but it can only be used by a consumers’ association following a final decision by the Autorité de la Concurrence (i.e. in ‘follow on’ claims).

A variant of this basic model for opt-in collective actions consists in the transfer of claims to a specialized entity, also known as “claims vehicle.” The setting up of these vehicles typically involves the transfer or sale of claims by a multitude of people harmed by the

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76 V. 21: “The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.” See also (OECD, 2015, p. 20[8]).
77 The EU Collective Redress Recommendation explicitly recommends that opt-in mechanisms be adopted instead of opt-out mechanisms.
78 Section 19 of the 2002 Enterprise Act, which added Section 47B to the 1998 Competition Act.
79 Law no. 2014-344 of 17 March 2014 (the so-called ‘Loi Hamon’).
same anticompetitive practice to a third party that bundles these claims together. This bundling helps to overcome existing economic disincentives and information asymmetries (Schreiber and Seegers, 2015, p. 2[42]). This is, strictly speaking, merely a practical alternative to the legal types of class actions, group actions, or representative collective actions set out in statute, but it has the same practical effect as an “opt-in” collective redress mechanism (Schreiber and Seegers, 2015, p. 5[42]). While the success of claims vehicles depends on legal systems allowing the bundling of claims, a number of European countries have acknowledged that such a mechanism can be used to bring damages claims before the courts.80

In practical terms, this approach is viable only if cartel victims are easily identifiable, their number is small enough to make assignment manageable, the claims are substantial enough, and the aggregate amount of individual claims creates a financial incentive for the ‘claims vehicle’ to proceed to litigation (Waller and Popal, 2016, pp. 53-54[34]). A problem that a ‘claims vehicle’ shares with opt-in mechanisms lies in the need to obtain consent from every party bringing the claim. This may limit the number of victims claiming damages – both due to practical difficulties in identifying such victims and obtaining their consent, and to time limitations arising from the relevant statute of limitations – which may lead to some of the illicit gain being retained by the infringers. Further issues with ‘claims vehicles’ are that victims do not receive full compensation, and that there may be difficulties in obtaining the necessary evidence from victims once they have sold their claims and have no further incentives to co-operate with the vehicle.

4.2.2. Opt-out actions

In the light of the limitations of opt-in claims, some jurisdictions have adopted opt-out mechanisms for collective redress (OECD, 2015, p. 19[5]). Under an “opt-out” collective action, all parties who fall within the definition of the represented group are bound by the outcome of the case unless they actively opted-out of the action. Thus, the claimant who does not opt-out in time is bound by a court decision or an out-of-court settlement. If someone opts out of the action, however, it cannot benefit from anything that transpires in the class action – including a share of awarded damages. In practice, the most typical claimants that opt-out in antitrust class actions are large corporate purchasers who may seek to negotiate or litigate with the defendants on their own (Waller and Popal, 2016, pp. 33-34[34]).

Opt-out systems present advantages and disadvantages. A perceived advantage is that opt-out systems may be more effective than opt-in systems in obtaining redress for consumers and SMEs, particularly in situations where the number of injured parties is extremely large. An often voiced criticism, however, is that opt-out systems can fuel an excessive litigation culture, especially if accompanied by other features such as the asymmetric shifting of legal

80 For example, in Finland – see District Court in Helsinki, interim judgment of July 4, 2013 (judgment 6492, reference 11/16750) – and in the Netherlands – Court of Appeal in Amsterdam, judgment of January 7, 2014 (reference 200.122.098/01). In Germany, however, a claim brought by Cartel Damages Claim (CDC) against six companies involved in a German cement cartel was dismissed by the Higher Regional Court of Düsseldorf because CDC would not have been able to cover litigation costs in the event of an unsuccessful outcome. As a result, the defendants would have had to bear all costs in the event of a defeat but would not be (fully) reimbursed in the event of a win – see http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html.
costs in favour of the claimant, punitive damages, broad rights of discovery, and contingency fee agreements (OECD, 2015, p. 20[5]). In order to limit this, as a rule ‘opt-out’ actions can be brought only by qualified entities on behalf of defined group of injured parties – e.g. consumer associations, public bodies such as an ombudsman, or trade associations.

Experience in the US and Canada indicates that a serious issue that is often raised in opt-out class actions is that of the certification of the class representative (OECD, 2015, p. 3[43]).

- Rule 23 of the US Federal Rules of Civil Procedure sets out the requirements for a class action to proceed. Rule 23(a) requires that the class be “so numerous that joinder of all members is impracticable” and have sufficient elements of “commonality” (i.e., the action must raise “questions of law or fact common to the class”). The class representatives must also be “typical of the claims (...) of the class”, and they must “fairly and adequately protect the interests of the class”. In actions for monetary damages, Rule 23(b) (3) sets out two additional requirements which are relevant for the vast majority of antitrust class actions: the questions of law and fact that are common to the class must “predominate” over individual questions, and a class action must be “superior to other available methods for fairly and efficiently adjudicating the controversy” (Waller and Popal, 2016, p. 33[34]).

Before a class action can proceed, a court must certify the action. Class certification is a crucial moment that typically determines the outcome of the action. If the class is certified, the action can proceed to discovery and resolution on the merits. Given the amount of damages at stake in a typical antitrust damages claim in the US, and the joint and several liability of defendants, in practice class certification will very often lead to the parties settling the action. If the court does not certify the class, the action will typically collapse because the amount of each individual claim will be too small to justify the cost of litigation (Geradin, 2015, p. 1089[33]).

As such, it is unsurprising that the certification of class actions in the US amounts to a mini-trial involving extensive discovery, deposition and cross-examination of witnesses, and long and costly hearings (Waller and Popal, 2016, p. 34[34]). As noted by the American Bar Association:

“Modern class certification proceedings routinely involve long evidentiary proceedings preceded by massive discovery efforts, expert economists, and Daubert motion practice. Filing an antitrust case as a class action and properly following through with a motion with any reasonable chance of success should be expected to be a multi-year, multi-million dollar proposition” (American Bar Association. Section of Antitrust Law, 2010, p. 33[44]).

- In Canada, almost all the provinces have allowed class actions for over a decade.81 Ontario – which has been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes – follows a class certification regime similar to Rule 23 of the US Federal Rules of Civil Procedure. Instead of requiring that common issues predominate over individual issues, however, Ontario sets a lower threshold that requires a class proceeding to be ‘the preferable procedure for the resolution of the common issues’ (Osborne et al., 2018, p. 65[45]). While certification applications are not as detailed, costly or lengthy as in the US, they are still onerous exercises. The Supreme Court of Canada held in 2013 that

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81 Ontario was the first province to do so, in 1993.
expert evidence would normally be required to determine whether there was sufficient commonality of loss to identify a class which could be represented for the purposes of bringing opt-out damage claims. In particular:

“the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.”

- Portugal also has an opt-out system, called “ação popular” ("popular action"). It is a general procedural mechanism for the protection of diffuse legal interests. Under this procedural form, entities can start claims in which they lack an individual interest in order to protect legitimate public interests. It is an “opt-out” system, whereby the holders of the interests covered by the “ação popular” are publicly notified, namely through a press announcement, and must decide whether or not they accept to be represented in the action. In the event of failure to opt-out, the holders of the interests will be deemed to have accepted to be represented in the action. In practice, however, only one competition law claim has ever been pursued under this mechanism.

- In the Netherlands, a favoured venue for competition damages claims in Europe, class actions are allowed to promote the interests of other persons by foundations or associations that promotes such interests. Nonetheless, a class action is yet to be brought to recover competition damages, likely because class actions cannot be used to claim monetary damages. A recent bill has been introduced to do away with this restriction for class actions, and allow damages to be claimed in class actions. This bill also foresees a number of safeguards against abuses, such as the requirement of a “close connection to the Netherlands”. While it was first announced in 2016, the bill is yet to be approved.

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82 Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57. At para. 113, it was held that: “: “[f]he loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. ”

83 Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57, para. 118.

84 Law 83/95, of 31 August 1995.

85 Brought by Observatory of Competition/CEDU against the main TV sport’s channel. This claim is still ongoing at the time of writing.

86 The current legal provision (Article 3:305a of the Dutch Civil Code) explicitly states that the object of a claim in a class action may not be to seek monetary compensation.

87 The source of this information is Getting the Deal Through; see: https://gettingthedeleathrough.com/area/27/jurisdiction/17/private-antitrust-litigation-netherlands/
A particular challenge raised by opt-out actions is that part of the damages claimed may not be distributed to the victims. This may be because some individual victims fail to come forward, or because administrative concerns may work against payments to individual plaintiffs, as in the case of an extremely large class where the costs of distribution to individual claimants are excessive. Consequently, in some cases, there is money left over in the form of unclaimed funds.

The issue of what is the next best use for the undistributed residue of a damages claim has given rise to difficulties. To give the remaining funds to the defendant is usually discarded, as this would reward the wrongdoer. Similarly, the pro rata apportionment of any residue to class members who have already received their rightful share of the settlement fund can be viewed as a windfall, and as distorting the access to justice objectives of class actions (Ontario Law Reform Commission, 1982, pp. 577-579; Boies and Haney Keith, 2014, p. 269). Instead, courts in Canada and the US then to employ the doctrine of “cy près” in collective opt-out proceedings. This doctrine requires the unclaimed funds to be put to “the next best use,” which may include awarding funds to public interest organizations or charities for purposes related to the class or the case (Foer, 2010, p. 86; Kalajdzic, 2013, p. 176; Boies and Haney Keith, 2014, pp. 270-271).

In the US, while it is accepted that distributions should be made “for a purpose as near as possible to the legitimate objectives underlying the lawsuit,” in some cases the nexus between the injured class and the cy près distribution has been said to be remote or even absent (Foer, 2010, p. 86). While the purpose of distribution need not be directly related to that of the claim – e.g. distribution may be ordered by reference to the industry in which the antitrust violation occurred, to fund antitrust enforcement (Farmer, 1999, p. 404), or even to fund a University centre devoted to the promotion of competition law (Foer, 2010, p. 87) – this still gives great discretion to judges.

In Canada, and particularly in Ontario, courts have interpreted the interplay between the aggregate damages (s. 24) and judgment distribution (s. 26) provisions of the Class Proceedings Act (1992) as authorizing cy près distributions. Generally speaking, courts have held that a fixed cy près payment will be approved when direct compensation to class members is not practicable. Furthermore, funds should be allocated to organizations that will use the funds in a manner that will deliver identifiable benefits to the class, directly or

88 The term cy près derives from the Norman/French phrase, cy près comme possible, meaning “as near as possible”. This is a tool typical of common law regimes, which explains why “cy près” originated as a rule in the law of trusts and estates, allowing courts to provide for the next-best use of gifts or fair disposition of charitable trusts or wills that would otherwise fail. The doctrine was extended to collective actions in the US in the 1970s (in Miller v. Steinbach, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at 3-4 (S.D.N.Y. 1974)) after the 1966 amendments to Federal Rule of Civil Procedure 23 expanded the class action procedure.

89 In re Airline Ticket Comm’n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002).


91 A court’s order approving a class action settlement – including one that involves a cy près award – is reversed only upon a showing of an abuse of discretion. See In re Airline Ticket Comm’n 2001, 268 F.3d 619, at 625 (8th Cir. 2001) (“We review a district court’s cy près distribution for an abuse of discretion.”). The matter has raised enough concern to elicit a reaction by the Supreme Court – see Marek v Lane, 134 S Ct 8 (2013) at 4.
indirectly, in an efficient and manageable way. The proposed cy près recipient’s
distribution program should be sufficiently related to the interests and needs of the class to
be “materially beneficial” to the class (Kalajdzic, 2013, pp. 181-182[49]). As in the US,
concerned has been expressed about the allocation of funds to entities and for purposes
which lack sufficient nexus to the injured class or to the nature of the action (Jeff Berryman,
2009[51]; Kalajdzic, 2013, pp. 183-180[49]).

It is worth mentioning here that in opt-out collective actions in the UK, which will be
reviewed immediately below, the legislator decided to identify a specified charity to which
any damages awarded in opt-out proceedings that not claimed by the represented persons
within a specified period must be paid.93

4.2.3. Mixed systems

A number of jurisdictions have adopted systems that mix elements of ‘opt-in’ and ‘opt-out’
regimes. The UK is arguably the most prominent example of this approach.94

The UK has sought to encourage previously unwilling consumers to pursue claims
collectively. Reforms in 2015 created a new procedure that allows collective proceedings
to be brought by a representative on behalf of a defined class of claimants, either on an opt-
in or an opt-out basis (OECD, 2015, p. 20[5]). The statutory proceeding for this mixed-type
collective action departs from the usual damage claims procedure in several respects. In
particular: (i) the class representative need not him or herself be a member of the class; (ii)
the many individual claimants within the class do not need to be identified in order for the
representative to start proceedings; and (iii) the CAT can award aggregate damages in
favour of the represented class, i.e. without undertaking an assessment of the amount of
damages recoverable in respect of the claims of each represented person. These features
are all the more striking where the proceedings are brought on an opt-out basis, in which
case the represented members of the class need not identify themselves individually until
after a judgment is issued in their favour, when they can come forward to seek their share
of the aggregate damages awarded.95

The regime contains other safeguards against the development of a “litigation culture”.
First, it imposes a number of restrictions on who can bring opt-out collective actions.
Claims can be brought by individual claimants or by genuine representatives of the
claimants. They can also be brought by genuine representatives of consumers, such as trade
associations or consumer associations, but not by a law firm, third party funders or special

93 UK Consumer Rights Act 2015 Schedule 8, parts 1.5 and 1.6. In this case, the charity is the
Access to Justice Foundation.
94 Another good example is Belgium, which adopted a Collective Redress System in 2014 –
see Loi portant insertion d’un titre 2 “De l’action en réparation collective” au livre XVII
“Procédures juridictionnelles particulières” du Code de droit économique et portant
insertion des définitions propres au livre XVII dans le livre 1er du Code de droit
économique [An Act to Insert a Title 2 “From the Collective Redress Action” in Book XVII
“Special Court Proceedings” of the Code of Economic Integration of Duty and Definitions
Specific to the Seventeenth Book in the Code Book 1 Economic Law] of Mar. 28 2014,
MONITEUR BELGE [M.B.][Official Gazette of Belgium], Apr. 29, 2014, 35201.
95 Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9, para. 21.
purpose vehicles. Furthermore, claimants domiciled within the United Kingdom have the opportunity to opt-out, but those outside the United Kingdom can only be invited to opt-in. Limiting the opt-out principle to within the United Kingdom is intended to lessen the incidence of forum-shopping. Additional safeguards against the development of a litigation culture include precluding courts from awarding exemplary damages in collective proceedings, and the requirement that any damages awarded in opt-out proceedings that are not claimed by the represented persons within a specified period must be paid to a specified charity (Lindfelt and Sahlin, 2016, p. 352).96

The main safeguard put in place, however, is that the CAT, a specialised competition tribunal, must assess the suitability of the class representative, whether the claim is suitable for a collective action, and whether it should be brought on an opt-in or opt-out basis. While collective proceedings may be brought by anyone who proposes to be a class representative, such proceedings may proceed only on the basis of a collective proceedings order issued by the CAT (“CPO”).97 Such an order may only be issued in respect of collective proceedings which meet a number of conditions: (i) the claims must be considered by the CAT to raise the same, similar or related issues of fact or law (“common issues”) and to be suitable to be brought in collective proceedings (“certification of eligible claims”);98 and (ii) the proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act in the proceedings (‘authorisation of class representatives’).99 Two opt-out claims have been brought before the CAT. The first was a follow-on claim, while the second on was a stand-alone claim that relied on a European Commission decision.100 In both cases, a collective proceedings order was not issued by the CAT. The CAT has nonetheless indicated a preference for the Canadian approach to class certification.101

96 UK Consumer Rights Act 2015 Schedule 8, parts 1.5 and 1.6.
97 See Sections 47B(2) and (4) of the 1998 Competition Act.
98 Section 47B(6) of the 1998 Competition Act.
99 Section 47B(8)(b) of the 1998 Competition Act. Rule 78(3) of the CAT Rules 2015 provides: “In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including— (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings; (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body; (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes— (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.”
100 Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9; Walter Hugh Merricks v MasterCard [2017] CAT 16.
101 In Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9, the CAT expressed doubts about the extent to which the claim relied on an infringement decision to prove its case. Given permission to amend its application, the claimant abandoned the case. In Walter Hugh Merricks v MasterCard [2017] CAT 16, the CAT declined to make an order as it concluded that the claim was not suitable to be brought in collective proceedings.
4.3. Class actions in Mexico

In Mexico, class actions are recognized in article 17 of the Constitution and regulated in the Federal Code of Civil Procedure (article 578 to article 626). The class action regime was developed through two important legal reforms.

Firstly, on July 29, 2010, Article 17 of the Mexican Constitution was amended to recognize the existence of class actions. This reform established that only the Federal Congress has the power to legislate on issues related to class actions, and assigned the resolution of these procedures exclusively to the Federal Judiciary. The reform also instructed the Federal Congress to make all the necessary legislative amendments within a year of the publication of the constitutional amendment.

Following this instruction, and in order to regulate class actions in Mexico, the Federal Congress published amendments to several federal statutes in the Federal Gazette on August 30, 2011. At the centre of this reform was the addition of a new section to the Federal Code of Civil Procedure (Federal Code of Civil Procedure). In the same amendment the Federal Congress also made changes to the Federal Civil Code (Federal Civil Code), the Federal Law on Economic Competition (Federal Law on Economic Competition), the Federal Law on Consumer Protection (Ley Federal de Protección al Consumidor), the Law on the Organization of the Federal Judiciary (Ley Orgánica del Poder Judicial de la Federación), the General Law on Ecologic Equilibrium and Protection of the Environment (Ley General de Equilibrio Ecológico y Protección al Ambiente), and the Law on the Protection and Defence of the User of Financial Services (Ley de Protección y Defensa al Usuario de Servicios Financieros). These legal amendments went into effect six months after they were published in the Federal Gazette.

4.3.1. Scope of class actions

Article 17 of the Constitution establishes that the Federal Congress will determine, through laws, the scope of the class actions, as well as the judicial procedures and mechanisms to compensate loss. The scope of class actions in Mexico is set out in Article 578 of the Federal Code of Civil Procedure, according to which class actions are limited to consumer relations connected to the exchange of goods and services, whether public or private, and the environment. As a result, class actions cannot be used in damages actions arising from competition infringements.

The Federal Code of Civil Procedure creates three different types of collective procedures in the Mexican legal system: the diffuse action (acción difusa), the collective action in strict sense (acción colectiva en sentido estricto), and the individual homogenous action (acción individual homogénea). The essential difference between the three is the type of right or interest that can be protected through each procedure, which will be reviewed below at section 4.3.3.
4.3.2. Standing to initiate the procedure

Article 585 of the Federal Code of Civil Procedure lists those entities granted standing to initiate class action procedures. Sections I to IV of this article grant standing to four federal public entities:

- The Office of the Federal Attorney for Consumer Protection (Procuraduría Federal de Protección al Consumidor) (I);
- The Office of the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección al Ambiente) (I);
- The National Commission for the Protection and Defence of the Users of Financial Services (Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros) (I);
- The Federal Competition Commission (the relevant provision still refers to the Federal Competition Commission, but this needs to be understood as referring to COFECE since the Federal Competition Commission ceased to exist as of September 2013) (I); and
- The Federal Attorney General (Procurador General de la República) (IV).

A few non-public entities are also granted standing to bring class actions by Article 585, II and III. These include:

- The representative of a group of at least 30 individuals (II); and
- Non-profit civil associations (asociaciones civiles), as long as they were established at least one year before filing the class action and their mission includes “the promotion or defence” of rights and interests in the subject area of the class action (III).

4.3.3. Remedies

According to Articles 581, 582, 604, 605, 610, and 611 of the Federal Code of Civil Procedure, injunctive relief, declaratory relief, and monetary compensation are available remedies in collective proceedings. However, not all remedies are available in all types of collective proceedings.

- In the case of diffuse actions, the judge can only condemn the defendant to return the situation to the state of affairs that existed before the damage was produced, assuming this is possible. If it is not possible, the judge will condemn the defendant to pay an amount of money in accordance to the damage caused to the interests or rights of the class. The money will not be distributed to the group, but will instead be transferred to a fund administered by the Council of the Federal Judiciary. Diffuse actions do not require the existence of a legal link between the plaintiff and the class.\(^{103}\)

- As regards class actions in strict sense and individual homogenous actions, the judge can condemn the defendant to pay damages for the harm caused and to compensate the individual damages that the members of the class suffered. The homogeneous action’s objective is to claim the execution of a contract or its

\(^{103}\) Article 604 of the Federal Code of Civil Procedure.
In this case, the compensation will be related to damages caused by the non-execution of the contract. Class actions in strict sense will result in compensation for damages caused by the non-compliance with a legal obligation. In order to receive individual compensation in these cases, each member of the group has to demonstrate in court that it suffered damage.  

4.3.4. Opt-in procedure

None of the class actions available in Mexico are opt-out. Instead, Article 594 of the Federal Code of Civil Procedure establishes a system of opt-in for class actions in Mexico. The members of the affected group can opt-in to the procedure anytime while the case is still in court. Additionally, the members of the affected group will have 18 months to join the class action after the judicial decision is final or after a settlement is reached.

4.3.5. Costs of litigation

The general rule set out in Article 7 of the Federal Code of Civil Procedure is that the losing party should reimburse the other party of the costs of the proceedings. Article 617 of the Federal Code of Civil Procedure carves an exception to this rule when it sets out that “each party will cover all the costs and expenses related to the class action, including the fees of their attorneys”. In addition, this article establishes that the fees of the attorneys cannot exceed a maximum percentage of the total value of the dispute. This ceiling on attorney fees varies depending on the total value of the dispute, but in no case it may exceed 20% of the total value of the dispute. This maximum on the fees of the attorneys applies whether the dispute ends through a judicial decision or through a settlement. According to the same provision, any settlement that ends a dispute has to resolve the issue of the costs and expenses, including the fees of the attorneys, and it has to be approved by a judge. In addition, Article 625 of the Federal Code of Civil Procedure establishes that the resources in the fund administered by the Council of the Federal Judiciary can only be used to “cover the costs of the class actions, including the fees of the attorneys of the plaintiff, when there is a social interest that justifies it and the judge orders it”. According to this provision, the costs of a class action include notifications to the members of the group, preparation of evidence, and the notification of the judicial decision. This fund collects the money that defendants in diffuse actions have to pay when they are condemned and it is impossible for them to reinstate the state of affairs that existed before the damage was produced.

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105 Article 625 of the Federal Code of Civil Procedure does not clarify whether it covers the costs of notification of the sentence to any or all the parties involved. Given that it refers to the possibility of covering the fees of the claimant or claimant’s lawyers, some experts consider that it could be inferred from this article that it would be those costs of notification of the judgment to any of the parties that the parties have incurred or could incur. Plaintiffs who are members of the class or community, and, above all, the most burdensome notification to the members of the class, in line with what is set out in Articles 591 and 607 of the of the Federal Code of Civil Procedure.

106 See fn.103 above.
4.3.6. Empirical assessment

Only a small number of class actions are reported in the main database of the Federal Judiciary Authority (which does not include all the cases). However, there is some indication that class actions may be getting off the ground. First, there is a recent judgment of the Supreme Court regarding a collective action from damages in the context of consumer protection against a telecom company.\(^\text{107}\) Furthermore, the Procuraduría Federal del Consumidor (PROFECO)’s database includes a number of class actions in a variety of sectors related to breaches of contractual terms and/or consumer laws.\(^\text{108}\)

\(^{107}\) See *Profeco vs Telefónica Movistar*, decided by First Chamber of the SCJN in direct amparo 49/2014.

\(^{108}\) See [http://acolectivas.profeco.gob.mx/](http://acolectivas.profeco.gob.mx/). As of 12 June 2018, this website identifies one single case which has been decided by the Mexican judiciary, and four cases which have been settled.
Chapter 5. Out-of-court redress schemes

The rationale for encouraging voluntary redress schemes or consensual dispute resolution systems is related to the costs and uncertainty of litigation. Competition-related damage claims are more complex than most civil actions, and can be particularly costly and time-consuming.

Alternative dispute resolution mechanisms allow victims to settle cases quickly and easily on a voluntary basis (OECD, 2015, p. 30[5]). As such, most systems try to promote resolution of claims out of court. This chapter reviews three such mechanisms: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration.

5.1. Voluntary redress schemes

In order to promote the compensation of victims, some jurisdictions consider the voluntary payment of damages to victims as a relevant circumstance when setting administrative penalties. This can take various forms:

1. **Voluntary Compensation as a Pre-Condition of Immunity** – In the US, voluntary compensation is one of the conditions for a company to obtain immunity from prosecution under the DoJ Leniency Policy.109

   - **Voluntary Compensation as a Mitigating Factor in the Setting of Administrative Penalties** – Treating voluntary compensation as a mitigating factor when calculating the amount of the pecuniary penalty applied for infringing competition law is a common way to promote voluntary compensation of victims in Europe. For example, the UK may reduce a fine by 5-10% if a business voluntarily redresses its victims (OECD, 2015, p. 33[5]). In the Netherlands, the competition authority considers voluntary compensation to be a mitigating circumstance when setting a fine.110 In Spain, ‘the performance of actions intended to repair the damage caused’ is a mitigating circumstance, and the payment of damages before an infringement decision is issued is expressly identified as an action intended to repair the damage caused.111 At EU level, the payment of voluntary compensation has been recommended as a mitigating factor112, while the EU Damages Directive holds that where an infringer has paid compensation as a result of a consensual settlement, a competition authority may consider this to be a

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109 US Department of Justice, Corporate Leniency Policy.
110 Point 49 (c) of the NMA Fining Code 2007.
111 Article 64.3 of the Spanish Competition Law.
mitigating factor when setting the fine for that infringer. In practice, however, it seems to be very rare for infringers of competition law to engage in voluntary compensation.

5.2. Alternative dispute resolution and settlement schemes

A number of jurisdictions have promoted specific mechanisms to settle damages claim outside of court. This section will not deal with simple settlement agreements – despite such agreements constituting a significant share of how damages claims are solved. The reason for this is that the rules for settlement agreements are usually straightforward and generic rules on settlement applicable to a variety of judicial disputes, if subject to the procedural laws of the relevant fora (OECD, 2015, p. 4[53]). Instead, this section will focus on schemes that individual jurisdictions have adopted specifically to incentivise the resolution of competition damages claims out of court. Three such mechanisms seem particularly worthy of attention:

- The Netherlands has had an ‘opt-out’ collective settlement mechanism since it adopted the Collective Settlement of Mass Damage Claims Act (WCAM) in 2005. The main features of this systems are that: (i) private litigation is settled out of court; (ii) the settlement agreement should include information on the estimated number of class members, the compensation amount, eligibility criteria for compensation, the methods for determining the compensation amount, and the methods for distributing the compensation amount; (iii) the settlement must be approved by a court; (iv) the collective settlement must be published in a newspaper and a notice must be sent to known injured parties by ordinary mail; (v) everyone who falls within one of the categories of the settlement is given the opportunity to opt-out of the settlement within a certain period of time (at least three months) (OECD, 2015, p. 31[5]).

- In the UK, the 2015 reforms have promoted a voluntary opt-out collective settlement regime within the CAT, which aims to allow businesses to settle cases quickly and easily on a voluntary basis. The settlement of opt-out actions requires approval from the court, unlike opt-in actions, with the court standing in to ensure that the interests of the class are being adequately protected. The reforms also granted the Competition and Markets Authority (CMA) a limited role in certifying voluntary redress schemes for companies that have been found to have infringed competition law (OECD, 2015, p. 8[5]).

- In the EU, while the EU Damages Directive does not include a collective redress mechanism, it nonetheless includes provisions that promote the settlement of

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113 EU Damages Directive, Article 18(3).
114 Information provided by members of the European Commission, informally.
115 This system has proven successful. Six collective settlements have been brought before the Amsterdam Court of Appeal, five of which have been declared binding. These included the EUR 1 billion settlement in the Dexia investment products case affecting 300,000 potential claimants, and also a USD 340 million Shell oil re-categorisation settlement. The latter settlement applies to investors in 105 jurisdictions who purchased their shares in non-US markets, but excludes US persons and entities.
damages out of court. First, the Directive provides for the suspension of limitation periods and of pending court proceedings during settlement negotiations.\footnote{EU Damages Directive, Article 18(1) and (2). This rule was adopted in Spain in near identical form – see Art. 75(3) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.} Secondly, to encourage out-of-court settlements the Directive ensures that an infringer that agrees to pay damages is not placed in a worse position vis-à-vis its co-infringers than it would be had it not settled. This would happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. As result, the Directive clarifies that the effect of partial settlements (e.g. where a claimant settles with only one of the co-infringers) is that the victim’s claim is reduced by the settling co-infringer’s share of the harm. Furthermore, the victim’s remaining claim can only be exercised against non-settling co-infringers, and the non-settling co-infringers cannot recover contribution from the settling co-infringer.\footnote{However, when the non-settling co-infringers are unable to pay the damages corresponding to the victim’s remaining claim, the settling injured party can exercise the remaining claim against the settling co-infringer unless this is expressly excluded under the terms of the consensual settlement – see Article 19 of the EU Damages Directive.}

5.3. Arbitration

Pursuant to the principle of party autonomy, private parties should be allowed to opt out of the state court system and to submit their disputes to arbitration. International arbitration plays a central role in resolving disputes out-of-court. It releases judicial resources, and it is often considered speedier and more cost-effective than litigation. Particularly for sophisticated parties, it gives them access to a final and enforceable award similar to a court judgment – which is sometimes easier to enforce –, with considerable advantages in terms of choice of the arbitrators, procedural flexibility and neutrality of the forum. As such, it is looked upon favourably by most legal systems (Nazzini, 2017, p. 796\footnote{American Safety Equipment Corp. v. J. P. Maguire & Co., Inc., 391 F.2d 821 (2d Cir. 1968).}).

There are, however, limits to party autonomy, and questions have been raised as to the arbitrability of areas of law that have a strong public policy element. Competition law is one of the areas of law that has historically raised arbitrability issues. Some considered that it was not a proper subject matter for arbitration, and claims involving competition law elements were traditionally considered non-arbitrable (Geradin and Villano, 2017, pp. 67-68\footnote{American Safety Equipment Corp. v. J. P. Maguire & Co., Inc., 391 F.2d 821 (2d Cir. 1968).}). Nowadays, however, it is generally accepted that matters of competition law can be subject to arbitration. In effect, some have gone as far as to hold that the arbitrability of competition law has ceased to be a significant issue in international arbitration (Lew, 2009, pp. aras, 12-68 and 12-69\footnote{American Safety Equipment Corp. v. J. P. Maguire & Co., Inc., 391 F.2d 821 (2d Cir. 1968.).}).

The question of the arbitrability of competition law was originally played out in the US. Antitrust claims were originally considered to be inappropriate for arbitration as a result of the public nature of antitrust rules, the complexity of antitrust assessments, and the possibility of conflicts of interest on the part of arbitrators.\footnote{American Safety Equipment Corp. v. J. P. Maguire & Co., Inc., 391 F.2d 821 (2d Cir. 1968).} In other words, the concern was that arbitral tribunals were not suitable venues to protect the general interest underlying
the US antitrust law regime. This position was reversed by the US Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which held that disputes involving antitrust issues could be subject to arbitration. In Europe, the largest EU jurisdictions – including Germany, France, Spain and the UK – recognise the arbitrability of competition law matters. Under EU law, the European courts have also implicitly acknowledged the arbitrability of competition law matters (Geradin and Villano, 2017, pp. 74-75).

Nonetheless, if a claim is brought in the absence of a pre-existing contractual relationship between the parties, it is highly unlikely that a competition matter will fall to be determined by arbitration. Damages actions by a competitor against colluding undertakings or against a dominant company will generally not be covered by an arbitration clause (Nazzini, 2017, p. 801). Even in the context of damages claims between parties to a contract, such as the cartelist and the purchaser of a cartelised product, EU courts have held that standard wording subjecting the regulation of the contractual relation of the parties to arbitration does not suffice to subject competition law claims to arbitration – instead, the parties must explicitly state that such clauses or agreements cover competition damages. This reasoning has been adopted by some national courts even if it is subject to local

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120 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)
125 *ET Plus SA & Ors v. Welter & Ors* EWHC, ET Plus SA & Ors v. Welter & Ors [2005] EWHC 2115 (Comm)
126 Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* ECLI:EU:C:1999:269. In this case, the CJEU was asked to rule on the question of whether Article 101 TFEU had a public policy nature within the meaning of Article V(2)(b) of the New York Convention for the purpose of refusing the enforcement or setting aside international arbitral awards. While dealing with this topic, the Court did not raise the issue of lack of arbitrability of EU antitrust claims, thus seeming to implicitly acknowledge that competition law was an arbitrable subject-matter.
127 Nazzini argues that, after determination of liability, the parties may still agree to refer the determination of the quantum of damages to an arbitral tribunal.
129 See, for example, Gerechtshof Amsterdam, 21 July 2015, No. 200.156.295/01.
variations. In the UK, for example, the usual interpretation of a typical arbitration clause saying that all disputes arising out of a contract should be subject to arbitration is that “the parties are likely to have intended any dispute (contractual or tortious) arising out of the relationship into which they have entered or purported to have entered to be decided by the same tribunal”.

The net effect of the law is that competition law claims will be regarded as coming within an arbitration clause only if they are closely related to a viable contractual claim which has already been, or could be, made. This covers many situations but not cartel damages, because “the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause”.

5.4. Out of court redress schemes in Mexico

Under an amendment published in the Official Journal of the Federation (DOF) on 18 June 2008, the following third paragraph was added to Article 17 of the Constitution:

“The laws shall provide alternative mechanisms to resolve disputes. In criminal matters, they shall regulate their application, ensure redress and establish the cases in which judicial supervision will be required.”

As Lord Hoffman stated in Fiona Trust v Privalov [2007] 4 All ER 951 at para 13: “…the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to have entered to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”

Ryanair Ltd v Esso Italiana Srl [2015] 1 All ER (Comm), para. 53: “Such reasoning, however, does not carry over into a situation where there is no contractual dispute (by which I intend to include disputes about contracts), but all that has happened is that a buyer has bought goods from a seller who has participated in a cartel. I think that rational businessmen would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself.”

An interesting recent case is Microsoft Mobile Oy (Ltd) v Sony [2017] EWHC 374 (Ch), where Sony argued that the dispute should be subject to arbitration and not the civil courts because all the allegedly cartelised supplies by Sony had been made pursuant to an agreement with an arbitration clause requiring “any disputes related to this Agreement or its enforcement” to be arbitrated. To establish that the claim for damages was related to the agreement, Sony advanced an argument against itself that Microsoft had not advanced: Sony argued that, because the relevant prices had been subject to an express obligation that they be negotiated in good faith, and because Sony was subject to a further obligation to disclose events that reasonably may affect its ability “to meet any of its obligations” under the agreement, the operation of a cartel would have been a clear breach of contract (as well as giving rise to civil liability under normal tort law). The Court accepted this submission, holding that it was “very difficult” to see how Sony could have engaged in the conduct complained of in the tort claims without also breaching the contract.
The idea underlying the amendment is to grant parties a wide range of options in resolving disputes affecting them. Prior to the amendment, the constitutional text gave priority to the resolution of disputes through public means, i.e., in judicial courts of law. Hence, as from 2008, the parties involved in certain types of dispute can opt for either public or private dispute resolution. The latter has the same weight and rank as the former. This has been determined by the courts in Mexico.

Although there is no consensus in Mexican legal literature as to what these alternative resolution mechanisms may be—a reality which is further complicated by alternative dispute resolution being governed by local regulations in each federal entity within Mexico—it is certainly possible to include mediation, conciliation and arbitration among them. Mediation has been recognised in certain state laws, such as the Law on Alternative Justice

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“ACCESS TO ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AS A HUMAN RIGHT. ENJOYMENT OF THE SAME RANK AS ACCESS TO THE JURISDICTION OF THE STATE.

Articles 17, second paragraph, of the Political Constitution of the United Mexican States, 8 of the American Convention on Human Rights and 14 of the International Covenant on Civil and Political Rights grant citizens effective access to the jurisdiction of the State, which shall be entrusted to courts that shall be expeditious in dispensing justice, issuing their decisions in a prompt, complete and impartial way; in this respect, the Federal Constitution in the aforementioned Article 17, fourth paragraph, goes further and, in addition to guaranteeing access to the existing courts, recognises as a human right the possibility that conflicts may also be settled by means of alternative dispute resolution mechanisms, as long as these are provided by law. That said, as regards the alternative dispute resolution mechanisms, the idea is fostered that it is the parties who are the owners of their problem (dispute) and, as such, it is they who should decide on the manner of resolving it, so that they may opt for a wide range of possibilities, of which legal proceedings are merely one. The alternative means consist of various procedures whereby persons may settle their disputes without the need for involvement of the courts, and they consist of negotiation (autocomposition), mediation, conciliation and arbitration (heterocomposition). In this respect, among the considerations expressed in the statement of grounds of the constitutional amendment to the aforementioned Article 17, on the eighteenth of June in the year two thousand and eight, it was established that the alternative dispute resolution mechanisms ‘are a guarantee to the population of access to prompt, expeditious justice ..., they will make it possible, firstly, to switch to the paradigm of restorative justice, will foster more active participation by the population to find other forms of relating to one another, where the focus is on personal responsibility, respect for others and the use of negotiation and communication for collective development’; in such a regulatory context, it must be concluded that both judicial protection and alternative dispute resolution mechanisms are established on the same constitutional level and with the same rank, and they have a single aim, which is to settle differences between persons who are under the rule of law in the Mexican State.”
of the Supreme Court of Justice of the Federal District.\footnote{133} The same applies to conciliation, for which provision is made, for instance, in Article 272 A of the Code of Civil Procedure of Mexico City and in Article 1390 bis 35 of the Commercial Code (which is not applicable to competition matters). Curiously, the Federal Code of Civil Procedure (CFPC) does not regulate conciliation, except as regards the procedures for collective actions in Articles 595 and 596 of the CPFC. This is not a minor issue, as this is the Code applied by the courts specialising in economic competition. The CFPC is also silent about arbitration. Arbitration is provided for in Articles 1415 to 1480 of the Commercial Code. This mechanism has seen a significant upswing in Mexico in recent years and has received express recognition from the courts of justice.\footnote{134}

\footnote{133} Article 1 of this Law provides as follows: “The provisions contained herein are a matter of public policy, in the general interest and of mandatory compliance within the Federal District, and their purpose is to regulate the fourth paragraph of Article 17 and the sixth paragraph of Article 18 of the Political Constitution of the United Mexican States and to regulate mediation as a method of conflict management for the resolution of disputes between individuals, when those disputes involve rights of which those individuals may freely dispose, without affecting public policy, based on assisted autocomposition.”


Article 17 of the Constitution lays down that no person may take the law into his or her hands, or resort to violence to enforce his or her rights. However, this prohibition does not imply the other extreme, that all disputes between persons must be resolved through judicial authorities, since it also states that the laws shall provide alternative mechanisms to resolve disputes. The constitutional solution is therefore an intermediate one: it provides that the courts will be expeditious in dispensing justice, but also that, in parallel, the law must make alternative mechanisms available. Based on this new architecture as from the amendment of the Constitution of 18 June 2008, some of the interpretative premises assumed by the Constitutional Court need to be clarified. Firstly, arbitration is a legislative arrangement with constitutional relevance. Therefore, the law that governs this arrangement must be deemed regulatory in terms of the fourth paragraph of Article 17 of the Constitution. In relation to the above, the characterisation of the decision to have recourse to that institution must be changed, since rather than a waiver of constitutional rights (to have recourse to the courts), arbitration embodies the affirmative exercise of constitutional freedoms that merit judicial protection. That said, as regards the various possibilities of exercising those freedoms, the text of the Constitution is neutral; it implies that all the alternative dispute resolution methods enjoy the same kind of constitutional protection – for instance, mediation, conciliation and arbitration – and, accordingly, the legislature is not obliged to regulate any of them in a preferential way. Since this is related to the exercise of freedoms, if the parties decide to resort to arbitration, they must do so on the premise that the arbitral tribunal is not comparable to a judicial authority from the constitutional perspective.”
The application of any of the aforementioned mechanisms when it comes to competition damages is not straightforward. Economic competition is currently a federal matter and, to date, no federal law on mediation or alternative mechanisms has been promulgated in this area. Despite the fact that Title V of the Commercial Code on alternative means of dispute resolution is about to be published, those means will nevertheless not be applicable to economic competition matters.

There remains the possibility that the parties in dispute reach an agreement directly through the settlement procedure set out in Articles 2944 to 2963 of the Federal Civil Code (CCF). Should any such settlement be reached, it will enjoy the status of *res judicata* (Article 2953 of the CCF).
Chapter 6. Ensuring the effectiveness of redress schemes

While the existence of procedural avenues to vindicate a right to compensation is a necessary element of any system of redress, it is not sufficient to ensure the system’s effectiveness. Instead, the effectiveness of any system of redress often depends on removing practical obstacles to the bringing of a claim. One obvious way of removing such obstacles is to allow for collective redress actions. However, given the expense and difficulty of making out a damages claim arising from a competition law infringement, the effectiveness of the system often depends on mechanisms that allow for sharing the risk and cost of bringing a claim, or that reduce the cost of bringing a successful claim.

This chapter will review three such mechanisms: (i) third-party funding; (ii) success-based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement.

6.1. Third-Party/Alternative Funding

In the collective actions reviewed above, a class representative usually brings the claim on behalf of the injured party. While this class representative may have the necessary resources to bring a damages claim, very often it will not. The same problem of being unable to support the costs of litigation is faced by individual victims – the exception usually being well-resourced companies.135

One solution to this problem is third party funding. It traditionally works as follows: the party seeking financial support usually enters into a funding agreement with the litigation funder. The agreement will often provide that the funder will meet some or all of the legal fees incurred conducting the action, meet some or all of the out of pocket expenses incurred in relation to litigation, indemnify the funded party with respect to any costs order made against that party if the litigation is unsuccessful, and pay any amount required to be provided by way of security for costs. In return, the funder will usually receive a percentage of the amount recovered by persons or entities that have entered into a funding agreement in the event that they are successful in the litigation, either by way of settlement or judgment. If the action is lost, the funder accepts the risk that it will receive nothing (De Morpurgo, 2011, p. 368[57]; Kalajdzic, Cashman and Longmoore, 2013, p. 100[58]). Third party litigation funding has the potential to provide access to justice, particularly in class

135 These companies are usually in intermediate markets – i.e. the products affected by the anticompetitive product are inputs that these companies use to create other products which are then sold to final consumers. As a result, most of such claims raise complicated issues of passing-on, which will be discussed in Chapter 12 below.
actions where it can level the playing field against well-resourced parties. While its adoption is sometimes contentious, it has been gaining traction across the world. Some have said that it gives rise to substantial risk of litigation abuse, particularly in the context of class actions, and may significantly reduce the compensation that injured parties receive. Spurious claims may be brought with a view to settle given the resources needed to counteract litigation funders. The active involvement of commercial litigation funders in the proceedings, including settlement discussions and decision-making, may complicate or exacerbate ethical issues and conflicts of interest between claimants and their legal representatives. A number of areas have been thought to give rise to issues that may require regulatory intervention or judicial control: (i) the size of the funder’s returns, including the percentage of the awarded damages it may be entitled to; (ii) the funder’s potential to control the conduct of the proceedings; (iii) the financial capacity of the funder, particularly its ability to meet adverse costs orders; and (iv) conflicts between the funder, the class members and the lawyer(s) representing the class, and interference in the client-lawyer relationship when the lawyer is paid by a third-party (Lyon, 2010; Morabito and Waye, 2011, p. 348; De Morpurgo, 2011, p. 360; Kalajdzic, Cashman and Longmoore, 2013, pp. 141-143).

Others support third party funding on the grounds that it increases access to courts and levels the playing field between plaintiffs and well-resourced parties. Furthermore, funders usually employ commercial lawyers with litigation experience, which means that cases are carefully screened and extensive due diligence is usually conducted, with the result that only the cases that appear to have substantial merit are funded. Funders are understandably concerned about the transaction costs of the litigation, and thus usually impose budgetary constraints on lawyers, which may limit the costs of litigation (De Morpurgo, 2011, p. 367; Kalajdzic, Cashman and Longmoore, 2013, pp. 143-145).

Historically, third party litigation funding has occurred more often in common law than in civil law jurisdictions. In Australia, where the practice is said to have originated, third party litigation funding has long been deemed lawful. The courts have gone as far as to hold that members of an opt-out class will be bound to pay a percentage of any recovery to a litigation funder in the absence of any contractual arrangement, as long as they register to participate in any proposed settlement. There are a number of large litigation funders, some of which are even publicly listed companies. While third party funders are not subject to specific regulation, it has been recommended that funders be licensed to ensure they hold adequate capital to manage their financial obligations, and that they adopt

136 But it is unclear what impact third-party funding has in the context of class actions in the U.S. – (Kalajdzic, Cashman and Longmoore, 2013), explain at p. 127 that as of 2013 they were unable to find a reported instance of third part funding in the class actions context. How much this is due to the possibility of lawyers being paid through contingency fee arrangements in the US is an open question.

137 Originally, in the field of insolvency. The High Court of Australia’s decision in Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd [2006] HCA 41 ended a period of uncertainty by confirming that litigation funding is not in principle contrary to public policy.

138 Pathway Investments Pty Ltd & Anor v National Australia Bank Limited (No 3) [2012] VSC 625.

139 See, for example, https://www.imf.com.au/.
systems to manage conflict of interest and ensure that they provide full disclosure of potential conflicts (OECD, 2015, p. 6[61]).

In the US, third-party investment in litigation started to develop in the mid-1990s. The industry can be divided into a small scale and more consumer-oriented branch which comprises so-called litigation “loans”140, and a more commercially-focused market on third-party funding (De Morpurgo, 2011, pp. 362-363[57]).

In the UK, third party funding is generally allowed under English law, but subject to caveats. The circumstances in which third party funding is acceptable in competition damages claims was recently discussed in the context of the certification of an opt-out collective action for competition damages.141 The CAT held that, before allowing a collective action funded by a third party, it will want to ensure that the claimant has sufficient funding to pursue the litigation and to bear any liability in costs to the defendant should the action fail.142 Furthermore, while the law is silent about the recovery of costs by third party funders, the CAT found that it was implicit that the amount of this recovery would have to be allowed, usually through cost orders.143 A question which arose was whether such costs could be paid out of undistributed funds. As we saw above at section 4.2.3, under English law there is a requirement in opt-out claims that any damages not claimed by the represented persons within a specified period must be paid to a charity. However, as long as there is a conditional liability for the claimant to pay the third party funder, this can be deemed a cost of the claimant, which can be paid out of the undistributed proceeds subject to order by the court.144 Even if there is a settlement: “If the Tribunal considers that the settlement is not reasonable because the amount the funder can recover out of the unclaimed proceeds is excessive having regard to the total amount of the settlement, the Tribunal would decline to approve the settlement on that ground.”145

Third-party litigation funding also occurs in civil law jurisdictions in Europe. The European Commission Recommendation on Collective Redress, in particular, addresses third-party funding. It proposes a general disclosure rule according to which the claimant party is required to declare the origin of the funds used to support legal action. In addition, the court should be in a position to stay proceedings where there is conflict of interest between the third party providing finance and the claimant,146 where the third party has insufficient resources to meet its financial commitments, or where the claimant has insufficient resources to meet adverse costs in case of the failure of the action (European Commission,

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140 Usually providing ‘loans’ to needy personal injury or negligence plaintiffs for covering their expenses (mainly living and medical) pending the outcome of a lawsuit in exchange for a share of potential proceeds of any damages recovered.


144 CAT Rule 94(4) and (5); Walter Hugh Merricks v MasterCard [2017] CAT 16, para. 125, holding that recovery out of unclaimed damages of the success fee or ‘uplift’ element of legal costs “incurred” under a conditional fee agreement is also possible.


146 This would seem to cover situations such as the use of non-distributed damages for repayment to the fund provider, control over the claim by the fund provider, and institutional relations between the law firm representing claimants and the fund provider.
Third-party funders should be prohibited to seek to influence procedural decisions, to provide financing for legal proceedings against a competitor or an affiliate, and to charge excessive interest rates. Finally, the remuneration of third-party funders should not depend on the amounts recovered, unless such arrangement is regulated by a public authority. (European Commission, 2013, pp. paras. 14-16 and 32[36])

However, third-party funding is not as common in civil law jurisdictions in Europe as in common law jurisdictions – apparently it occurs only in a handful of EU countries, such as the Austria, Germany, the Netherlands and the UK – and it currently remains unregulated in virtually all EU Member States (De Morpurgo, 2011, pp. 365-366[57]; European Commission, 2018, pp. 9-10[37]).

6.2. Success-based billing

Yet another mechanism to incentivise damages actions is to transfer the risk of bringing such a claim to another third-party involved in the preparation of such a claim – the lawyers for the claimants. In order to incentivise lawyers to take such risks, they must be adequately remunerated – and such remuneration will tend to take the form of a percentage of the damages awarded, or of a success uplift in the amount of fees they are owed.

A first form of success-based billing is contingent-fee arrangements – under which the claimant’s lawyers may receive a percentage of whatever money is paid to the claimant by the respondent, but where the payment of any fees is conditional on a monetary award being awarded to the claimants. Contingent-fee arrangements are common in US private antitrust cases, as they are in other types of cases there (Antitrust Modernization Commission, 2007, p. 243[18]). However, contingent-fee arrangements are usually restricted, when not outright prohibited, in most jurisdictions. The European Commission has recommended that contingent fees should be prohibited in competition cases; and that, if they are exceptionally allowed, they should be appropriately regulated in collective redress cases taking into account the right to full compensation of the members of the claimant class (European Commission, 2013, pp. paras. 29-30[36]). Nonetheless, there seem to be a significant number of EU Member States where some form of contingency fee is allowed, with the amount to be paid to the lawyer ranging from 15% to 50% of the value of the award. In all these Member States, these appear to be specific provisions on the operation of remuneration in collective redress actions. An exception to this seems to be the UK, where contingency fees are not permitted in opt-out collective actions (OECD, 2015, p. 6[33]; European Commission, 2018, p. 10[37]).

A different form of incentive mechanism is performance fees. The main difference between contingency and performance fees is that in the case of performance fees the lawyer gets paid even if he loses the case, but will be paid more if he wins; whereas, in the case of contingency fees, the lawyer does not get paid at all unless he wins the case. Performance

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147 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the European Union Law, paras. 14-16 and 32.

148 The European Commission Report on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms remarks that, in the UK, under common law anyone who improperly funds the litigation of another may be found liable for all the (adverse) costs of that litigation if the case is lost.
fees, either in the form of a success fee – i.e. an uplift of the lawyers’ fees, unconnected to the amount recovered, if the lawyers’ are successful – or of a reduction in the remuneration in case certain goals are not achieved, are fairly widespread. They can be found, for example, in Australia and in a number of EU Member States (European Commission, 2018, p. 16[37]; OECD, 2015, p. 6[61]).

6.3. Cost allocation rules

Judicial costs can take various forms. They may include attorneys’ fees, and in certain contexts discovery costs. How these costs are allocated can have a significant impact on the incentives of victims of competition law infringements to bring damages actions.149 A system which has used its cost rules to incentivise claims for antitrust infringements is the US. In order to ensure that private parties have adequate economic incentives to undertake costly antitrust litigation, federal competition law in the United States authorizes the award of treble damages, plus attorneys’ fees, to prevailing plaintiffs (OECD, 2015, p. 2[43]). A plaintiff is considered to be “successful,” and an award of attorneys’ fees is mandatory, whenever any damages are awarded (Cavanagh, 1988, p. 52[62]). In addition, a plaintiff seeking injunctive relief may, if it “substantially prevails,” recover attorneys’ fees.151 A successful defendant, however, is not entitled to recover its attorneys’ fees (Antitrust Modernization Commission, 2007, p. 250[18]).

These rules on costs have been criticised by some on the grounds that they encourage the filing of frivolous antitrust cases, particularly if successful defendants are not entitled to recover their fees (Antitrust Modernization Commission, 2007, p. 243[18]). An argument against this perspective is that the cost of launching an antitrust case can be prohibitive. Expert witness costs are unrecoverable, and considerable capital will be tied up in attorneys’ fees for years until any recovery is had. (Antitrust Modernization Commission, 2007, p. 437[18]). Furthermore, concerns about the effects of granting recovery of attorney fees can be mitigated by the courts being required to only grant “reasonable” fees.152 When determining whether fees are reasonable, courts consider factors such as the novelty of the issues in the case, the skill required to perform the requisite legal services properly, the lawyer’s experience and reputation, the undesirability of a case, and numerous other factors. Many courts start with a “lodestar” figure, which is the attorney’s hourly rate multiplied by the attorney’s hours worked. The court then makes adjustments to that lodestar figure if appropriate (Antitrust Modernization Commission, 2007, p. 250[18]).153 When making cost orders, courts should bear in mind that the purpose of awarding attorneys’ fees to prevailing plaintiffs is to help ensure that plaintiffs with meritorious

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149 For a summary of the theoretical and empirical literature on the impact of different fee allocation schemes on the incentives to sue, see (Renda et al., 2007, pp. 176-192[116]).
152 Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209, 1215 (D. Mass. 1990) (“The award of reasonable attorney’s fees incurred in prosecution of the antitrust claims(...) is mandatory. This Court must only determine what award is reasonable.”), rev’d on other grounds, 932 F.2d 37 (1st Cir. 1991).
153 Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate”).
claims will have access to counsel to redress antitrust violations. Rules on attorney fees are intended to create incentives for private parties to bring lawsuits prosecuting anticompetitive conduct. Such incentives are less necessary where much of the evidence has been developed as part of a government investigation. In such cases the plaintiff’s case is often already made by the underlying criminal conviction. Courts should therefore consider whether the plaintiffs were relying on such evidence, and reduce fees appropriately in such cases to reflect the relative lack of risk of bringing a claim (Cavanagh, 1988, pp. 57-58[62]; Antitrust Modernization Commission, 2007, p. 251[18]).

Judicial costs are not relied in Europe as a tool to incentivise private enforcement. Instead, through the EU a loser-pays rule applies regarding costs (Clark, Hughes and Wirth, 2004, p. 116[63]). This is thought to deter potential claimants from bringing frivolous actions, given the risk of the reimbursement of costs to the defendant if the claim is dismissed, while also encouraging the pursuit of justified collective claims by ensuring fact that a losing defendant will have to cover necessary costs.

Nonetheless, the rules concerning civil procedure costs, and the manner in which they are reimbursed (as well as the amounts of those costs), vary substantially across Member States (European Commission, 2018, pp. 8-9[77]). This is particularly clear as regards the costs with discovery, since Member States are free to choose whether disclosure costs are born by the disclosing party, or are instead fully or partly recoverable by the winning party. National disclosure rules may offer varying incentives for claimants and, thus, Member States can use cost rules to attract or discourage legal proceedings in their respective jurisdiction (Peyer, 2016, p. 102[64]). Another tool that can be used regarding costs are cost management and cost capping orders.154

6.4. Insights for Mexico

According to the Federal Code of Civil Procedure155, the judge has to determine whether the representation of collective interests is appropriate. One of the criteria for considering that representation is appropriate is that actions should not be brought for profit motives. It would seem that the Federal Code of Civil Procedure is referring here to the legal representatives of classes comprising at least 30 people and of legally constituted civil associations, and not to the lawyers appointed to provide advice in relation to claims and to initiate and handle collective actions.156

Indeed, it is a common practice in Mexico for lawyers to receive “contingency fees” or “success fees” in cases where a claim is successful, as well as regular fees to cover representation costs irrespective of the outcome of the litigation (Calderon-Villegas, 2016, p. 142[65]).

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154 See example, the first cost-capping decision of the UK’s Competition Appeal Tribunal in Socrates Training Limited v The Law Society of England and Wales [2016] CAT 10. Courts may also disallow all or part of the costs in the UK, under Civil Procedure Rules 44.1.


The regulatory system in Mexico does not address the funding of collective redress actions by a third-party entity.

Ordinarily, in civil litigation the losing party has to pay the winning party’s legal costs. The legal costs are calculated at the court’s discretion and correspond to the amount that the winning party would have had to disburse, with the exception of expenses deemed superfluous.\textsuperscript{157}

By contrast, in collective actions, each party bears its own expenses and costs, including the respective fees of their representatives.\textsuperscript{158} Furthermore, those fees will be subject to a series of caps that are laid down in the Code (see section 4.3.5). The Mexican system makes no provision for allocating the costs of fees in order to incentivise collective redress actions, as occurs in the United States, where the defendant pays the claimant’s fees if the claim is successful.

\textsuperscript{157} Article 7 of the Federal Code of Civil Procedure.
\textsuperscript{158} Articles 616 and 617 of the Federal Code of Civil Procedure.
Chapter 7. Claimants and standing

Economic injuries have a way of rippling through markets, creating larger numbers of victims than the typical contract or tortious dispute. The victims may not only be consumers, but also rivals, suppliers, and firms operating in complementary market. This creates a broad range of potential claimants.

As noted by the US Supreme Court: “An antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but […] there is a point beyond which the wrongdoer should not be held liable.” To an extent, this expresses a principle common to tort law systems across the world, and reflects the need to restrict liability for pure economic loss in order to limit the possibility of socially undesirable restrictions on individual liberty and socially wasteful litigation. If competition law infringers could be held liable for all individual losses that may be causally linked with their wrongdoing, this would entail significant risks of over-deterrence and could result in an undue restriction on commercial freedom (Franck et al., 2017, p. 1[4]).

There are rules on standing for non-contractual liability – e.g. on capacity and on the existence of some “interest” or “genuine grievance” – that determine who has standing to sue. Nonetheless, such rules are usually purposefully vague, and hence do not really allow for the exact identification of who has and who lacks standing to sue. As a result, an important question in most jurisdictions is who should have standing to bring a claim in the private enforcement of competition law, and whose loss is too “remote” to allow them to start judicial proceedings (Hovenkamp, 2005, p. 59[8]). This is a question that has led to different approaches around the world.

The question about standing to claim for damages in competition law cases can be usefully broken down into three different categories of claimants: (i) direct purchasers; (ii) indirect purchasers; and (iii) other plaintiffs. We review each one in turn below.

7.1. Direct purchasers

Across the world, purchasers of products or services that were the object of an infringement of competition law are allowed to sue the infringing party for loss suffered. In some jurisdictions, however, standing in damages actions is restricted mainly to direct purchasers.

The best example of this is the US. The Supreme Court has limited the standing of parties to sue for antitrust damages, because: “Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust

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Five factors must be taken into account in deciding whether a plaintiff should have antitrust standing: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, in particular whether the plaintiff is a consumer or a competitor in the relevant market; (3) the directness of the injury, including whether determining damages would be too speculative; (4) the danger of duplicative recovery and whether it would be too complex to apportion the damages; and (5) the existence of a class of better-situated plaintiffs or more direct victims (American Bar Association. Section of Antitrust Law, 2010, p. 18). As a result, in “conventional” cases such as cartels, antitrust standing under US federal law is restricted to direct purchasers – with the notable exception of purchasers injured by “umbrella pricing” (for the benefit of whom the appellate courts of at least two circuits have affirmed standing and proximate causation) and exclusionary practices affecting competitors.

### 7.2. Indirect purchasers

Indirect purchasers are those who acquired products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom, not directly from an infringer but instead from a direct or a subsequent purchaser. An example of an indirect purchaser is the customer of the original purchaser from a dominant firm or cartelist. The indirect purchaser will pay more for a product or service made more expensive by the infringement – the added expense arising from the direct purchaser having incorporated its added costs arising from the infringement into the sale price (i.e. “passing on” the added cost) (Truli, 2016, p. 308).

The question is ultimately about which parties in a production or distribution chain may sue to recover damages resulting from the same antitrust violation. As an illegal overcharge is passed through a distribution chain, each of the parties in that chain may suffer antitrust injury. For example, when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This “direct purchaser” then may incorporate the price-fixed good into the products it sells, and pass on to its distributors all or some portion of the manufacturer’s overcharge. In turn, the distributors may be able to pass on all or part of that overcharge to consumers. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are called “indirect purchasers.” Thus, the damages from the original antitrust violation may flow from direct to indirect purchasers (Antitrust Modernization Commission, 2007, p. 265).

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162 In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166, fn. 24 (5th Cir. 1979); United States Gypsum Co. v. Indiana Gas Co. Inc., 350 F.3d 623, 627 et seq. (7th Cir. 2003). In contrast, a claim for damages due to umbrella pricing was dismissed in Mid-West Paper Products Co. v. Continental Group 596 F.2d 573 (3rd Cir. 1979).

163 Article 2(24) of the EU Damages Directive.
The existence of damage suffered by indirect purchasers raises a number of important issues – including:

- how to address passing-on if indirect purchasers are allowed to sue. In order to avoid overcompensation, a passing-on defence or mechanism of some sort – that will very likely add significant complexity to the whole system – must be allowed. This issue is discussed in much greater detail in Chapter 12.3 below.

- many indirect purchasers are consumers who are disinclined to take large corporations to court. While a compensation system that extends to indirect purchasers can work without collective redress mechanisms, the available empirical evidence shows that indirect purchaser actions are rather rare, except in certain cases – such as wholesalers who are indirect purchasers. This has led some to argue that promoting damages claims by indirect purchasers may require the adoption of some kind of collective redress mechanism (Lande and Davis, 2008[68]; Rodger, 2014[69]). This issue was discussed in Chapter 4.2 above.

In policy and academic debates, however, these issues are traditionally framed as a matter of whether indirect purchasers should have standing and, if so, whether any particular rules should apply to their claims. This question will be discussed here; for the benefit of clarity, the question will be reviewed by reference to the main systems that have refused to grant standing to indirect purchasers (i.e. US federal law) and that require that standing be granted to indirect purchasers (i.e. EU law).

### 7.2.1. Indirect purchasers should not have standing – The US experience

In the US, the Supreme Court’s 1977 decision that indirect purchasers do not have standing followed a number of prior judicial decisions regarding the amount of damages that direct purchasers could recoup. The Supreme Court first concluded, in 1968, that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had “passed on” to indirect purchasers the illegal overcharges initially paid by the plaintiff. As a result, direct purchasers could recover all overcharges they suffered from an antitrust violation, even if the direct purchasers passed on some or all the overcharge to their customers (that is, indirect purchasers).164

Almost a decade years later, the Supreme Court had to decide whether indirect purchasers were allowed to sue for damages in antitrust, and held that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges.165 The Supreme Court pointed to a number of reasons underpinning this decision not to grant indirect purchasers standing. First, this would mean that the same rule would apply to both claimants and defendants: neither could rely on the passing on of overcharges to either bring, or defend against, a damages claim for antitrust infringements. Furthermore, restricting standing to direct purchasers was thought to promote more effective private enforcement, to avoid the imposition of multiple – and ultimately inconsistent – liability on defendants, and to circumvent the need to engage in the complex economic adjustments required to determine the impact of a competition infringement on indirect purchasers (Antitrust Modernization Commission, 2007, p. 268[18]).

The same rules have been applied regarding the standing of suppliers of cartelists. Suppliers are not the target of anticompetitive practices, and hence their standing was denied by at least four Circuit courts. The courts based their verdicts solely on considerations regarding the effective private enforcement of the antitrust laws. In particular, consumers and competitors in the affected market were available as a class of more suitable plaintiffs than suppliers in the relevant markets: these consumers and competitors were thought to be in a better position than suppliers to identify antitrust violations and to have sufficient self-interest to bring an antitrust suit. In this context, it was further argued that damages claims by suppliers entail risks of duplicative recovery. Lastly, it was held that suppliers’ damages and their causal connection with an antitrust infringement were too “speculative” (Franck et al., 2017, pp. 8-9).

It should be noted, however, that these restrictive rules on standing have been challenged as unwarranted, in court, through political initiatives and by academic commentators. First, in the very Supreme Court decision that denied standing to indirect purchasers, a vigorous dissent held that such an approach frustrated both the compensation and deterrence objectives of damages actions in antitrust – objectives which were made clear by the granting of treble, instead of merely compensatory damages. The dissent further emphasized that there was evidence of congressional intent that all consumers should be able to recover their antitrust injuries. The dissent was also not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was greater than the complexity of other antitrust issues.

Furthermore, the federal rules on lack of standing of indirect purchaser have been circumvented at the state level. Through both legislation and court decisions, many states adopted policies that allow both indirect and direct purchasers to sue under state antitrust law to recover damages. The result has been that direct purchasers typically sue in federal court, while indirect purchasers sue in state court to recover damages resulting from the same antitrust violation (Antitrust Modernization Commission, 2007, pp. 266, 269). As a result, an act of Congress was adopted in 2005 that allows defendants – under certain circumstances – to move certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in that court (Antitrust Modernization Commission, 2007, p. 269).

166 Comet Mechanical Contractors, Inc., v. E.A. Cowen Construction, Inc. 609 F.2d 404 (10th Cir. 1980); Exhibitors’ Service, Inc. v. American Multi-Cinema, Inc. 788 F.2d 574 (9th Cir. 1986); International Raw Field v. Staufer Chemical Company 978 F.2d 1318, 1327-29 (3rd Cir. 1992); SAS of Puerto Rico, Inc., v. Puerto Rico Telephone Company 48 F.3d 39, 44 (1st Cir. 1995). The suppliers’ losses were argued to arise from the restrictive effects that the antitrust infringement caused in downstream markets. See also the discussion at section 7.3 below.


168 In 1989, the Supreme Court confirmed the validity of state laws permitting indirect purchasers to sue for damages, holding that those laws were not impliedly pre-empted by federal antitrust law: California v. ARC Am. Corp., 490 U.S. 93, 102–06 (1989).

More recently, the bipartisan Antitrust Modernisation Commission recommended that Congress overrule the above-mentioned Supreme Court precedents “to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from offences against federal antitrust law” (Antitrust Modernization Commission, 2007, p. 267\(^{[18]}\)). The Commission pointed out that the current rules on standing of indirect purchasers leave many of those actually injured by antitrust violations without compensation. It also noted that indirect purchasers can also bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers.\(^{170}\)

### 7.2.2. Indirect purchasers have standing – The EU

In most jurisdictions, indirect purchasers are granted standing to claim damages for competition law infringements. The EU and its Members States provide a good example of jurisdictions where this is the case.\(^{171}\)

The basic rules on standing in Europe are to a large extent the result of decisions by the Court of Justice of the European Union (‘CJEU’). In particular, the CJEU has held that the “full effectiveness” of competition law would be put at risk if individuals were not able to claim damages for injury suffered as a result of a competition infringement — and that, as such, private parties had a right to claim for damages in such circumstances.\(^{172}\) Regarding standing, it has held that: “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm” and a prohibited anticompetitive conduct.\(^{173}\) While it did not address directly whether indirect purchasers should be granted standing, the case law was read mainly as allowing both direct and indirect purchasers to sue (Whish and Bailey, 2012, p. 301\(^{[70]}\)).

The issue was, however, explicitly addressed by the EU Damages Directive, which in its Article 12(2) explicitly grants standing to indirect purchasers. Given the way EU law

\[\text{plaintiff and one defendant are diverse, (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least $5 million.}\]

In addition, some indirect purchasers have brought their state law damage claims in federal court under the federal court’s supplemental jurisdiction. In these cases, the indirect purchasers have asserted a federal antitrust claim seeking injunctive relief (which is not barred under Illinois Brick) and have requested that the federal court hear their state law claims for damages pursuant to the court’s supplemental jurisdiction. Although this procedure appears to have been used successfully with some frequency in recent years, it can provide only a partial remedy to the problems of duplicative litigation. Plaintiffs may not use it when they cannot seek injunctive relief — e.g. when claiming damages from a price-fixing cartel that has disbanded following criminal prosecution.\(^{170}\)

\(^{170}\) Three (of twelve total) commissioners dissented from this recommendation. (Antitrust Modernization Commission, 2007, p. 274\(^{[18]}\)).

\(^{171}\) And so does Canada, where the Supreme Court made clear in Pro-Sys Consultants Ltd. v. Microsoft Corporation (2013) SCC 57, that indirect purchasers have standing to sue.


works, this means that indirect purchasers will have standing to claim for antitrust damages in every EU Member State.

Granting standing to indirect purchasers automatically raises the question of how to deal with matters concerning the passing on defence. While the Directive expressly allows such a defence,\(^{174}\) it also establishes a rebuttable presumption that an overcharge has been passed on by the direct purchaser to the indirect purchaser, whenever: (a) the defendant has committed an infringement; (b) the infringement resulted in an overcharge for the direct purchaser; and (c) the claimant/indirect purchaser has purchased affected goods or services.\(^{175}\) As a result, an indirect purchaser faces a lower standard of proof to demonstrate passing on than do defendants invoking such a defence to limit their liability – with the result that defendants face an increased risk of exposure to cumulative liability before direct and indirect purchasers. In order to prevent the infringer from being subject to multiple liability, or from being able to escape liability, the Directive requires courts to take due account of: (i) actions for damages, and respective judgements, that are related to the same infringement of competition law but are brought by claimants at other levels of the supply chain; and (ii) relevant information in the public domain resulting from the public enforcement of competition law (e.g. whether it is know that other claimants are likely to sue the infringing party).\(^{176}\) This topic will be discussed in greater detail in Chapter 12.3 below.

It is also worthwhile to shortly mention that Canada has recently, in three decisions by its Supreme Court, granted indirect purchasers standing to claim damages for antitrust infringements, and set out the conditions for class certification when the claim takes the form of a collective action – as already discussed in Chapter 4 above.\(^{177}\)

### 7.3. Other claimants

A number of parties other than purchasers may suffer harm as a result of anticompetitive conduct. Whether someone is entitled to compensation should, in the first place, depend on whether there is a causal relationship between the unlawful conduct and the harm – a topic which will be discussed in Chapter 11 below. This is the position in Europe, where the law is that: “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited” by competition law.\(^{178}\) As a result, the potential range of claimants may include upstream suppliers or downstream purchasers from the infringer, whether at the intermediary, wholesale or retail levels (e.g. dealers or distributors), including consumers; parties with no involvement in the supply chain who have nonetheless paid higher prices as a result of structural damage to effective competition in the market (e.g. umbrella pricing);

\(^{174}\) Article 13 of the EU Damages Directive.

\(^{175}\) Article 14(2) of the EU Damages Directive. See also Recital 41 of the Directive.

\(^{176}\) Article 15 of the EU Damages Directive.


\(^{178}\) Joined Cases C-295/04 to 298/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others, EU:C:2006:461, para. 61. See also Article 10f of the EU Damages Directive. Canada adopts a similar test – see s. 36 of the Competition Act RSC 1985, c C-34.
competitors; employees; unions and their members; and even, potentially, shareholders (Lianos, Davis and Nebbia, 2015, p. 36).

As should be made clear by the extent of potential claimants, framing the question of standing as relating exclusively to causation can have the effect of turning the issue of standing into a question regarding what rules of causation should apply. An example of this can be found in a reference from an Austrian court to the CJEU on the topic. The Austrian rules on causation effectively excluded the possibility of establishing causation for indirect economic loss. The CJEU held that, while the conditions for establishing liability for damages – including rules on causation – are for the Member States to determine, these conditions must not detract from the effectiveness of the EU competition rules. As a result, standing will have to be established on a case-by-case basis. National rules on causation may not categorically exclude the right to compensation even when the causal link between the loss and the infringement may have been broken by an autonomous decision of a third-party to raise its prices.179 This demonstrates how rules on standing can be affected by the choice of rules applicable to the determination of causation (Lianos, Davis and Nebbia, 2015, pp. 29-30).

While rules on causation and standing may be related, they are conceptually distinct. The universe of those who will have suffered loss is larger than the universe of those who will be able to establish loss based on the relevant causation tests; and the universe of those who will be granted standing to claim for damages may be narrower still. For example, in the US the test for standing contains both causation-related elements and other considerations. First, the claimant must plead an “injury in fact” – i.e. injury to business or property substantially caused by defendant’s actions of the type the antitrust laws were intended to prevent.180 As a result, standing will only be granted after taking into account: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, in particular whether the plaintiff is a consumer or a competitor in the relevant market; (3) the directness of the injury, including whether determining damages would be too speculative; (4) the danger of duplicative recovery and whether it would be too complex to apportion the damages; and (5) the existence of a class of better-situated plaintiffs or more direct victims.181 A second example can be found in Canada, which has a very limited scope for the private enforcement other than against cartels. Private party prosecution of such practices is limited to instances of refusal to deal, price maintenance, and exclusive dealing, tied selling, and market restriction. In order to commence a private prosecution before the Competition Tribunal, a party must first obtain leave of the Tribunal, which will only be granted where the Tribunal has reason to believe that the party is directly and substantially affected in its business by the trade practice in question. Leave to commence a private prosecution is rarely sought and even more rarely granted (Osborne et al., 2018, p. 68).

179 Case C-557/12, Kone AG and others v. ÖBB-Infrastruktur AG, EU:C:2014:1317.
182 However, leave has been granted in the past – see the examples provided in OECD (2015) Relationship between Public and Private Enforcement – Contribution of Canada DAF/COMP/WP3/WD(2015)9, p. 8-9.
Despite the possibility of applying strict rules on standing, a number of categories of claimants in addition to purchasers have been widely accepted in most jurisdictions.

The first widely acknowledged category of claimants is suppliers. The US applies rules regarding the standing of suppliers similar to the rules it applies to standing of direct and indirect purchasers: as regards monopsonies – i.e., when suppliers are the target of a cartel of buyers – standing is granted only to direct suppliers. At least four Circuit courts have denied standing to suppliers who were not the direct target of anticompetitive practices. In Europe, neither the case law by the European Court, nor the operative part of the Damages Directive, address the situation of suppliers. Yet it is pointed out in recital 43 of the Directive that “infringements of competition law […] may also concern supplies to the infringer (for example in the case of a buyers’ cartel).” This case of a monopsony underpayment due to a cartel by buyers is mentioned only as one conceivable example of possible harm done to suppliers, which suggests that the legislature may have had in mind damages done to suppliers due to downstream cartelization by their customers as a possible cause for damages actions, unlike in the US.

The second widely accepted class of claimants comprises those affected by “umbrella pricing”. These claimants include those affected by the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected in the absence of the cartel. Entities which raise their prices like this include not only purchasers from non-infringing suppliers, but also suppliers to the cartel and sellers of separate complements. In the US, at least two circuit courts have granted standing to purchasers injured by “umbrella pricing”. In Europe, the CJEU have held that domestic law must not exclude compensation of losses resulting from umbrella pricing “categorically and regardless of the particular circumstances of the case” and thereby effectively gave umbrella plaintiffs the right to sue, even if there is doubt at the exact extent of this right. A third category of claimants that may be granted standing are the infringing parties’ competitors. The main criticism of allowing competitors to claim is that they may use litigation strategically as an extension of competition in the market. The main advantage of allowing competitors to sue is that allowing claims only when the price effect has occurred may lead to interventions against anticompetitive conduct occurring too late – the competition law infringement may already be over.

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184 See fn. 166 above.

185 In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166, fn. 24 (5th Cir. 1979); United States Gypsum Co. v. Indiana Gas Co. Inc., 350 F.3d 623, 627 et seq. (7th Cir. 2003). In contrast, a claim for damages due to umbrella pricing was dismissed in Mid-West Paper Products Co. v. Continental Group 596 F.2d 573 (3rd Cir. 1979).

186 Case C-557/12 Kone AG and others v. ÖBB-Infrastruktur AG, EU:C:2014:1317, para 33.

Competitors are unusually well-placed to detect competition enforcement early – a competitor may feel the effects of the anticompetitive practice before consumers, and it is likely to be familiar with the infringing companies’ technologies and costs. More importantly, competitors may suffer significant loss as a result of the competition infringement (Hovenkamp, 2005, pp. 68-70[8]). As a result, competitors are universally allowed to bring claims in competition law, even if it may be appropriate to adopt measures to prevent the manipulation of the system for strategic purposes (e.g. stringent rules for allowing a claim to proceed).

A fourth potential category of claimants, although a very unlikely one, comprises those affected by volume effects. Volume effects arise from the fact that some purchasers are not willing to pay the higher price resulting from anticompetitive conduct, and therefore cease purchasing the affected product altogether. However, these customers would have continued to purchase the product in the absence of overcharge – and hence have suffered a loss in the amount of the consumer surplus they would have enjoyed in purchasing the product at the original price (Oxera, 2009, p. 100[71]). Identifying victims that suffered loss from the infringement because they did not buy the product at an increased price is very difficult. Demonstrating loss in such cases may be even more difficult, since evidence must be adduced showing that these customers would have acquired the product were it not for the price increase – and the award for damages will further require determining the difference between the price and the customers’ use value of the product (Oxera, 2009, p. 15[71]).

A last category of claimants is parasitic on the previous ones: special purpose vehicles, or class representatives in collective actions. While both were briefly alluded to in Chapter 4, it is worth looking in a bit more detail at special purpose vehicles. These entities pursue claims on the basis damages transferred to them, directly or indirectly, by some of the victims allegedly harmed in connection with a competition infringement. Given the dispersion of damages suffered by the victims, it is not reasonable for the persons adversely affected themselves individually to sue those responsible. As a result, these entities aim to combine assets based on damages actions resulting from infringements of competition law

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188 It should be remarked that the European courts have acknowledged the possibility of such a loss of volume harm in the presence of complete pass-on in Joined Cases C-192/95 to C-218/95 Société Comateb and others v. Directeur Général des Douanes et Droits Indirects ECLI:EU:C:1997:12, which concerned port fees that were illegally levied in the French territory. While this was not an antitrust ruling, it was held at paras. 31-32 that: “a trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales(...) In such circumstances, the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused him damage.” (emphasis is ours)
– and provide a useful alternative when class actions are not allowed or feasible. Such an option is common in both the EU\textsuperscript{189} and the US\textsuperscript{190}.

Data from Europe – where the categories of standing are not as restricted as in the US, being limited only by the requirement that there is sufficient causation between the infringement and the harm suffered – indicates that different categories of victims will claim for damages at different rates.

Table 7.1. Claimants in Actions for Competition Damages (1999-2013) \textsuperscript{191}

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Total Cases</th>
<th>Direct Purchasers\textsuperscript{192}</th>
<th>Indirect Purchasers</th>
<th>Competitors</th>
<th>Umbrella Customers</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>86</td>
<td>29 (33.7%)</td>
<td>6 (7.1%)</td>
<td>15 (17.4%)</td>
<td>0</td>
<td>34 (39.6%)</td>
</tr>
<tr>
<td>Germany</td>
<td>51</td>
<td>23 (45%)</td>
<td>1 (2%)</td>
<td>25 (51%)</td>
<td>0</td>
<td>1 (2%)\textsuperscript{195}</td>
</tr>
<tr>
<td>France</td>
<td>93</td>
<td>67 (71.4%)</td>
<td>0</td>
<td>11 (13.3%)</td>
<td>0</td>
<td>15 (15.3%)</td>
</tr>
<tr>
<td>Italy</td>
<td>299</td>
<td>242 (80.9%)</td>
<td>0</td>
<td>48 (16.1%)</td>
<td>0</td>
<td>9 (3%)</td>
</tr>
<tr>
<td>Spain</td>
<td>175\textsuperscript{194}</td>
<td>145 (83.8%)</td>
<td>0</td>
<td>26 (14.9%)</td>
<td>0</td>
<td>4 (2.3%)</td>
</tr>
</tbody>
</table>


7.4. Standing to claim for damages in Mexico

The Federal Law on Economic Competition grants standing to claim in respect of damages caused by anticompetitive conduct to all persons who have suffered loss, which potentially covers a wide range of legal entities and individuals. As mentioned above, existing case law concerning redress for impairment of free market participation or economic competition is very scarce in Mexico – see section 3.3.2 – and, to date, the matter of who has standing in this kind of case has not been addressed.

\textsuperscript{189} A good example was Case C-352/13 \textit{CDC v. Evonik Degussa and Ors} ECLI:EU:C:2015:335, where CDC entered into agreements concerning the transfer of claims for damages with 32 undertakings domiciled in 13 different Member States of the European Union or of the European Economic Area, some of which had previously concluded similar transfer agreements with 39 other undertakings.

\textsuperscript{190} \textit{Sprint Communications Co. v. APCC Services, Inc.}, 554 US 269 (2008), which held that an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor.

\textsuperscript{191} All jurisdictions, including first instance and appeals, counted as one entry (per case), successful and unsuccessful, and relying either on EU competition or national competition law, or both, from 1 January 1999 to 31 December 2013. If the direct purchaser is also a competitor, this entry is counted as 0.5% for each and included in both columns.

\textsuperscript{192} Numbers in brackets include percentages of total damages cases brought.

\textsuperscript{193} This refers to a case brought by an assignee of antitrust damages claims. This number is likely higher now across Europe, as a result of the incorporation of businesses devoted to purchasing and pursuing claims on behalf or in the place of the original victims.

\textsuperscript{194} Many of these claims relate to litigation concerning the Spanish distribution system in the oil products sector.
Despite the broad range of persons with potential standing to claim competition damages, actual standing may be limited by the rules of causation in place in Mexico. Under Article 2110 of the Federal Civil Code, the damage and loss must be an immediate, direct consequence of the breach of a legal obligation. This is a fundamental principle of the Mexican system of non-contractual civil liability. According to the thesis registered under No. 813305, if the breach of the obligation is only a secondary factor, subordinate to other factors, then it will not be the direct, immediate cause of the damage or loss. However, it should be noted that this is an isolated opinion (it is not binding case law because it has not been reiterated), it was issued several decades ago, and it refers to an obligation, not to an unlawful act or deed, so that it could be referring to breach of contract rather than non-contractual liability. It can therefore be disputed whether this opinion would be applicable today to competition matters.

Under this conventional standard of causation, damage suffered by indirect purchasers might not be deemed to be a direct, immediate consequence of anti-competitive conduct, since it could be argued that such loss depends on secondary or intervening factors. Indirect purchasers would suffer damage only if the direct purchaser affected by a monopolistic practice decided to pass on all or part of the overcharge caused by such conduct. The passing on of the overcharge would constitute an intervening factor between the monopolistic conduct and the loss or damage. In these cases the causal nexus would be discontinuous and divided into two stages (Rivera et al., 2014).

Based on principles of justice, effectiveness and efficiency, certain authors have proposed a new standard for causation which recognises damages and loss caused to indirect purchasers on the basis of a discontinuous causal nexus which occurs in two stages. Amendments are already being made to environmental and consumer laws in Mexico, and new legal decisions are coming about that elaborated on this new standard (Flores and Rivera, 2016). In environmental matters, Article 2, Section IV of the Federal Law on Environmental Responsibility establishes liability for indirect loss. As regards consumer protection, the courts have found that the manufacturer is liable for damage caused by defective products even if there is no direct link between the manufacturer and the final consumer.

195 DIRECT, IMMEDIATE CAUSE. Article 2110 of the Civil Code of the Federal District and Territories provides that damage and loss must be an immediate, direct consequence of the breach of the obligation. This precept is applicable also in commercial matters. That said, cause must be taken to mean the efficient cause, that is to say the determining factor, such that because of the breach of the obligation the damage or loss inevitably occurs. If the breach of the obligation is only a secondary factor that operates in a subordinate manner to other factors, it may not be deemed to be the direct, immediate cause of the damage or loss. Direct amparo 3287/57. Banco del País, S.A. 23 April 1958. http://sjf.scn.gob.mx/sjfsist/Documentos/Tesis/813/813305.pdf.

196 “Indirect loss (...) l which, in a causal chain, does not constitute an immediate effect of the act or omission that is attributed to a person under this Law.”

197 CONSUMER RIGHTS. INCLUDES CLAIM FOR DAMAGES CAUSED BY DEFECTIVE PRODUCTS (INTERPRETATION OF THE LAST PART OF THE THIRD PARAGRAPH OF ARTICLE 28 OF THE CONSTITUTION). (...) the right to compensation, like some of the rights of consumers. Hence a broad interpretation of Article 28 of the Constitution indicates that those rights that the law must protect include that any person who has suffered damage to his or her safety or health, on account of the
use of defective products, is entitled to claim compensation or redress from the manufacturer and, during the proceedings, the person affected must demonstrate the link between the damage and the defect, considering, furthermore, whether the product complied with safety standards, information on risks and normal conditions of use. [Discrete Thesis]; Ninth Period; Collegiate Circuit Courts; Judicial Weekly of the Federation and its Gazette; Volume XXIX, February 2009; page 1850.
Chapter 8. Defendants and the extent of their liability for damages

The general rules on liability for damages under tort or civil law typically require the presence of four elements in order for injured parties to be awarded compensation for loss: (i) some type of fault (intention or negligence) on the part of the defendant, except when liability is strict; (ii) unlawful conduct (illegality); (iii) the presence of damages (which must be quantified); and (iv) a causal link between the breach and the damages (OECD, 2015, p. 125). In civil litigation, all four elements must be proved by the claimant in order for a claim to be successful.

In this chapter, we shall discuss who may be liable for competition damages, the requirements for establishing fault, and rules that rely on specific characteristics of defendants to determine the extent of their liability.

8.1. Identifying the defendants

The question of who the addressee of a damage claim should be in the context of a corporate group tends to go hand in hand with approaches to corporate separateness. Two main approaches can be found.

According to the first approach, the autonomy of corporate bodies and legal form must be respected. In jurisdictions that follow this orientation, the mere ownership of 100% of a subsidiary will not suffice to attribute liability to the parent company for that subsidiary’s conduct; nor does it create a presumption that the parent company exercises the degree of control over the subsidiary necessary to impute liability on the parent company for the subsidiary’s conduct (OECD, 2016, p. 2576). As a result, a damage claim should be brought against the exact corporate entity that committed an infringement. This position seems to prevail in the US, and in European countries such as Germany and the Netherlands. For example, in the US parent companies will not be liable unless the government establishes their direct participation in the antitrust violation in criminal cases. In private antitrust suits, as a general rule, courts hold parent companies liable only if: (i)

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the parent itself was actively involved in the antitrust violation (direct liability);\textsuperscript{200} or if: (ii) a plaintiff succeeds in meeting corporate law’s stringent requirements for piercing the subsidiary’s corporate veil (indirect liability). There is no special US doctrine for veil piercing in antitrust suits, which is why the courts apply the general veil piercing doctrines as they have been developed in corporate law.\textsuperscript{201}

A second approach tends to look at the whole corporate group, an approach followed by a large number of jurisdictions around the world (International Competition Network, 2017, p. 13\textsuperscript{(77)}). Under EU substantive competition law, for example, the focus is on the economic reality underlying the corporate entity that infringed competition law. European Union competition law infringements are committed by undertakings, which comprise an economic unit identified independently of its legal form.\textsuperscript{202} Under EU competition law, the unit of analysis is not the specific legal entity that committed the infringement, but the relevant “undertaking”, which can include several different legal entities that, by virtue of their structural and contractual links, operate as a single economic unit in a specific market, together with their officers and employees.\textsuperscript{203} The parent entity can be held liable for an antitrust infringement in which its (current or former) subsidiary was directly involved under the double condition that the Commission proves that the parent entity: (i) had the capability of exercising decisive influence over the commercial policy of its subsidiary and (ii) in fact made use of such power, having regard to the economic, legal and organisational links between them. In the case of wholly owned subsidiaries (and of shareholding of slightly more than 96%), there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the commercial policy of its subsidiary. In such cases, therefore, it is sufficient to prove that the subsidiary is wholly owned (or nearly wholly owned) by the parent company to establish parental liability. It is then for the respondents to provide evidence rebutting this presumption. Parent and subsidiary will normally be held jointly and severally responsible for the payment of the pecuniary penalty.\textsuperscript{204}


\textsuperscript{203} Officers and employees may not themselves be the addressees of an infringement decision under EU law – Joined Cases 40/73 to 48/73 50/73, 54/73 to 56/73, 111/73, 113/73, and 114/73 Suiker Unie and Others v Commission EU:C:1975:174, para 539. This position is also adopted in member states such as the United Kingdom: see Director General of Fair Trading v Pioneer Concrete (UK) Ltd (also known as Re Supply of Ready Mixed Concrete (No 2) [1995] 1 AC 456. Safeway Stores Ltd v Twigger [2010] EWCA Civ 1472, at paras 19–23 per Longmore LJ, and para 37 per Lloyd LJ. See (Graells and Odudu, 2017, p. 167\textsuperscript{[79]}).

The corollary of this approach is that, when attributing liability for an infringement, several legal entities belonging to the same undertaking may be held liable (Kersting, 2018, pp. 7-8). This means that liability will be attributed jointly and severally not only to the offending corporation, but also to its parent company (and, by extension, to the wider corporate group to which the corporation belongs) when the parent was capable of determining the commercial policy pursued by this subsidiary, i.e. when this subsidiary did not independently determine its conduct in the market. For example, given the European Commission’s practice of addressing infringement decisions at parent companies, this means that those parent companies – and not only the exact legal entity that infringed competition law – will be liable for damages (Lianos, Davis and Nebbia, 2015, p. 52).

A different example of this approach can be found in Spanish law, which imposes liability on the company which controls the infringing entity, except if the relevant behaviour is shown not to have been influenced by those parent companies. This may have important ramifications regarding the ability of the respondent to pay damages, and the fora in which the damage claim is brought.

8.2. Fault

The general rules on liability usually require the defendant to have been at fault (by intention or through negligence) in order for it to be liable for the damages caused by his actions – i.e. the mere fact that the conduct infringed was illegal does not suffice for liability to arise (Graells and Odudu, 2017, p. 160). This subjective element refers to the conduct – i.e. the infringement of competition law –, and not the damages created by the conduct.

Given the complexity of the conducts that may infringe competition law, and the nature of the defendants themselves (who are usually corporations), some jurisdictions have decided to alleviate the burden on the plaintiff to prove fault in an antitrust private litigation so as not to make it excessively difficult or practically impossible to exercise the right to compensation. The rationale for alleviating (or exempting) the requirement of proving fault comes from the objective difficulty of proving the subjective circumstances around a competition law infringement. It can be very hard for the plaintiff to show that the defendant committed the anti-competitive conduct intentionally or negligently. Usually, the subjective element is not part of the competition authorities’ analysis in a competition case, even when intention or negligence is a requirement for an infringement to be found – which may make the success of follow-on actions more difficult, since the claimant is unable to rely on the existing evidence collected by the competition authority to prove the

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205 This can – and has – given rise to serious debates about the implications of extending liability to parent companies regarding such different matters as company and constitutional law.

206 But note that it has been held that in the EU ‘competition law infringements may occur without fault’ – see (Graells and Odudu, 2017, p. 160) by reference to the Case 194/14 P AC-Treuhand v Commission EU:C:2015:717, para. 31, and Joint Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission, EU:C:2005:408, paras 142 and 143, showing a passive infringement. Fault is required, however, for the imposition of a fine.

207 For example, in the EU the Commission is under no obligation to establish the existence of an abusive intent on the part of the dominant undertaking in order to identify an infringement of competition law – see Case C-549/10 P Tomra Systems and Others v Commission, EU:C:2012:221, paragraphs 19-22.
subjective element of his case. Even though the infringement of competition law has been demonstrated in a decision by the competition authority, the claimant in a follow-on action might not be in a position to overcome an additional hurdle of proving that the misconduct by the defendant was intentional or negligent (OECD, 2015, p. 13\[5\]).

In the US, there are two intent standards in antitrust. Some claims require proof merely of the intent to carry out the conduct set forth in the claim (Cass and Hylton, 2000, p. 10\[80\]). These claims require only that the defendant know that he is taking a particular action, not that he does so with the purpose of bringing about a particular (undesirable) result. Other claims fall under a specific intent standard, requiring the plaintiff to prove that the defendant intended to harm competition. Specific intent is an element of some antitrust wrongs (e.g. attempted monopolisation\[209\]), while general intent is an element of others (e.g., price fixing other Section 1 conduct\[210\]).

A 2004 study on the status of private litigation in Europe showed that European jurisdictions took different approaches to the burden and standard of proof for fault (Clark, Hughes and Wirth, 2004\[63\]). In most jurisdictions, the claimant had to establish the defendant’s fault to obtain damages for non-contractual liability. In all jurisdictions where fault was required, either intention or negligence sufficed to establish fault. This study is particularly useful for our purposes, because it identifies a number of different approaches to fault as a condition of liability for competition law damages:

- Fault is not required for liability to arise;
- The infringement of competition rules will automatically imply that the fault element is fulfilled;
- Fault is an element of competition damages claims, but it is presumed once the claimant has proven an infringement of competition law. Such a presumption is generally rebuttable, i.e. the burden of proof is reversed from the claimant to the defendant which must demonstrate that it was not at fault.

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208 In the first Supreme Court case specifically to address the intent issue, Nash v. United States 221 U.S. 1 (1911), the court rejected the claim that proof of a specific intent to restrain trade or to harm competition was required before a defendant could be found to have violated the Sherman Act.


210 For example, United States v. Socony-Vacuum Co 310 U.S. 150 (1940) and United States v. Container Corp. of America 393 U.S. 333 (1969).

211 This study was commissioned by the EU Commission to identify and analyse the obstacles to successful action for damages existing in the Member States of European Union on the basis of the answers from 25 Member States. It is available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

212 The exceptions were Cyprus, Czech Republic, Ireland, Slovakia and the UK.
• Fault must be shown in relation to the violation of competition law i.e. it must be shown that the infringement was committed negligently or intentionally (Clark, Hughes and Wirth, 2004, p. 50).²¹³

Outside Europe, Korea and Japan have both introduced rules to the effect that a previous finding of infringement creates a presumption of fault.²¹⁴

8.3. Individual, or joint and several liability

When there are multiple tortfeasors who are jointly responsible for the loss – as is often the case in collusive infringements of competition law – they may be either individually, or joint and severally liable for damages. In the case of individual liability, the infringing party will only be liable for the share of the damage it caused individually. In the case of joint and several liability, each infringer is liable to the claimant for the entire damage and loss resulting from the competition law infringement – even if it may subsequently recover contribution for its share of the damages from other infringers.

In actions for damages for the infringement of competition, the general rule is that co-perpetrators of an infringement are jointly and severally liable, i.e. each defendant is liable for the full amount of damages even if several defendants jointly engage in the unlawful conduct. Thus, as a rule a claimant may recover the full amount of the judgment from any one of the defendants.²¹⁵

Joint and several liability is normally coupled with rules on contribution between joint and severally liable parties, and regarding the impact that settlement between a claimant and a defendant may have on the claim. It is here that most systems diverge, so it is worth considering each of these sets of rules in turn.

8.3.1. Contribution among defendants

Contribution claims permit one defendant to seek “contribution” from another defendant if it has paid more than a “fair” share of the damages. This contribution will be to an amount

²¹³ The EU Damages Directive allowed Member States to maintain conditions such as culpability “insofar as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive”.

²¹⁴ For Japan, see Article 25 of the Competition Law; for stand-alone claims, the claimant is required to prove the respondents’ intentional misconduct or negligence. In Korea, see Article 56 MRFTA.

²¹⁵ In the US, (Antitrust Modernization Commission, 2007, pp. 243, 251[18]). See Texas Indus., Inc. v. Radcliff Fieldls, Inc., 451 U.S. 630, 646 (1981) (noting the “judicial determination that defendants should be jointly and severally liable” in antitrust cases, while holding that there is no right of contribution); see also Flintkote Co. v. Lysfjord 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both “firmly rooted” and a “well settled principle”). In the EU, see Art.11(1) of the EU Damages Directive, which codifies the practice in most of Europe, where many courts in several Member States have confirmed the joint and several liability of cartel members as joint infringers or co-tortfeasors – see German Federal Court of Justice, judgment of June 28, 2011 (ref. KZR 75/10) – ORWiki; Austrian Highest Court of Justice, judgment of February 14, 2012 (ref. 5 Ob 39/11p) – Lifts and Escalators; Spanish Supreme Court, judgment of June 8, 2012 (ref. 344/2012) – Acor. See also (Seegers, 2014[82]).
that reflects the harm that each of the defendants has caused to the claimant. As a rule, a defendant who is jointly and severally liable for damages is able to claim for contribution from other co-defendants or perpetrators. In claims for competition damages, however, this right to contribution from co-defendants has been subject to restrictions. For example, in the US claims for contribution among defendants are barred in antitrust cases (Cavanagh, 1987, p. 13[81]).

Because a plaintiff can choose to recover all his damages from a single defendant, notwithstanding the possible existence of other, perhaps more culpable defendants, the absence of a contribution rule means that the sued defendant may pay damage judgments far in excess of his responsibility, while other responsible parties escape liability.

In Europe, the EU Damages Directive sets out that any participant in an infringement should be responsible towards the victims for the whole harm caused by the infringement, with the possibility of obtaining contribution from other infringers for their share of responsibility. For example, the amount of contribution that a cartel member may recover from the other cartel members shall be determined in the light of “their relative responsibility for the harm caused” by the infringement. This, broadly speaking, reflects the rules already in place in most EU countries (Wils, 2017, p. 26[6]). Nonetheless, the Directive creates a number of exceptions from the rule of joint and several liability. One concerns the liability of a full immunity recipient. This topic is covered in greater detail below but, in short, the Directive limits the liability of immunity recipients to the harm caused to its direct and indirect purchasers. Similarly, small- or medium-sized companies are liable only for the damage done to their direct and indirect purchasers (Peyer, 2016, p. 94[64]).

Even when contribution can be obtained by a joint and severally liable party, there are differences in the procedures through which it may be claimed. On one end, we have the example of Spain. Here, while the defendants may claim contribution from one another, a party which is required to pay damages cannot obtain contribution from another potentially liable company during the damages claim. Instead, that party will have to start a new procedure in which it will claim contribution from its co-infringers. On the other end is the UK, where a defendant which is joint and severally liable may make a claim against other co-infringers for contribution during the damages claim proceedings.

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218 This exception applies if the firm has a market share of less than 5 per cent and if “[…] the application of the normal rules of joint and several liability would irretrievably jeopardize [the small or medium-sized company’s] economic viability and cause its assets to lose all their value”. Ringleaders, repeat offenders or firms that have coerced others into participating in the illegal conduct cannot benefit from this exception. See the EU Damages Directive, Art. 11(2).


220 This is called a Part 20 claim, because it is regulated by Part 20 of the Civil Procedure Rules.
8.3.2. The impact of settlements

Parties in a claim for damages may settle the case. As noted above in 0, some jurisdictions have promoted specific mechanisms to settle damages claim outside of court. In the context of claims with multiple co-defendants, the question arises of what impact a settlement should have on outstanding claims. In particular, settlement agreements may have an impact on the amounts of outstanding liabilities and on the dynamics of damages claims when the agreements do not cover all of the damages.

For example, if the claimant and a defendant settle in the EU, the damage claim is reduced by the full amount of the defendants’ share in the claimant’s overall loss; it is irrelevant whether or not the claimant received a settlement payment covering the full amount of loss caused by the settling infringer.\(^{221}\) Is apparent that this rule may lead to compensation payments under settlement agreements that are below the actual loss the claimant has suffered. To address this issue, the EU Damages Directive revives the settling defendant’s liability if the claimant is unable to obtain full compensation from non-settling co-infringers. However, the liability for any remaining and uncompensated loss is not renewed when it is expressly excluded in the settlement agreement, which is thus likely to be the default option for settling defendants (Peyer, 2016, pp. 94-95\[^{64}\]; Seegers, 2014, pp. 146-147\[^{82}\]).\(^{222}\)

In the US, on the other hand, “claim reduction” in antitrust cases – i.e. reductions in the amount of a claimant’s total remaining liability to reflect settlement payments already made – is seriously limited (Antitrust Modernization Commission, 2007, pp. 243-244\[^{18}\]). The result of the US’s rules on claim reduction, when combined with the bar on contribution in antitrust cases, is that whenever an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, this means that non-settling defendants arguably remain liable for more than their “fair” share of damages. This permits plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled (Antitrust Modernization Commission, 2007, pp. 251-252\[^{18}\]). As a result, less culpable defendants may pay an unfairly large share of total damages, while more culpable defendants escape significant (or any) liability.

This system has been the subject of numerous criticisms in the US, particularly as regards the pre-litigation dynamics it creates. The combination of rules on joint and several liability, contribution and claim reduction can cause a “race” to settle, potentially exposing defendants that had a small or no role in the overall anticompetitive scheme to a disproportionately large liability (Antitrust Modernization Commission, 2007, pp. 243-244\[^{18}\]). In many cases, plaintiffs offer settlements early on to one defendant – sometimes the one most culpable or with the greatest sales – that bear little or no relationship to that defendant’s actual responsibility. The non-settling defendants may have little or no actual culpability, but they nevertheless are forced into settling by the effect of the enormous exposure they face because the earlier sweetheart settlement arrangements have effectively multiplied their potential liability (Antitrust Modernization Commission, 2007, p. 418\[^{18}\]).

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\(^{221}\) Article 19 and Recital 35 of the EU Damages Directive.

\(^{222}\) Seegers is critical of these provisions as he considers that the parties cannot assess *ex ante* what their part in the cartel will be taken to be. Instead of facilitating the enforcement of damage claims against cartels, he considers that the EU Damages Directive places an additional burden on the victim, namely the task of determining the internal contribution shares of the cartelist.
As a result, defendants are under significant pressure to settle antitrust claims, even those of questionable merit, simply to avoid the potential to be responsible for the payment of excessive liability (Cavanagh, 1987, pp. 1288-1293[81]; Jacobson, 1980, pp. 220-221[83]). This dynamic permits plaintiffs to engage in “whipsaw” settlement tactics, playing defendants off one another, in a race to settle early or be left potentially liable for nearly the full remaining amount of the claims, trebled (Cavanagh, 1987, pp. 1288-1290[81]).

Although the existing rules can maximize deterrence and encourage the resolution of antitrust claims through quick settlement, they may also over-deter conduct that may not be anticompetitive by exposing individual defendants to potential liability for damages far in excess of the benefits they derived from their conduct (Antitrust Modernization Commission, 2007, p. 252[18]). Already in 1981, the US Supreme Court noted that:

“Some amici and commentators have suggested that the total amount of the plaintiff’s claim should be reduced by the amount of any settlement with any one co-conspirator; others strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation.”

In 2007, the American Antitrust Modernisation Committee recommended that Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain a reduction of the plaintiffs’ claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants (Antitrust Modernization Commission, 2007, p. 244[18]).

8.3.3. Leniency applicants

Economists have long stressed that an illegal cartel can be deterred by making sure that potential cartelists’ incentives to sustain the cartel are not in place, and that potential cartelists cannot trust their partners in this illegal activity (Bigoni et al., 2015, pp. 663-666[84]). In effect deterrence is not fully achieved by focusing on the overall level of fines and damages that the cartel may be liable for. Instead, deterrence is enhanced if there are mechanisms in place that create incentives for cartelists to leave a cartel. This is the main motivation behind leniency and whistle-blower rewards’ programs.

Incentives to apply for immunity and leniency need not be exclusively related to public sanctions such as prison terms and pecuniary penalties. On the contrary, removing liability for civil damages may also increase the incentives for a cartelist to apply for leniency; and maintaining liability for civil damages may limit the effectiveness of leniency programs, since it increases the amount potentially due by every cartelist – including leniency applicants – and thus increases the incentives for the cartel to continue to operate (Franck et al., 2017, p. 15[4]).

As a result, many regimes – if not most – limit the liability of leniency applicants for damages. In the US, for example, organizations that participate in the Department of

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Justice’s (DoJ) corporate leniency program are not liable for treble damages, as is the rule, but only for single damages.\footnote{See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2014) [hereinafter ACPERA].} In the EU, the EU Damages Directive limits the liability of immunity recipients to the immunity recipient’s customers alone (i.e. the immunity applicant is not subject to joint and several liability) (OECD, 2015, p. 7\textsuperscript{5}). Only if claimants are not able to obtain full compensation from the other co-infringers will the immunity recipient become liable for the damages caused by its co-infringers (Peyer, 2016, p. 94\textsuperscript{64}).

8.4. Liability for competition infringements in Mexico

The general rules on civil liability in Mexico have already been described in Chapter 3 of this Report, as has the way in which this liability operates in the context of competition damages claims. It was explained that the person seeking redress for the damage or loss caused must prove: (i) an unlawful action or omission; (ii) fault; (iii) loss; and (iv) the causal link between the unlawful action or omission and the loss. If these four elements are proved, a judge will order payment of damages.

In principle, the person liable is the one who performed the anticompetitive conduct and who was sanctioned by the Federal Economic Competition Commission (COFECE) or the Federal Telecommunications Institute (IFT) in the relevant administrative process, as was the case with the companies that colluded to increase the price of medicines they were selling to the Mexican Social Security Institute (IMSS). These are the companies that will be sued in the action for competition damages before the specialist courts, and which, if the four elements mentioned above are proved, will be ordered to pay the corresponding compensation. It is still not clear what the liability of a parent company will be in competition damages cases, although it appears that it might be possible to pierce the corporate veil, which would make it possible to establish liability on the part of the company controlling an infringing subsidiary in competition cases.\footnote{As regards the doctrine of “piercing the corporate veil”, which makes it possible to establish liability on the part of the company controlling a subsidiary, there is an argument that it could be applicable in competition matters. FOURTH COLLEGIATE COURT IN CIVIL MATTERS OF THE FIRST CIRCUIT. Period: Tenth Period. Register No. 2002201. Level of Jurisdiction: Collegiate Circuit Courts. Type of Thesis: Discrete. Source: Judicial Weekly of the Federation and its Gazette. Book XIV, November 2012, Volume 3. Thesis: I.4o.C.18 C (10a.). Page 1941. “The existence of corporate groups and the theory of the piercing of the corporate veil are by no means alien to the Mexican legal system, either in legislation or case law, the latter in matters of economic competition, for which it is of undeniable utility, but without excluding its application to other cases where the activity of economic groups converges, in its corporate aspect, as is the case of contractual transactions entered into by those bodies.”}

As was highlighted in Chapter 3, competition law infringements are established administratively in advance by the competition agencies. Under Article 134 LFCE, the claimant does not have to prove this element of the claim before the specialist courts, but only the quantum of the damages and the causal link. If several companies are responsible for the unlawful conduct, as in the case of pharmaceutical companies convicted of carrying out an absolute monopolistic practice, they will all be jointly and severally liable for damages. This means that the claimant may claim the total of the damages from all the companies involved or merely from the infringing company which, in its view, has the...
greatest resources (deep pockets) to pay damages. In the latter case, the company that has paid damages may claim contribution from the other infringing parties in respect of their share of liability.

Under rules applicable generically to judicial disputes, the parties involved in a competition damages dispute may reach an agreement by means of a settlement. Under Mexican law, a settlement produces the same *res judicata* effects as a court ruling (Article 2953 of the Federal Civil Code).

No measures have been adopted in Mexico to limit the liability for damages on the part of leniency applicants. As mentioned above, imposing full liability for damages on those undertakings who avail themselves of a leniency programme can limit the incentives for cartelists to join the programme and expose an absolute monopolistic practice. In such a scenario, the effectiveness of the leniency programme in detecting absolute monopolistic practices would, most probably, be diminished. On the other hand, it is possible that a rule limiting the full liability of cartelists availing themselves of the leniency programme could be unconstitutional, because the right to damages pertains to the person affected, and a limitation of this kind infringes the right to property and appropriate, full compensation.
Chapter 9. Establishing an infringement

As noted in the beginning of the previous chapter, the general rules on liability for damages under tort law require the existence of a conduct that is unlawful in order for damages to be awarded (OECD, 2015, p. 12\[5\]). One of the main difficulties in damages actions for competition infringements is to establish that an infringement occurred in the first place. This chapter will focus on this topic.

A basic distinction should be made in this regard. On the one hand, there are actions that follow a finding by a competition authority that an infringement occurred (“follow-on claims”). As a result of this decision, there already is evidence that an infringement has occurred. However, private parties may start damages claims even in the absence of public enforcement. These are usually called stand-alone claims, and typically the claimant will have to prove that an infringement occurred in order to obtain damages.

An additional issue that is discussed in this chapter is the statute of limitations. While technically a procedural point, in practice this is a requirement that an infringement must have occurred within a certain, limited period of time before the claim was brought. Given how long public enforcement can take – or, to be more precise, how long it can take until an infringement decision becomes final –, matters regarding the statute of limitations are very important in practice, particularly in the context of follow-on claims.

9.1. Stand-alone claims

Establishing that an infringement occurred poses one of, if not the greatest challenge to stand-alone claimants. Proving that an infringement has taken place is a challenging proposition even for competition agencies set up specifically for that purpose. To establish that a competition law infringement took place requires a claimant to either prove that a conduct which is per se unlawful under competition law took place – which is difficult, since those conduct are almost always secret – or to establish that a conduct had negative effects on prices, output or innovation in the relevant market. For example, a claimant will usually have to demonstrate that prices were agreed secretly between cartel members in order to demonstrate that a per se infringement of competition law took place. To demonstrate that a conduct is anticompetitive, the claimant will often have to reconstruct a hypothetical competitive market and demonstrate that the conduct had negative effects on market output – which not only requires the deployment of complex economic theories and models, but will often also require knowledge of facts concerning the commercial activities of the infringer and other players on the relevant market.

Given the difficulty of proving an infringement in the first place, one could expect stand-alone claims not to be as common as follow-on claims. However, this intuition would be misleading. In the US, a 1988 study found that only roughly one quarter of all the private antitrust suits were based upon prior government cases (Kauper and Snyder, 1988, p. 358\[85\]). More recently, Lande and Davis’s study of 40 private settlements of USD 50 million or more demonstrated that almost half of the violations were uncovered by private
parties instead of through government enforcement (Lande and Davis, 2008, pp. 879-918[68]). Connor also found that, between 1990 and 2012, 41% of all treble-damages cases in the US were not preceded by any known government sanctions – either in the United States or elsewhere –, and collected 72% of all damages awarded (Connor, 2012, pp. 11-12[21]). It also seems that, in the six largest European economies by size, stand-alone actions for damages significantly exceed the number of follow on claims.226

Table 9.1. Damages Claims in Europe

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Follow on actions</th>
<th>Stand-alone actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>23.5%</td>
<td>76.5%</td>
</tr>
<tr>
<td>France</td>
<td>12.9%</td>
<td>87.1%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>28%</td>
<td>72%</td>
</tr>
<tr>
<td>Italy</td>
<td>79.9%</td>
<td>20.1%</td>
</tr>
<tr>
<td>Spain</td>
<td>12.6%</td>
<td>87.4%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>11%</td>
<td>89%</td>
</tr>
</tbody>
</table>

*Note: Competition Damages cases introduced in the courts of these jurisdictions from 1 January 1999 to 31 December 2013.*

*Source: Ioannis Lianos, Peter Davies and Paolisa Nebbia Damages Claims for the Infringement of EU Competition Law (2015, OUP), p. 3.*

9.2. Follow-on claims

Even where stand-alone claims end up being the majority of competition cases before the courts, initial experience acquired in follow-on actions may be important to the subsequent development of a culture of stand-alone damages litigation.227 In any event, the type of anti-competitive practice remains the key to whether stand-alone or follow-on claims prevail in specific contexts. For example, the more naturally secretive cartel cases are predominantly follow-on actions (Rodger, 2013, p. 104[41]). This likely reflects the greater difficulty of finding evidence of such infringements when compared to more easily identified behaviour, such as abuses of dominant positions.

9.3. Effect of infringement decisions in civil damages claims

Claimants in follow-on damages actions must establish the existence of an antitrust infringement as a pre-condition for claiming damages. In other words, absent any specific provision, claimants will be required to re-establish the same facts and circumstances on which the competition authority relied for its infringement decision. Allowing claimants to rely on the findings of a competition authority simplifies the task of the claimant who will only need to focus on showing that it suffered actual damages from the anti-competitive conduct and on their quantification. This can be achieved by granting legally binding effect to competition authorities’ decisions in follow-on private actions (OECD, 2015, p. 18[5]).

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226 However, other studies have found that the contribution of stand-alone cases to the overall volume of private antitrust damages litigation was relatively small – see (Renda et al., 2007, p. 40[116]).

227 This is not to say that every infringement decision will be followed by a damages claim. During the period 2006-2012, less than 25% of the European Commission’s infringement decisions were followed by damages actions – see (OECD, 2015, p. 5[5]).
As such, one question which is raised by follow-on claims concerns the value of an infringement decision adopted in the course of public enforcement in the context of private damages actions. There are a number of options, moving along a spectrum from an infringement decision sufficing to establish that an infringement has occurred in the context of damages actions, to the infringement decision not having any additional evidentiary value in such cases (OECD, 2015, p. 19[5]; Lianos, Davis and Nebbia, 2015, p. 45[20]).

9.3.1. Public infringement decisions suffice to establish that an infringement occurred in subsequent damages claims

In a number of jurisdictions, the existence of an infringement decision will suffice to establish that an infringement occurred in the context of a damages claim.

This is the prevailing approach in the EU. Under EU rules, when national courts rule on matters relating to competition law which are already the subject of a decision by the European Commission, those courts cannot take decisions running counter to that decision. As a result, claimants who bring actions for damages before national courts subsequent to a European Commission decision can rely on the latter directly as irrefutable proof that an addressee of a decision infringed EU competition law (Lianos, Davis and Nebbia, 2015, p. 45[20]). Furthermore, the EU Damages Directive sets out that infringement decisions by national competition authorities will automatically constitute full proof of the infringement before the courts of that same Member State. The logic behind this is that, usually, such decisions will have been the subject of judicial review, and as such they do not affect the separation of powers because the decision on whether the infringement has taken place was ultimately adopted by a national court (European Commission, 2008, pp. aras. 148-150[35]). Even before the Damages Directive entered into force, this approach was already adopted in a number of Member States (Clark, Hughes and Wirth, 2004, p. 69[63]).

Three particular situations merit discussion here. The first is the possibility of using decisions by foreign authorities finding an infringement of competition law to establish an infringement in damages claims. The EU Damages Directive sets out that, where an infringement decision is taken in another Member State, it will at least amount to prima facie evidence that an infringement of competition law has occurred. Some EU member states, such as Austria, Germany and Spain, go further and consider that the binding effect of decisions of both domestic and foreign EU competition authorities suffices to establish that a competition infringement took place in subsequent damages claims.

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229 In 2004, this group included Austria, Czech Republic, Estonia, Germany, Greece, Hungary, Slovenia, Sweden (though only as regards individual exemption decisions) and the UK. In Poland, court ruling finding a breach of competition law were binding on civil courts.

230 Article 10(2) of the Damages Directive.

231 For Germany, see the 9th Amendment of the German Act Against Restraints on Competition (GWB), which entered into force in 9 June 2017, Art. 33b GWB. Under this provision, the binding effect of decisions originating from other member states is limited to the finding of an infringement of either European or German competition law. It does not extend to the finding of an infringement of the national competition law of the member state from which
A second scenario is that where a final decision by the national competition authority is required before a national court can find that an infringement occurred for the purposes of damages claims. This was the situation in Spain, where until 2007 damages claims could only succeed if the national competition authority had previously issued an infringement decision. Since 2007, stand-alone claims have been allowed in Spain. But even before this date, EU laws applied to EU-level infringements, which meant that national courts were already empowered to decide on matters of infringement of EU competition law independently of the existence of a prior infringement decision.

A third issue concerns the effect of commitment decisions in follow-on damage claims. The European Commission can accept commitments from companies instead of adopting a decision requiring that an infringement be brought to an end. Since a commitment decision does not conclude that there has been an infringement of competition rules, it cannot serve as the basis of a follow-on damage claim. However, private claimants may try to adduce the decision as (circumstantial) evidence of an infringement – but the probative value of such a decision will depend on the evidentiary rules of the jurisdiction where the damages claim is brought (Rat, 2015, pp. 539-540).

9.3.2. Infringement decisions as prima facie evidence of an infringement in damages claims

This was, until recently, the prevailing approach to infringement decisions across the world. It is still the approach adopted in the US where, under section 5(a) of the Clayton Act, final judgments of US federal antitrust investigations are prima facie evidence of a violation in private antitrust proceedings. In Australia, Section 83 of the Consumer and Competition
Act seeks to assist private actions by making findings of fact that established a contravention in competition proceedings *prima facie* evidence of the same facts in later proceedings, including private actions (Harper et al., 2015, p. 71[87]).

In the EU, until the Damages Directive was adopted this was a common approach in a number of member states where infringement decisions created a rebuttable presumption of an infringement and of the facts contained in the decision (Clark, Hughes and Wirth, 2004, p. 69[63]; Lianos, Davis and Nebbia, 2015, p. 45[20]). However, infringement decisions could be granted additional probatory value without this amounting to a reversal of the burden of proof. For example, in France decisions by the competition authority used to be considered crucial evidence; in Lithuania, Malta and Poland, public documents are granted a higher evidential value in law.

An interesting peculiarity of the EU system, already noted in the section above, is that the EU Damages Directive requires Member States to see such decisions as *prima facie* evidence of a competition infringement (OECD, 2015, p. 13[5]). As a result of this, foreign decisions have special probatory force. Some countries – such as Austria, Germany and Spain - even go further, and grant such decisions binding effect. A similar effect can potentially be granted to a competition authority’s decision that is not yet final (OECD, 2015, p. 19[5]).

### 9.3.3. Infringement decisions do not have a special probative value

This is an option that used to be adopted in a number of European countries such as Spain, where neither infringement decisions adopted by a competition authority, nor high court judgment confirming those decisions, nor the sanctions imposed therein, were deemed to have a binding effect on civil courts. This was a result of national rules that ensured that judicial magistrates remained independent from all other bodies of the judicial branch (Diez Estella and Estrada Meray, 2014, p. 194[88]).

(9th Cir. 2001) (recognizing that 15 U.S.C. § 16(a) grants prima facie weight, but not collateral estoppel effect, to FTC findings in subsequent matters to which collateral estoppel would apply had the government itself brought the case).


An example of this is the Italian judgment 3640/2009 *Inaz Pague* by the Italian *Corte di Cassazione*, according to which a decision by the competition authority only benefitted from the status of privileged evidence of the facts set out therein. In particular, the decision created a presumption of the facts on which the decision is based, but this presumption was rebuttable. Similarly, infringement decisions in Latvia relieved the plaintiff of having to prove the existence of a violation - but this did not prevent the actual correctness of the decision being called into question.

See note 231 above.

*‘En el ejercicio de la potestad jurisdiccional, los Jueces y Magistrados son independientes respecto a todos los órganos judiciales y de gobierno del Poder Judicial’* - see Article 12(1) of Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.
However, this option seems to be less and less common. Spain, again, provides a good example of this. As a result of the transposition of the EU Damages Directive, a new article was added to the Competition Act which provides that an infringement decision adopted by the national competition authority which is no longer subject to judicial review will provide irrefutable evidence that an infringement took place in the context of damage claims – while foreign decisions also create a rebuttable presumption that an infringement did occur.

9.4. Scope of infringement decisions’ effect in damages claims

Even when a decision by a competition authority has binding effect, applying it in damage claims is not necessarily straightforward. Decisions of the competition authority usually include extensive and detailed explanations of the competition law infringement sanctioned by the authority. In a cartel case, for example, this will typically include a description of the companies involved in the cartel, the cartel arrangement mechanisms, the duration of the cartel activity, its geographic scope, and so forth (OECD, 2015, p. 18).

Which elements of the decision are binding, or have additional probatory value, are questions that can raise practical difficulties. As a rule, the effect of the infringement decision only extends to subsequent damages actions for the same antitrust violation as found in the decision (i.e. same geographic scope, duration, etc.) (OECD, 2015, p. 19). But what is the effect of an infringement decision in a damages claim when the defendant is not the addressee of the infringement decision, nor was it identified in the operative part of that decision, but is instead only part of the wider corporate group to which the sanctioned entity belongs? And what findings of fact does an infringement decision actually contain that are binding on a court in subsequent damages claims, other than that there was an infringement?

Some of these difficulties may be eased through statutory provisions and case law. Both EU and UK laws have rules determining the scope of the binding effect of an infringement direction. According to Recital 31 of the Directive, the binding effect of a finding of infringement made in public enforcement proceedings in follow-on actions for damages: “cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction”. In the UK, the 1998 Competition Act facilitated claims by providing,

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241 Through Real Decreto-ley 9/2017, de 26 de mayo.

242 Artículo 75 de la Ley de Defensa de Competencia. But note that in Canada, for example, it has been expressly decided that foreign infringement decisions are not binding in proceedings before the Canadian courts – see Pro-Sys Consultants Ltd. v. Microsoft Corp. (2014) BCSC 1281.

243 In Emerson Electric Co v Morgan Crucible Co PLC [2011] CAT 4, an application to dismiss a damages claim was successful on this basis.

244 Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2: “the significance of a particular passage in the Decision is to be assessed bearing in mind not just what it says but where it stands in the context of the Decision as a whole. A general statement in an introductory passage, or a summary of other material, is likely to be of less force or significance for present purposes than one expressed in more detail in a section where a particular issue is examined directly” – para. 95.
in section 58, that those findings of fact by the competition authority which are relevant to an issue arising in a court action are binding on the parties. A court will also be bound by a decision of the national competition authority that any of the competition law prohibitions has been infringed (Rodger, 2013, pp. 109-110). In the US, courts have set out that the binding effect of infringement decisions following governmental action (also known as collateral estoppel effect) only extends to rulings that are essential to support the liability determinations.

Difficulties may yet arise even when there are legal provisions setting out what elements of an infringement decision should be taken into account as binding in subsequent judicial proceedings. A good example of this can be found in a follow on case brought in the UK in connection to an infringement decision by the European Commission. In this case, the legal requirements for a claim for damages to be allowed included whether the defendant had had intent to injure. The question was thus whether the facts included in the European Commission’s decision sufficed to find that the defendant had had such an intent. At first instance, the court found that intent to injure was implicit in the European Commission’s decision. The Court of Appeal, however, rejected this on the basis that the claimant could not rely on material facts that were not within the Commission’s findings but were merely consistent with them. Instead, an inference that the defendant had intent to injure could only be made if no other inference could be made from the facts contained in the infringement decision.

A recent decision by the Spanish Supreme Court in the context of damage claims against participants in the sugar cartel also clarified the extent to which a decision by the competition authority provides evidence of an infringement. In this decision, the Supreme Court held that, since the facts of the anticompetitive conduct are the same for the purposes of private and public enforcement, the facts identified in the infringement decision are very useful for private enforcement purposes. However, any holding by the public enforcement authorities concerning causation and damages calculation should be ignored (Marcos, 2015, pp. 215-216).

9.5. Ensuring that potential claimants are aware of infringement decisions

There are public interest reasons in support of competition authorities disseminating decisions establishing an infringement of competition law widely. First, the publication of an infringement decision informs the general public of the competition authority’s action and of the reasons behind it. Secondly, it promotes general deterrence by sending a message to undertakings. Lastly, and more importantly for our purposes here, publicising the decision provides more information to parties who may have been harmed by the anti-competitive conduct. As a result, victims of the infringement have the opportunity to assert

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245 As long as that decision in which the findings of fact were made is no longer subject to appeal.


247 In this particular case, under the tort of conspiracy.


their rights against the companies involved in the case and seek redress (OECD, 2015, p. 34[5]).

An important consideration when publishing an infringement decision – which is also relevant for the scope of the effect that the decision may have on subsequent civil damages claims, as discussed in the section above – is what information the published version of an infringement decision should contain. Public versions of cartel decisions are very important for damage claimants. One of the main hurdles that damage claimants face in competition damages cases – particularly when rules on disclosure are strict – is access to evidence necessary to demonstrate loss. Damage claimants thus view the public version of the infringement decision as an important potential source of evidence and have an interest in getting swift access to a version which is as detailed as possible. Details relating to the function of the cartel, the names of the implicated employees and the cartelised products, the anti-competitive contacts, agreed prices, affected customers, etc., are of particular value to damage claimants (Kafetzopoulos, 2015, p. 295[89]). At the same time, authorities often have to have regard to the legitimate interest of undertakings in non-disclosure of their business secrets. As a result, public interest consideration in the disclosure of information contained in an infringement decision must be balanced against the right of the involved parties to confidentiality when publishing an infringement decision (OECD, 2015, p. 34[5]).

An additional question is whether the competition framework should promote private enforcement by sending the infringement decision to potential claimants. In 2010, Brazil’s antitrust agency, CADE, included for the first time in a cartel decision an order that a copy of the decision had to be sent to potential injured parties. Following this initiative, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country (Martinez and Levy, 2013[90]). Korea also has similar provision in its competition law, according to which the competition authority can order infringers of the competition law to announce in public or notify known victims of their anti-competitive behaviour of the decision. The competition authority often has imposed this remedial order in decisions condemning anti-competitive conduct (OECD, 2015, p. 36[5]).

9.6. Limitation periods

When seeking damages for infringements of competition law, claimants must not only establish that an infringement occurred – they must do so in a timely fashion. Rules limiting the time period during which a potential claimant can bring an action for damages create

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250 For a good example of this, see Art. 30 of Regulation No 1/2003, pursuant to which, when publishing its decisions, the Commission must have regard to the legitimate interest of undertakings in non-disclosure of their business secrets; and Art. 16(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), pursuant to which business secrets and other confidential information are not to be communicated or made accessible to third parties.

251 Under Article 5 of MRFTA (Remedial Measures), in case of any act violating the provisions of Article 3-2 (Prohibition on the Abuse of Market Dominance) the KFTC may order the market-dominating company involved to reduce prices, to discontinue the violation, to announce its receipt of a remedial order to the public, and to take other necessary remedial actions.
legal certainty, which is why they exist in all legal orders. However, limitation periods can also create considerable obstacles to the recovery of damages depending on their duration, on when they start, and on whether or not the duration period can be suspended. In particular, ‘short’ limitation periods that begin to run from ‘the moment the infringement started’ and which ‘cannot be suspended’ may render the right to seek compensation practically impossible (OECD, 2015, p. 21[5]).

The obstacles posed by limitation periods to damages claims were reviewed during the drafting of the Damages Directive in Europe. Prior to the adoption of the Directive, it was for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an anticompetitive practice, provided that those rules did not impose a very short limitation period that could not be suspended, or otherwise rendered it practically impossible or excessively difficult for victims to seek compensation for the harm suffered.252 In practice, there was considerable diversity among countries with regard to the maximum duration of limitation periods, which oscillated between one (Spain253) and 30 years (Germany254 and Luxembourg). Addressing this situation, the EU Damages Directive set out not only a minimum five year limitation period,255 but also clear rules on when limitation periods should start to run, so that victims will have more time to bring their action: “Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to him; and (c) the identity of the infringer.”256

Ultimately, there are three different stages during which the limitation period for competition damage claims run (Lianos, Davis and Nebbia, 2015, p. 44[20]). We shall look at each in turn below.

9.6.1. Date of infringement

If the limitation period starts to run on the day when the infringement was committed, it is possible that the limitation period for continuous or repeated infringements would be over even before the infringement is terminated. Accordingly, most systems develop mechanisms to prevent this from happening. In the EU, the Damages Directive provides that the limitation period shall not begin to run before the infringement has ceased.257 Under

252 Joined Cases C-295/04 to 298/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni Spa and others, EU:C:2006:461, para. 81-82.

253 Prior to the implementation of the EU Damages Directive, the Spanish statute of limitations followed the general limitation period set out in Art. 1968.2 of the Civil Code – i.e. one year since the victim became aware of the harm. See (Diez Estella and Estrada Meray, 2014, p. 192[88]); (Herrero Suarez, 2015, p. 170[117]).

254 In Germany, the limitation period is three years from knowledge of infringement; ten years from the date in which the damage arose (sec. 33h(3) GWB); or thirty years from the infringement (sec. 33h(4) GWB).

255 Article 10(3) of the EU Damages Directive.

256 Article 10(2) of the EU Damages Directive.

257 See, for an example of implementation of this, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.
US federal antitrust law, the limitation period starts from when the cause of action accrued and lasts four years. However, for a continuing conspiracy, the limitation period restarts each time there is a new and independent act that leads to additional injury to the plaintiff. In Canada, an action for damages must be brought within two years from “a day on which criminal conduct was engaged in or the order in question was contravened” or “the day on which any related criminal proceedings were finally disposed of”. Because the limitation period runs two years from “a” day on which criminal conduct was engaged in or an order was contravened, a claimant can seek to recover damages for continuing conduct that occurred over a number of years (OECD, 2015, p. 3[91]).

9.6.2. Knowledge of infringement

Given the secret nature of many competition law infringements, if the limitation period starts running before the infringement is discovered, damage claims may become time-barred before the harm has even been perceived by the victims. As a result, the majority of jurisdictions start the count for the statute of limitations from the point in time at which the victim became aware of the infringement.

As we saw above, under US federal antitrust law the limitation period starts from the moment when the cause of action accrued. The running of that limitation period can be deferred or “tolled” based on different types of equitable or statutory tolling. The most common type of equitable tolling is deceitful concealment, which provides that the limitation period will be stayed until the claimant discovers the violation, provided that the claimant can prove that: (i) the defendants deceitfully concealed their illegal conduct, and (ii) the claimant exercised reasonable due diligence in trying to discover the violation, given the circumstances. Under (ii), the claimant cannot turn a blind eye or otherwise ignore facts which would cause it to inquire further into the defendants’ conduct (OECD, 2015, p. 21[92]). In practice, it is common for private plaintiffs to assert that the statute was tolled or extended by the deliberate efforts of the defendants (Sims, Fenton and Wales, 2015, p. 21[92]).

In Canada, limitation periods are based on discoverability principles. While the limitation period for bringing a claim under the Competition Act is two years, such a period will not begin to run until the earlier of the day the person first knew that she or he has a cause of action against the defendant, or the day that a reasonable person under the circumstances would first have known that she or he has a cause of action against the defendant (subjective period) (OECD, 2015, pp. 21-22[5]).

In the EU, the Damages Directive sets out that the limitation period cannot start running before the claimants become aware of a number of factors, namely: (a) the behaviour and the fact that it constitutes an infringement of competition law; (b) the fact that the infringement of competition law caused harm to the claimant; and (c) the identity of the infringer. The Directive further sets out a minimum limitation period of five years for a claimant to bring an action for damages, without setting out any maximum limitation

259 Pace Indus. Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987).
260 Section 36 of the Competition Act RSC 1985, c C-34.
9. ESTABLISHING AN INFRINGEMENT

<table>
<thead>
<tr>
<th>Period</th>
<th>Description</th>
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<tbody>
<tr>
<td>5 years</td>
<td>This minimum limitation period of five years has been adopted, for example, in Germany and in Spain.</td>
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<tr>
<td>3 years</td>
<td>In both Japan and Korea, the limitation period is three years from the moment when the claimant becomes aware of the damage. However, these countries have different limits on the maximum statute of limitations from the moment the infringement occurred – 10 years in Korea, and 20 years in Japan (OECD, 2015, p. 22).</td>
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9.6.3. Following an infringement decision

This specific limitation period is only relevant for follow-on claims. Given the amount of time that a competition law investigation can take, it is eminently possible that a claim becomes time-barred before the infringement decision becomes final. This is so even if the statute of limitations only starts running from the moment the infringement is over and/or the claimant becomes aware of it.

To prevent this, there are often specific rules regarding limitation periods for follow-on claims. In the EU, the Damages Directive provides that the limitation period is suspended during the investigation of the competition authority, and actions can be brought until at least one year after an infringement decision becomes final, or proceedings are otherwise terminated. In Germany, a limitation period is suspended if the claimant sues for disclosure of evidence (see below at Chapter 10.1.1); a German competition authority takes action with respect to an infringement of competition law; or if the European Commission, the competition authority of another Member State, or a court acting as such, takes action because of an infringement of Article 101 or 102 TFEU or of an infringement of the national competition law of another Member State.

In the US, similarly, Section 5(i) of the Clayton Act provides for tolling during the pendency of a government antitrust suit. As a result, claimants may start a claim up until one year after the government suit has ended, if the private suit is “based in whole or in part on any matter complained of” in the government action. Similarly, in Canada the

261 Article 10(3) of the Damages Directive.

262 In Spain, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia. However, in Germany this limitation period begins to run at the end of the year in which these requirements have been fulfilled (see sec. 33h(2) GWB). This brings the rules on limitation periods for cartel damages in line with the general rules of German law on limitation periods (see sec. 199(1) German Civil Code).

263 Article 10(3) of the EU Damages Directive. An example of near identical transposition can be found in Spain, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

264 This rule entered into force on 1 July 2005. It was unclear whether this suspensive rule applied only to infringements committed after the new provision came into force, or whether it had retroactive effect. The Federal Supreme Court recently held that it was the latter. As such, the limitation period for a claim for damages shall be suspended if the Federal Cartel Office or the European Commission had initiated proceedings against the infringers as long as the claims for damages based on cartel violations committed prior to 1 July 2005 were not yet time-barred at that date. See KZR 56/16 – Gauzechentalerkartell II, 12.06.2018.

265 Sec. 33h(6) GWB. This means that the suspensive effect takes place even if the competition authority from another EU Member State takes action with respect to the infringement of its national competition law.

266 15 USC § 16(i).
limitation period can start to run on “the day on which any related criminal proceedings were finally disposed of”. The bringing of criminal proceedings can revive an otherwise expired limitation period, which can result in the limitation period differing significantly between cases where there has been a criminal prosecution and civil cases without a criminal element (OECD, 2015, p. 3[91]).

9.7. Establishing a competition infringement in Mexico

As noted at the beginning of this chapter, the general rule on liability for damages under Mexican tort law is that the plaintiff has to prove that the conduct of the defendant undertaking is unlawful. As was also mentioned, there are two models in this respect: (i) “follow-on claims”, where the unlawful conduct has been established in advance by the competition authority; and (ii) “stand-alone claims”, where the persons affected can claim damages directly, with no need to wait for the competition authority to establish the infringement. In the case of Mexico, some take the view that only the first model is available to victims. Indeed, Article 134 of the Federal Law on Economic Competition (LFCE) provides as follows:

“Persons who have suffered damage or loss arising out of a monopoly practice or unlawful concentration may bring legal proceedings in defence of their rights before the courts specialising in economic competition, broadcasting and telecommunications until the decision of the Commission becomes final.

The limitation period for claiming payment of damages shall be suspended by the decision to open an investigation.

With the final decision issued in the procedure followed in the form of a trial, the unlawful nature of the conduct of the undertaking concerned for the purposes of the action for damages shall be deemed to be proven”

Having regard to the specialist nature of the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT), the LFCE laid down a sequence for bringing the civil liability action in this matter. First, these technical bodies must establish in their final decision (Articles 85 and 120, third paragraph, of the LFCE) the unlawful conduct of the entity that is subject to the investigative procedure. Once this decision has become final – in other words, once the period for challenging the decision has elapsed without any challenge being raised, or once all appeals have been rejected – persons who suffered damage or loss arising out of the sanctioned monopolistic conduct or unlawful concentration may have recourse to specialist courts specialising in economic competition and bring a damages claim before them. This is how the clause at the end of the first paragraph of Article 134, “until the decision of the Commission becomes final”, has been understood. According to this interpretation, it is not possible in Mexico to avail oneself of damages proceedings without this declaration of unlawfulness and unless it is final. Other observers, as we mentioned above in Chapter 3, consider that stand-alone claims are admissible either under Article 102 of the LFCE, a non-restrictive interpretation of Article 134 of the LFCE or the general principles of non-contractual liability.

Although the apparent restriction of competition damages claims to those cases where there has been a final, binding infringement may be criticised, particularly from the perspective of those systems that allow stand-alone claims, this restrictions grants an advantage to claimants: the aforementioned infringement decisions suffices to prove that the defendant undertaking’s conduct was unlawful in the context of a competition damages claim, as provided in the final paragraph of Article 134 of the LFCE. In other words, in a competition
damages claim the infringement decision has the effect of *res judicata*. Accordingly, the claimant does not have to prove that the relevant conduct occurred or that it was unlawful. When the claim is follow-on, the court before which compensation is being claimed (in the case of Mexico, the specialist courts) cannot contradict what has been decided by the specialist competition agency (COFECE or IFT), whose infringement decision has not been challenged or which has already been challenged and upheld before judicial bodies. The evidence of the claimant, therefore, will focus on establishing loss and proving the causal link between the unlawful conduct (which has already been established) and the loss the claimant suffered.

In this context, we must bear in mind that limitation periods for civil liability claims in Mexico are very short. Under Article 1934 of the Federal Civil Code (CCF), tortious claims prescribe within two years *from the time when the damage was caused*. In accordance with Article 584 of the Federal Code of Civil Procedure (CFPC), the time bar for collective actions is three years and six months from the time when the damage was caused. Taking into account that, in the context of competition matters, the damage can be caused at one point in time but perceived long time afterwards, the legislature has established that the decision to open an investigation at the investigation stage issued by COFECE or IFT (Article 69, Section I of the LFCE) interrupts the aforementioned limitation period, including in the case of collective actions. Under Article 1175 of the CCF, the interruption of the prescription period nullifies all the time that elapsed before it for the purposes of the limitation period. One problem with this mechanism is that the competition authority has 10 years to start investigating a case under Article 137 of the LFCE. This means that the investigation can start after the right to seek redress for competition damages has been time-barred. It is not clear what the legal outcome would be in such a scenario, but it is possible that there will no longer be any prescription period to interrupt, and that the victims would not be able to bring an action for damages.
Chapter 10. Rules of evidence

Competition cases are particularly “fact-intensive”. To determine the extent of damages, the claimants will have to compare the post-anticompetitive conduct world to how the market in question would have evolved had there been no infringement. To establish an infringement of competition law, it is necessary to show negative effects on prices, output or innovation in the relevant market – except when, as we saw at Chapter 9.3 above, this can be established by reference to a decision by an enforcement body. To prove causation, the claimants would have to identify the precise elements of anti-competitive conduct by an infringer that caused damages to the claimants.

A factor that will influence the success rate of private actions is the courts’ approach to allocating burdens of pleading, production, and proof. As a rule, the burden is on the claimant to prove damages, if not an infringement (Gavil, 2007, p. 199[27]). The ability to bring a successful damages claim rests on the claimants’ ability to gain access to the necessary evidence. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. “Structural information asymmetries” are common in competition cases: many of the relevant facts and information required to bring a case are not known to claimants in sufficient detail because these facts are held by the defendant or by third parties. (OECD, 2015, p. 14[5]) For example, when identifying the extent of damages, a claimant will usually have to rely on evidence of the price overcharges agreed secretly between cartel members and of how the cartel members influenced price and other parameters of competition, and on internal documents of the infringers showing their analysis of market conditions and developments. Furthermore, the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market (European Commission, 2008, p. ara. 98[35]). As a result, evidence needed by the claimant to make its case is often in the hands of the defendants, of third parties, or of the competition authority. The difficulties faced by claimant in obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions (European Commission, 2008, p. ara. 96[35]).

As a rule, damages actions are subject to the general rules on non-contractual liability that apply in each jurisdiction – including rules on evidence. To address the difficulties faced by claimants when bringing claims for competition law damages, however, private enforcement regimes have developed mechanisms that allow potential claimants to gain access to the evidence necessary to successfully plead a private damages case. This chapter reviews the main such mechanisms, including: (i) mechanisms for disclosure of evidence in the possession of defendants or third parties; (ii) access to competition agencies’ files; (iii) access to settlement documents; (iv) rules on expert evidence.
10.1. Disclosure

10.1.1. General rules

Disclosure is a procedural mechanism through which a party in a legal dispute or a third party is forced to reveal relevant information to the other party in a case. One of its main functions is to address information asymmetries. As noted above, in competition damages claims it is usual for the infringer to have better information about the harm caused to victims. Disclosure operates to correct this asymmetry by forcing a party to disclose evidence to the other party.

Disclosure can also be important to promote justice and the quick resolution of disputes. For example, the disclosure of evidence can reduce both disagreements between parties and judicial errors regarding the *quantum* of damages. This is particularly important in follow-on claims – where the dispute is about causation and *quantum* –, where disclosure can serve to both speed up litigation and facilitate settlement negotiations (Peyer, 2016, p. 99[64]). On the other hand, the possibility of disclosure can raise questions regarding how much and what kind of information should be revealed. This question is closely related to the costs of disclosure which, as the US experience shows, are substantial and can be subject to tactical manipulation by the parties – usually in the form of “fishing expeditions”, “discovery blackmail”, procedural abuses, and attempts to create excessive costs for (some of) the other parties to a case (European Commission, 2008, p. ara. 79[35]; Peyer, 2016, p. 101[64]).

As a result, it is widely accepted that there should be clear discovery rules that make access to evidence easier while minimising the cost of disclosure exercises. Such rules should address how a party is to access evidence, the minimum level of disclosure, the conditions for obtaining a discovery order by a court and the methodology to determine the scope of such an order (European Commission, 2008, pp. para. 74-76[35]).

It can be said that there are two main approaches to disclosure, which mirror the division between civil and common law jurisdictions. According to the first approach – found in jurisdictions such as Belgium, Germany, France, Spain, Korea and Japan – discovery tends to occur during trial and it is generally subject to the requesting party being able to identify specifically the documents he wishes to request (OECD, 2015, pp. 14-15[5]). Under the second approach – found in countries such as Australia[269], Ireland, the United Kingdom,

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267 A “fishing expedition” is a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found. “Discovery blackmail”, on the other hand, is a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious.

268 For Spain, see (Herrero Suarez, 2015, p. 159[117]).

269 In Australia, under general civil procedure rules disclosure must be made of all existing documents that the party has in his possession, custody or power that is relevant to a fact in issue. Furthermore, the Federal Court’s rules on discovery allow respondents to ACCC proceedings, and parties to private proceedings, to seek orders relating to the discovery of relevant documents which the ACCC has acquired compulsorily – see Federal Court Rules 2011, Part 20. The ACCC may itself seek discovery orders of material which it has not
and the United States – there are mechanisms for mandatory pre-trial discovery which require the parties to disclose relevant categories of evidence to each other.\textsuperscript{270}

The extent of discovery varies across jurisdictions. Parties in the English courts are only obliged to conduct a “reasonable search” for documents when giving standard disclosure, allowing them to limit the categories of documents that are being searched. Similarly, the prospect of cost management and cost capping may reduce the impact of potential disclosure costs on an innocent defendant.\textsuperscript{271} In the US, in most cases discovery can only occur in response to a request by the opposing party. Recent reforms in discovery practice have produced rules that impose obligations of mandatory initial disclosure upon the parties, whereby each party is required to produce certain types of information without a prior request by the other party.\textsuperscript{272} The reforms also imposed various limitations on the number and length of certain types of discovery. Furthermore, lawyers must – under federal and some state laws – certify that their discovery requests, responses, and objections are warranted and not unreasonable given the context of the particular case; violators will be subject to sanctions.\textsuperscript{273}

The problem faced by regimes that do not contain mandatory pre-trial discovery, or that require the parties to identify the specific documents they would like to see disclosed, is that they can make it extremely difficult for potential claimants to have access to the evidence necessary to: (i) assess the extent of the damages suffered, and hence to decide whether it is worthwhile to bring a damages claim; (ii) meet the burden and standard of

\textsuperscript{270} While mandatory pre-trial discovery is more usually found in common law jurisdictions, it can also be found elsewhere – see, for example, Sweden. Furthermore, civil law jurisdictions contain various examples of mechanisms to make it easier to access evidence through forms of disclosure or through the reversal of the burden of proof. As noted in European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para 90: “in regards disclosure, many Member States of the civil law/continental legal tradition provide that courts can order opponents or third parties to hand over evidence in their possession, if the claimant specifies this evidence sufficiently and if it is relevant to the case. There are also examples whereby jurisdictions of the civil law tradition reduce, in cases of information asymmetry and under certain conditions, the requirement of specification of means of evidence and allow the taking of evidence in the sphere of the opponent (or third parties) on the basis of more general factual contentions.”

\textsuperscript{271} Civil Procedure Rules 31.7(1)-3. The first cost-capping decision of the UK’s Competition Appeal Tribunal was adopted in Socrates Training Limited v The Law Society of England and Wales [2016] CAT 10. The court may also disallow all or part of the costs, under Civil Procedure Rules 44.1.

\textsuperscript{272} The required disclosures encompass names of persons likely to have “information that the disclosing party may use to support its claims or defences”, copies of, or the location of, documents that the disclosing party may use to support its claims or defences, computation of damages sought by the disclosing party, and any relevant insurance coverage. Later in the pre-trial process, other disclosures relating to expert testimony and other trial witnesses may be required. See Federal Rules of Civil Procedure 26(a) (1).

proof for succeeding in a damages claim – or, in some cases, even to bring such a claim or to avoid it being summarily dismissed.

Given that in many EU jurisdictions did not provide for mandatory pre-trial discovery, while simultaneously imposing strict rules requiring claimants to assert in detail all the facts of their case and to proffer exactly specified pieces of evidence in support of these assertions, the European Commission concluded that: “national rules on evidence often have the effect of making it very difficult, if not impossible, for claimants to bring a successful action for antitrust damages” (…) a more effective framework for the exercise of the right to compensation for antitrust damage hinges on improved access for victims to evidence in the possession or under the control of the opponent or third persons” (European Commission, 2008, pp. aras. 96, 99[33]). To address this, the Damages Directive puts forward a number of measures which should facilitate competition damages claims in EU Member States.274

In particular, the Directive allows claimants to ask national courts to order the defendant, a third party or a competition authority to disclose relevant evidence which lies under their control.275 In order to limit the risks and costs inherent to disclosure exercises, the Directive requires claimants to meet several conditions before obtaining a disclosure order from the court. In particular, they should: (i) present all the facts and means of evidence that are reasonably available to them, provided that this shows plausible grounds to suspect that they suffered harm as a result of an infringement of competition rules by the defendant; (ii) show to the satisfaction of the court that they are unable, applying all efforts that can reasonably be expected otherwise, to produce the requested evidence; (iii) sufficiently specify categories of evidence to be disclosed as precisely and as narrowly as possible.276 Furthermore, judges will have to ensure that disclosure orders are proportionate, and that confidential information is duly protected.277 In order to ensure that disclosure is effective, the Directive requires Member States to ensure that the national courts are able to impose penalties on parties, third parties, and their legal representatives in the event of any destruction of evidence or failure to comply with obligations for disclosure. These penalties must be ‘effective, proportionate, and dissuasive’ and may include the possibility to draw adverse inference, to dismiss claims and defences in whole or in part, and to order the payment of costs.278

274 These measures were inspired on rules on obligations to disclose evidence to the opponent in civil litigation in intellectual property disputes included in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 195/16 – which were, in turn, inspired by obligations of the EU and its member states under TRIPS.

275 Articles 5 and 6 of the EU Damages Directive. The defendant is also awarded such rights when it is deemed necessary, e.g. with regard to passing-on defences (see Recital 15). See also (Truli, 2016, p. 302[67]).

276 A category of evidence should be identified by reference to common features of its constitutive elements such as the “nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria” – see Recital 15 of the EU Damages Directive.

277 Article 6(5) of the EU Damages Directive.

278 Article 8 of the EU Damages Directive.
In short, the Directive creates disclosure mechanisms that allow access to evidence based on fact-based pleading, combined with strict judicial control of the plausibility of the claim and the proportionality of the disclosure request. Such an approach required a number of changes to the procedural rules of a number of Member States, such as Germany and Spain.

Germany is a good example of a jurisdiction where disclosure was quite restricted – in effect, courts only had the power to order the production of certain records or documents. The legislator therefore had to introduce a new set of rules regarding disclosure to comply with the Directive. In effect, the German legislator went beyond the Directive and introduced a new mechanism allowing claims for the production of evidence. Under this new mechanism, injured parties do not have to bring an action for damages in order to be able to profit from the rules on disclosure of evidence; instead, they can bring a stand-alone action for the disclosure of evidence which is independent of the action for damages (Kersting, 2018, p. 16[78]). However, the party required to disclose evidence can demand reimbursement of all reasonable expenses from the other party – even if such reimbursement will likely only be due if the damages claim is unsuccessful.

In Spain, the regime of access to evidence was as restricted as in Germany. Following implementation of the EU Damages Directive, however, a new section was added to the

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279 When determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. In particular, they shall consider: (a) if there is fumus boni iuris supporting the merits of the claim; (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which are unlikely to be of relevance for the parties in the procedure; (c) whether the evidence the disclosure of which is sought contains confidential information, and what arrangements are in place for protecting such confidential information. A good example of a disclosure exercise in line with these principles can be found in Peugeot v NSK et allia [2017] CAT 2.

280 See Art. 142(1) of the German Code of Civil Procedure. The provision translates, roughly, as: “The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference.”

281 Noting that, similarly to the EU, Germany also took inspiration from existing disclosure rules applicable to IP cases, see (Kersting, 2018, p. 16[78]).

282 Section 33 (g) (1) GWB. Defendants can also ask for disclosure from the claimant – Sec. 33 (g) (2) (1) GWB. Furthermore, those who may be asked to pay damages can bring a claim for disclosure not only when defending against a damages claim, but also when they have brought – as claimants – an action that no such claim for damages exists (i.e. a negative declaratory judgement) (see Sec. 33 (g) (2) (2) GWB). On the potential for such an action to be used as a delaying tactic by potential defendants, see (Kersting, 2018, p. 17[78]).

283 Kersting notes that such an action is less costly than an action for damages, and that it suspends the limitation period (section 33 (h) (6) n° 3 GWB).

284 Section 33 (g) (7) GWB.

285 Under German law an injured party’s damages also include the costs necessary to enforce its claim, and the reimbursement costs can then either be included in or offset against these costs. This means that this claim could be offset against the claim for costs of disclosure by the defendant. (Kersting, 2018, p. 17[78]) finds that disclosure costs will only have an impact in cases where disclosure is being sought from third parties; otherwise, the costs will have to be borne by the infringer.
Civil Procedure Law, setting out special rules applicable to competition damages claims. According to this section, a party in a claim for competition damages can request that the court adopt all necessary measures to gain access to evidence that may prove relevant to the resolution of the judicial proceedings in the possession of the other parties in the proceedings or of third parties. Such request can be made before judicial proceedings start, with the initial claim or the reply to it, or even during judicial proceedings. If the request is made before the claim is brought, the party making the request must specify the future claims for which the evidence may be relevant, and provide the reasons for why the evidence is necessary – by reference to the evidence to which the potential claimant already has access to. Potential sanctions for not complying with a court order requiring disclosure include fines; the court deeming that the facts that the undisclosed evidence were supposed to prove are indeed proved; the disclosing party not being allowed to invoke legal exceptions or making counter-claims in the relevant judicial proceeding; and the costs of the proceedings being imputed onto the party that failed to comply with the disclosure order.

10.1.2. Documents which disclosure may be limited

Commercially sensitive information

In actions for competition damages, a large part of the information and evidence relevant to prove the case is likely to be commercially sensitive. Confidential information may be relevant for determining whether there has been an infringement (e.g. data on the market position of the defendant and his cost structure) or for determining the quantum of loss (e.g. pricing data of the defendant or third parties, or pricing strategies) (European Commission, 2008, p. 122). This poses significant challenges regarding the articulation of the right to damages, on the one hand, and the right to protect one’s commercially sensitive information, on the other. As noted by the European Commission: “If addressees of a disclosure order were to be able to invoke a general confidentiality defence to block disclosure of any commercially sensitive information, the access to evidence that is essential for establishing the truth would often become practically impossible. A protection against disclosure without exception would almost inevitably lead to the loss of the damages action by the claimant.” (European Commission, 2008, p. 123)

The balancing between preserving the confidentiality of some types of information and ensuring that claimants have access to the evidence necessary to bring a damages claim...
takes different forms depending on the jurisdiction. In the US, Federal Rule of Civil Procedure 26(c)1 provides a way to prevent the release of confidential and privileged information in litigation. Under this rule, the trial court has the authority to seal, limit or prohibit pre-trial discovery to protect a “trade secret or other confidential research, development, or commercial information”. A balancing approach is used to reconcile the interests of the party seeking information, the public’s right to access information, and the interests of the party desiring to protect information. The party seeking such a protective order against the release of confidential and privileged information must first make a good-faith effort to resolve the discovery dispute. If such an effort is not successful, the party must then demonstrate actual or potential harm suffered as a result of the release of confidential and privileged information. The court will also consider the relevance of the case for the public interest. If the court finds that the “case involves private litigants, and concerns matters of little legitimate public interest,” good cause for issuing a protective order will likely be found.290 In this case, it is then for the other party to show that how that the information is relevant and necessary.291 If the requesting party is able to satisfy its burden, the court must then weigh the potential injury from disclosure against the other party’s need for the information.292 If the court determines that it can sufficiently protect the trade secret or other confidential information, the court should issue a protective order concerning the release of confidential and privileged information which incorporates the interests of both parties.293 If, on the other hand, the court determines that a protective order cannot sufficiently protect the trade secret, the court may deny the request for information.294

In the EU, the dominant method is related to the proportionality assessment required for disclosure mentioned in Section 10.1.1 above. Under the Damages Directive, one of the elements that must be taken into account by courts in the context of this proportionality assessment about whether to disclose information is: “whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.”295 Furthermore, courts can resort to a range of measures to protect such confidential information from being disclosed during the proceedings.296

290 Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3rd Cir. 1994).
295 Damages Directive, Article 5 (3) (c). See, for an example from Spain, Art. 283 bis (a) (3) c) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.
296 These “include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.” See Recital 18 of the EU Damages Directive.
A good example of an EU regime comes from the UK, a common law jurisdiction where courts have long dealt with matters related to disclosure. It is well established that a confidentiality scheme or “club” can be set up at the disclosure stage of litigation.297 The scheme may be arranged by order of the court but is often arranged by agreement between the parties, albeit always subject to the court's jurisdiction. Disclosed documents which are identified as confidential will be part of the scheme. Access to them, and their use by the receiving party and its legal team, will be expressly restricted. Typically, the documents will be accessible only to the lawyers and relevant independent experts who are to give evidence in the case, and to named individuals at the receiving party. The system is flexible and there are many variations. In some cases, signed undertakings are required from some or all of the persons to whom the documents are to be disclosed. In other cases, access to the documents is restricted even further.298 When the matter comes to trial, the confidentiality of documents in the scheme is maintained in three ways: by an interim order,299 by not stating the confidential information out loud in public, and by sometimes sitting in private for part of the case.300

A good example of the rules applicable to confidential information in a civil law jurisdiction can be found in the Spanish transposition of the EU Damages Directive.301 Spanish law allows courts to use evidence containing confidential information when relevant to the case, with the exception of evidence covered by lawyer-client privilege. Courts shall balance the nature of, and the applicable provisions for the protection of the relevant confidential information. The court may also adopt measures to protect the confidentiality of the information, including not revealing sensitive parts of evidence; holding closed hearings; limiting the number and type of people allowed to inspect the evidence, such as lawyers and experts subject to confidentiality duties; or order experts to prepare non-confidential, statistically aggregated summaries of evidence.

Privileged Documents

All legal regimes contain evidentiary privileges which render certain types of documentary or witness evidence either inadmissible in civil proceedings or immune from compulsory disclosure. Arguably, the most prominent and widespread of these privileges is legal professional privilege, specifically litigation privilege. This renders confidential communications that pass between lawyer and client, and between a lawyer and certain third parties, immune from the disclosure obligation (Chase et al., 2017, p. 28[93]).302 Another important form of privilege includes without-prejudice immunity, which renders

299 Under CPR rule 31.22(2).
300 Regarding the appropriateness of sitting in private for situations involving commercially valuable secret information, see Bank Mellat v H.M. Treasury [2013] UKSC 38, para. 2.
301 Art. 283 bis (b) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.
302 In order to fall within the ambit of this privilege such communications must normally come into being for the purpose of actual or anticipated legal proceedings. Such communications are however admissible if the client elects to waive the privilege or if the communication ceases to be confidential for whatever reason.
communications between parties for the purpose of settlement negotiations inadmissible (Chase et al., 2017, p. 29[93]).

Under US law, attorney-client privilege protects communications between attorney and client for the purpose of securing legal advice. Most courts in the United States also offer a more limited protection for materials produced by the lawyer as part of the legal preparation of the case, creating a presumptive privilege for all materials “prepared in anticipation of litigation”. Such material is discoverable only upon a showing that the party has substantial need of the information and cannot obtain it through alternative means (Chase et al., 2017, p. 38[93]).

In Mexico, there have been judicial theses setting out that communications between a lawyer and its client in the context of procedures brought by competition authorities, or of administrative procedures in competition matters, are privileged except inasmuch as there are indicia that the lawyer is a participant in the competition infringement.

10.2. Access to competition enforcement file

Requests to access a competition agency’s file normally occur in follow-on actions that are initiated in parallel to or after a public investigation by a competition authority. Allowing a potential claimant easier access to public enforcement files can be a useful way to facilitate competition damages litigation, particularly as regards follow-on damage actions. The file of a competition authority can include useful information not only on competition enforcement, but also about the amount of damages caused by anticompetitive conduct and the causation link between the infringement and the damage (OECD, 2015, p. 14[5]). On the other hand, there are reasons related to the protection of public enforcement that may justify restricting potential claimant’s access to the agency’s file. For example, rules on access to file may treat evidence differently depending on whether it is confidential and non-confidential, or depending on whether the information was submitted as part of a leniency application or of settlement negotiations (OECD, 2015, p. 27[5]). Furthermore, rules on access to file may also preclude access to the information in the file unless it is shown that the party would not otherwise be able to access the relevant information.

10.2.1. General rules

While the specific rules on disclosure vary across jurisdictions, it is common for claimants to have access to the competition agency’s file but for that access to be limited as regards certain categories of information. The reasons to restrict access to evidence contained in the competition authority’s file usually relate to the protection of ongoing investigations and of the effectiveness of public enforcement more generally.

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303 Except in costs-proceedings i.e., those proceedings following settlement or judgment that are concerned with determining the parties’ costs liability.


306 For example, Art. 6(10) of the EU Damages Directive provides that national courts may only request the disclosure from a competition authority of evidence included in its file where no party or third party is reasonably able to provide that evidence.
In Australia, as a rule the ACCC will disclose cartel information contained in its file if a court or tribunal grants it leave. However, the ACCC may refuse to disclose information given to it in confidence if it relates to a breach, or possible breach, of a cartel prohibition ("protected cartel information") on the basis of various criteria. These criteria include the fact that the information was given to the ACCC in confidence, and the need to avoid disruption to national and international enforcement efforts. In the case of information provided by informants, the ACCC must also have regard to their protection and safety, and whether disclosure may deter informants from coming forward in future.\(^{307}\)

The EU has adopted specific rules regarding information which is or was in the hands of a competition authority. First, Article 6(10) of the EU Damages Directive provides that national courts may only request the disclosure from a competition authority of evidence included in its file where no party or third party is reasonably able to provide that evidence. Even if this requirement is met, different disclosure rules apply to different categories of documents under the Directive, with the disclosure of some categories of information is restricted. To begin with, some documents in a competition agency’s file cannot be disclosed to potential claimants at all; this is particularly the case of leniency statements and settlement submissions.\(^{308}\) According to Wouter Wils, the rationale for the absolute bar on disclosure of these statements is that: “"[t]he corporate statement would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the cartel participant’s voluntary act of making a leniency application, thereby facilitating the discovery and punishment of the cartel by the competition authority, as well as subsequent follow-on actions for damages. In such a situation, it does not appear unfair to deny damages claimants the right to obtain the corporate statement, whereas the protection against disclosure of corporate statements in private actions for damages may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment" (Wils, 2009, p. 19[7]).

Secondly, documents prepared for the purpose of the investigation and withdrawn settlement submissions cannot be disclosed until the competition investigation is closed. This category includes: (i) information that was specifically prepared for the proceedings brought by a competition authority; (ii) information the competition authority has drawn up and sent to the parties; and (iii) withdrawn settlement submissions. This material is protected from disclosure requests until the competition authority has adopted a decision or otherwise terminated the proceedings. Of course, nothing prevents voluntary evidence disclosure by leniency applicants and other defendants after the completion of the competition authority’s investigation, if they wish to do so in the context of settlement discussions with private claimants (OECD, 2015, pp. 27-29[5]; Peyer, 2016, p. 93[64]).\(^{309}\)

Lastly, pre-existing materials – i.e. documents which exist irrespective of the proceeding of the competition authority, including written agreements/contracts, texts of e-mails, minutes of meetings, etc. – can be disclosed because, in theory, this evidence could be discovered by the claimant. Therefore, the EU Damages Directive states that court can order the disclosure of pre-existing materials at any time in actions for damages, even if the

\(^{307}\) Australian Consumer and Competition Act, s.157(1B).

\(^{308}\) Damages Directive, Article 6(6).

\(^{309}\) Article 6(5) of the EU Damages Directive.
pre-existing documents are subsequently included in the materials submitted to the competition agency by a leniency applicant.\textsuperscript{310}

In the US, while cartel prosecutions are frequently followed by private civil damages actions, the rules of civil discovery allow private plaintiffs to obtain from cartel participants data and documents evidencing the cartel. Access to grand jury material is tightly controlled, and “particularized need” must be demonstrated before grand jury material can be obtained in civil discovery; even then, the interest in grand jury secrecy is balanced against the need for discovery (OECD, 2015, pp. 4-5[43]).\textsuperscript{311}

\textbf{10.2.2. Leniency documents}

To ensure an effective right to compensation in follow-on actions, claimants should have access to the necessary evidence to prove their claim. Most of this evidence will already be in the possession of the competition authority. However, an unlimited and unregulated access to evidence in the competition authority’s file may unduly affect the effectiveness of public enforcement, especially in relation to important enforcement tools like leniency programmes.

Leniency programmes have radically changed the ability of competition authorities to detect and investigate cartel activity. The rationale for offering immunity to a cartelist who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing all the participants in a cartel. These benefits include increased detection rate, destabilising effects on other cartels, cost savings in investigations and prosecutions as a result of the applicant providing evidence directly from within the cartel, the saving of litigation costs, and so on. Taken together, these benefits result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment. For this reason, it is extremely important that the design of the private enforcement system takes into account the fundamental need to preserve the effectiveness of leniency programmes (OECD, 2015, p. 23[5]).

Disclosing evidence included in the file of a competition authority, and in particular of documents submitted by leniency applicants, may affect the incentives of cartelists to apply for leniency because such disclosure will increase their exposure to subsequent damages actions. If the competition authorities have no control over the scope of the disclosure of leniency materials, the leniency applicant may become an easy target for private claims and be placed in a worse position than other members of the cartel who have not applied for leniency. In order to preserve a strong and effective public enforcement regime, it is necessary to consider how to maintain the balance between preserving the integrity of leniency programmes (and of settlement programmes) and ensuring that claimants can obtain as much information as possible (including from the competition authorities) (OECD, 2015, p. 24[5]).

This balance has been settled in Europe by the Damages Directive, which prevents the disclosure of leniency documents. Prior to the adoption of the Directive, however, the

\begin{itemize}
\item Articles 2(16) and 6(6) of the EU Damages Directive. This was adopted closely in Art. 283 (i), (j) and (k) of Ley 1/2000, de 7 enero, de Enjuiciamento Civil.
\item See Fed. R. Crim. Proc. 6(e). See, e.g., \textit{In re Air Cargo Shipping Antitrust Litig.}, 931 F. Supp. 2d 458, 463 (E.D.N.Y. 2013)
\end{itemize}
situation was different. In a case dealing with a request to access documents submitted by a leniency applicant, the European courts decided that, in the absence of a binding EU regulation on the issue, it was for the Member States to enact and apply national rules on access to leniency documents, leaving national judges to decide whether to disclose leniency materials ‘on a case-by-case basis’, balancing the interest pursued by public and private enforcement in each specific instance.\(^\text{312}\) While the court provided some guiding principles on how to conduct this balancing, (OECD, 2015, p. 24\(^\text{(5)}\)),\(^\text{313}\) the effect was the development of different approaches by national courts. In Germany, the prevailing position was to refuse access to the file on the grounds that refusal to provide access to the leniency application would not make it ‘practically impossible or excessively difficult’ to obtain compensation for damages suffered.\(^\text{314}\) In the UK, on the other hand, the courts opted instead to require a limited disclosure (i.e. with certain passages redacted) of the confidential version of an infringement decision adopted by European Commission.\(^\text{315}\) Such differences in approach will be eliminated once the Directive – and its rules on absolute prohibition to disclose leniency documents, with the exception of pre-existing materials –\(^\text{316}\) is implemented.\(^\text{317}\)

In Korea, as a general rule courts can order the KFTC to disclose documents in relation to private antitrust damage claims.\(^\text{318}\) However, it was not clear if this general disclosure rule extended to leniency information. Another doubt was whether this obligation to disclose existed only when the KFTC was the defendant in an administrative appeal against one of its decisions, or whether it also applied to damages actions. To deal with these questions, in 2007 Korea introduced rules safeguarding the confidentiality of leniency materials. In principle, the identity of the leniency applicant and any information and materials

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\(^312\) Case C-360/09 Pfleiderer AG v Bundeskartellamt ECLI:EU:C:2011:389. See also Case T-437/08 CDC Hydrogene Peroxide ECLI:EU:C:2009:17.

\(^313\) Namely, that: (i) Member States must ensure that the rules which they establish or apply do not render the implementation of EU law impossible or excessively difficult; (ii) the national court must balance the principle of effective justice in damages claims and the need to protect the effectiveness of leniency programmes; (iii) it is necessary to weigh on a case-by-case basis the opposing interests of facilitating disclosure of information in order to exercise the right to compensation versus the public interest of uncovering cartels and preserving the attractiveness of leniency programme. See (OECD, 2015, p. 24\(^\text{(5)}\)).

\(^314\) See Amtsgericht Bonn (Local Court Bonn), decision of 18 January 2012, case No 51 Gs 53/09 (Pfleiderer); Oberlandesgericht Düsseldorf (Düsseldorf Appeal Court), decision of 22 August 2012, case No B-4. Kart 5/11(OWi) (roasted coffee).

\(^315\) High Court of Justice judgment of 04 April 2012, case No HC08C03243 (National Grid v ABB Limited). The National Grid case concerned a long-running cartel in the gas-insulated switchgear market. In 2007, the European Commission fined Siemens, ABB, Alstom, Areva and others €750 million, although some of the fines were later reduced by the General Court. National Grid brought a damages claim at the High Court in November 2008, seeking over £108 million in overcharges plus interest. The parties ultimately decided to settle, and the litigation dissolved in June 2014.

\(^316\) See Chapter 10.1.2 above, and Art. 2(16) and 6(6) of the EU Damages Directive.

\(^317\) Whether this will change the situation in the UK will depend on the outcome of the current Brexit negotiations.

\(^318\) Article 56-2 MRFTA.
submitted under the leniency programme should not be disclosed to third parties.\textsuperscript{319} Exceptionally, however, the KFTC may disclose the identity and/or material submitted by the leniency applicant to other persons if either the leniency applicant agrees or if the information is necessary to file or carry-out a lawsuit in relation to the case concerned.\textsuperscript{320}

10.2.3. Settlement documents

In a number of jurisdictions, the competition authority has the power to settle infringement proceedings. Settlements have many advantages. They allow competition authorities to sanction anticompetitive conduct while saving time and resources that would have to be spent in producing an infringement decision and, potentially, defending it in court.

The use of settlement proceedings by competition authorities has nonetheless been the object of criticisms. One criticism that concerns us here is that settlement decisions are usually quite short, and do not contain sufficient information to significantly assist potential damages claimants in pursuing their claims. As a result, claimants would often like to gain access to settlement documents – which can contain additional evidence that will allow them to sustain a claim for damages. However, it is much less likely that infringers will settle with a competition authority if they know that their settlement documents could be disclosed to potential damages’ claimants – which would go against the public enforcement goal of facilitating competition enforcement. As with leniency documents, considering whether to disclose settlement submissions requires balancing between facilitating access by claimants to evidence and protecting the mechanisms of public enforcement.

In Europe, the balance was set in favour of public enforcement, and settlement submissions in the competition authority’s file can never be disclosed. The exception is settlement submissions which have been withdrawn, which can nonetheless only be disclosed once the public enforcement case is over (OECD, 2015, p. 6(5)).\textsuperscript{321}

10.3. Expert evidence

The role of economics and economists in establishing the content of competition laws has never been greater than it is today. For much of the last generation, courts and competition authorities have increasingly turned to economic principles and commentary for the ideas needed to shape the content of modern competition laws, regulations, and guidelines (Lopatka and Page, 2005, pp. 618-619^[94]; Gavil, 2007, p. 185^[27]). In the increasingly complex litigation world of competition law, courts often need the assistance of economic “experts” in order to acquire specialised information which is otherwise unavailable to them. The need for expertise is the consequence of an epistemic asymmetry between judicial decision-makers (judges and/or jury in the US system) and “experts” (Lianos, 2009, p. 8^[95]).

The role of experts is different from all other witnesses, because the expert witness is allowed to testify not only as regards facts which he personally, witnessed but also on inferences from facts or classes of facts that others may have reported and which usually fall outside the scope of a judge’s knowledge (Lopatka and Page, 2005, p. 626^[94]). Their role is to summarize knowledge that it would be difficult, long and costly for the judge or

\textsuperscript{319} Article 22-2(2) MRFTA.
\textsuperscript{320} Article 35 Enforcement Decree of MRFTA.
\textsuperscript{321} Article 6(5) and (6) of the EU Damages Directive.
the jury to acquire on their own; and to provide insights that assist judges in understanding
the facts of the case and the possible implications of their interpretative choices (Lopatka
and Page, 2005, p. 627[94]; Lianos, 2009, pp. 10, 12[95]). In the field of competition law,
methods implemented by economic experts may vary, from simple mathematics, or basic
economic theory, to very complex statistical and econometric tools or sophisticated
theoretical argumentations which may not be fully understood by non-economist
adjudicators such as judges and juries (Gutiérrez-Rodríguez, 2009, p. 224[96]). But even in
the face of complex and potentially contradictory expert evidence, it is ultimately for the
judge to assess and evaluate the evidence (CEPEJ, 2013[97]) – in accordance with the
general rules on the standard of proof, which are discussed in greater detail in Chapter
11.4.1 below.322

Nonetheless, there are differences in the relation between judges and experts across
jurisdictions which should be pointed out. In common law systems, judges act as
“gatekeepers” for expert testimony, deciding what is admissible based on standards
developed both by case law and statute, and ultimately deciding on the matters affected by
expert evidence. In civil law countries, for the most part judges invite expert evidence and
must then decide on the value of any expert report within the context of the case. In this
context, civil law courts are expected to fully justify their reasoning on the scientific matter
in issue by explaining to what extent, and why, reliance has been placed on any given expert

Despite this controlling role over expert evidence performed by judges, the relation
between the judge and the expert as regards expert evidence has been compared to that of
a principal (the judge) and an agent (the expert) (Gutiérrez-Rodríguez, 2009, p. 225[96]). As
in any such relationship, there are challenges in aligning the interests of the agent and the
principal. Three types of interest that may cause some form of expert bias have been
identified: personal interests, financial interests and intellectual interests (Dwyer, 2008,
p. 163[100]).323

The amounts at stake and the complexity of competition cases have led to the development
of an industry of economic consultants. The development of the field of forensic expertise
and the professionalization of the role of expert witnesses, with the establishment of
multinational corporations specialising in economic consulting, underlines the ongoing
transformation of the role of economic expert witnesses and the increased financial pressure
on experts to promote their clients’ position (Lianos, 2009, p. 17[95]).

322 See Guidelines on the role of court-appointed experts in judicial proceedings of Council of
Europe’s Member States no. 8.1. (‘The expert opinion is not binding on the court or on the
parties. The court evaluates it freely. The court must verify and determine whether the
expert opinion is objectively convincing. In so doing, the court has to consider all objections
that have been made against the expert opinion by the parties’ and 8.2 (‘Basically the expert
opinion should have the same probative value as other evidence. If the expert opinion is not
meant to function as a piece of evidence in the lawsuit but the statements are only meant to
help the actual understanding of the judge, the expert’s statements have no mandatory
binding effect. The judge has the possibility to diverge from the expert’s presented position
and understanding if he/she has reasonable reasons to do so.’).

323 The risk of intellectual bias should not be underestimated. As noted by (Hand, 1901,
p. 53[108]): ‘Human nature is too weak [to remain neutral when presenting a case for a side];
I can only appeal to my learned brethren of the long robe to answer candidly how often
they look impartially at the law of a case they have become thoroughly interested in, and
what kind of experts they think they would make, as to foreign law, on their own cases’.

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Furthermore, it is well known that different approaches to data analysis may lead to
different conclusions, depending on the researcher’s underlying assumptions and strategies
(Beecher-Monas, 2007, p. 50; Rubinfeld, 1985, pp. 1055-1078). This arises from the
need to address a number of challenges. The (lack of) availability and reliability of
information used in the assessment of the evidence is the first problem that an expert faces.
The challenge posed by informational gaps created by this obstacle is often overcome
through reliance on assumptions. Secondly, when data is available a theoretical model has
then to be chosen to analyse it. Different models may render different results with the same
data. However, due to the lack or “professional consensus” on many issues relevant for
competition analysis, two completely contradicting opinions about the same facts may be
legitimately advanced. Lastly, econometrics is not a neutral technique since it depends on
the economists’ decisions about the kind of data that should be used and about the model
and methodology that should be applied. While the use of assumptions and the deployment
of theories is a common scientific practice, it means that it is important for courts to identify
underlying assumptions and methodological issues in order to be able to assess the experts’
theories, methods and conclusions (Lianos, 2009, p. 56; Gutiérrez-Rodríguez, 2009,
pp. 227-228).

However, because of the information asymmetry problem, a judge may not able to assess
on its own the veracity and plausibility of each of the economic theories and arguments
presented (Lianos, 2009, p. 63). The challenge, in such a scenario, is two-fold: (i)
institutional, as regards the alignment of incentives of judges and experts; and (ii)
substantive, as regards the assessment of economic expertise into the decision. Ways to
address the institutional challenge are identified in this chapter. A discussion on how courts
deal with the substantive challenge is contained in the following chapters, particularly at
sections 11.4 and 12.1.2 below.

There are different institutional frameworks that have been adopted to address the
asymmetry problem raised by economic expertise in courts. One can distinguish between
approaches based on the adversarial process, usually found in common law jurisdictions,
and approaches focused on neutral experts, which are typical of civil law jurisdictions
(Lianos, 2009, p. 65).

10.3.1. Subjecting expert witnesses to adversarial proceedings

The appointment of expert witnesses by the parties gives rise to three problems: an increase
in the private costs of litigation because of the appointment of experts; an increase in the
social costs due to the increasing length of litigation; and the limited independence and
reliability of partisan expertise in relation to court-appointed experts.

Since the first cost will be partially incurred when deciding whether to bring litigation, and
the second is also present when experts are court-appointed, the main issue here is with the
lack of independence of the experts themselves (Lianos, 2009, p. 69). However, if this
partiality were to occur, it could be balanced by the presence of two opposing experts, in
the same way that the arguments presented in a case are balanced by the arguments of
opposing counsel. The risk in this scenario is that the judge lacks the expertise to assess
expert testimony, and is unable to distinguish between legitimate arguments and those
adopted because they favour the expert’s party. This risk is particularly high for economics
– and particularly for competition-related economics. As noted by Posner: “the use of
economic experts is more problematic is in the areas of economics on which there is no
professional consensus. This used to be and to some extent still is the situation with regards
to antitrust economics” (Posner, 1999, p. 96). Similar concerns have been expressed in
England, where a Report prepared in anticipation of a reform of civil procedure noted that:
“(m)ost of the problems with expert evidence arise because the expert is initially recruited
as part of the team which investigates and advances a party’s contentions and then has to
change roles and seek to provide the independent expert evidence which the court is entitled
to expect.” (Lord Woolf, 1995) 324

10.3.2. Case management of expert witnesses

These concerns with the (absence of) impartiality of expert witnesses have led to the
development of techniques of case management on both sides of the Atlantic.

For example, in Spain courts require experts’ reports to be based on reliable principles and
methodology, and that those are applied to the facts of the case (i.e. experts must ‘formulate
a reasonable and technically sound hypothesis not founded on erroneous and not testable
data’) (Marcos, 2015, p. 217). In Canada, on the other hand, complex economic
evidence is tendered in proceedings before the Competition Tribunal by both sides.
Nonetheless, the Tribunal itself is also empowered to appoint independent experts in order
to assist it regarding ‘any question of fact or opinion relevant to an issue in a proceeding.’
(Leigh et al., 2018, p. 70)

In the US, the management of expert evidence through rules on its admissibility. According
to Rule 702 of the Federal Rules of Evidence: “If scientific, technical, or other specialized
knowledge will assist the trier of fact to understand the evidence or to determine a fact in
issue, a witness qualified as an expert by knowledge, skill, experience, training, or
education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is
based upon sufficient facts or data, (2) the testimony is the product of reliable principles
and methods, and (3) the witness has applied the principles and methods reliably to the
facts of the case.” The Rule can usefully be divided into two parts. The first half defines
who may testify as an expert, that is, who is qualified to offer opinion testimony. The
second half sets forth three specific criteria for evaluating whether an expert’s proffered
testimony is relevant and reliable, and therefore admissible (Gavil, 2007, p. 190).

This drafting reflects the decision in Daubert, where US Supreme Court interpreted a
previous version of this rule as requiring that scientific expert testimony be grounded in the
methodology and reasoning of science. Courts were thus allowed to control the
admissibility of evidence on the basis of a number of factors, namely: (i) whether the
evidence is provided by a qualified expert, i.e. someone with sufficient knowledge, skill,
experience, training or education; (ii) whether the evidence is reliable. The evidence must
be more than “subjective belief or unsupported speculation” and, if scientific, “it must be

324 Chapter 23, para 5.
326 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, at 590 (1993). This should be coupled
with Kumho Tire Company, Ltd & al. v. Patrick Carmichael 526 U.S. 137 (1999), at 152,
which extended the “general gatekeeping obligation” of the Judges not only to testimony
based on scientific knowledge, but also to testimony based on technical and other
specialised knowledge (including economic expertise).
327 Noting that in most antitrust cases this has not been challenged, but that nonetheless there
are cases of proposed experts being disqualified, (Lopatka and Page, 2005, pp. 643-645).
derived by the scientific method”. If technical, courts will need to develop criteria of reliability appropriate to each area of expert testimony;\textsuperscript{328} (iii) whether the evidence is relevant and fits the facts. Expert testimony should be sufficiently connected to the facts of the case to ensure that it will be able to assist the jury in resolving the legal dispute. In other words, expert evidence must be relevant to the resolution of issues relevant to the case. The justification should be fact-based and allow for an extensive analysis of economists’ models (Gavil, 2007, pp. 188-190\textsuperscript{[27];} Lianos, 2009, p. 85\textsuperscript{[95]}).

Furthermore, in \textit{Daubert}, the Supreme Court also made clear that the judge should make the threshold determination regarding whether certain scientific knowledge would indeed assist the trier of fact in the manner contemplated by Rule 702. The Supreme Court established a multifactor inquiry that looks at a number of factors that should be taken into account for the purpose of determining whether expert evidence is admissible. A first factor is whether a theory or technique is “scientific knowledge”. Second, the court should ascertain whether the theory or technique has been subjected to peer-review and publication. Third, the court should ordinarily consider the known or potential error rate of the relevant models and techniques used to support expert evidence. Fourth, the court should establish whether the theory or technique has “general” or “widespread” acceptance in the relevant scientific community.\textsuperscript{329}

Another interesting example of case management of expert evidence comes from the UK. Here, the objective of the “case management” system is to increase the impartiality of the process of expertise by creating instruments that attempt to loosen the links that exist between the expert witness and the parties. Two main mechanisms have been developed in this regard:

- **Hot Tubbing** – The “hot tub” procedure was developed by the Australian Competition Tribunal in the 1970s. It aims to maintain the basic principles of the adversarial system, while simultaneously allowing for direct interaction among experts. Under this procedure, experts submit written statements after they have received written non-expert evidence but prior to the oral proceedings. After each expert has prepared their evidence, there may be a pre-trial order that they confer, without lawyers, to prepare a joint report on the matters about which they agree and those on which they disagree, giving short reasons as to why they disagree. They may then be called upon to participate in a short seminar or debate before the Tribunal. First, each expert will be asked to identify and explain in their own words how they perceive the main issues. After that, each can comment on the other’s exposition. Each may ask then, or afterwards, questions of the other about what has been said or left unsaid. During these “concurrent evidence sessions”, the judge, and not the lawyers of the parties, has the control: there is no cross-examination by the lawyers. At a second stage of the procedure, the lawyers take control and they may cross-examine the expert witnesses. The process attempts to emulate the environment of scholarly scientific debate in a colloquium, rather than that of the conventional adversarial proceedings.\textsuperscript{330}

\textsuperscript{328} \textit{Kumho Tire Company, Ltd & al. v. Patrick Carmichael} 526 U.S. 137 (1999), at 141.


\textsuperscript{330} In reality, there seem to be multiple versions of hot tubbing in practice. A good overview can be found in the Civil Justice Council ‘Concurrent Expert Evidence and ‘Hot-Tubbing in English Litigation Since the Jackson’s Reforms – A Legal and Empirical Study’ (2016),
- **Appointment of Joint Experts** – If the issue is not contentious, the parties are encouraged to use a single joint expert. Where the instructing parties cannot agree who should be the expert, the court may either select the expert from a list prepared or identified by the instructing parties, or devise a different procedure to select the expert. The procedure makes possible the interaction between experts: “(t)he court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to identify and discuss the expert issues in the proceedings and to where possible, reach an agreed opinion on those issues”. The court keeps a dominant role in the process: first, it specifies the issues the experts should discuss; second, it directs the discussion between experts, who should complete a statement showing to the court the issues they agree and the issues and reasons they disagree. However, the regime maintains elements of the adversarial procedure. The content of the discussion between the experts cannot be referred to at the trial unless the parties agree and, even: “(w)here experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.”

### 10.3.3. Appointment of court experts

A neutral, court appointed expert will mitigate the risk of bias that undermines the hiring of expert witnesses by the parties. In the US, for example, Federal Rule of Evidence 706 allows a court “on its own motion or on the motion of any party” to appoint experts “of its own selection” or “agreed upon by the parties” to assist in evaluating expert testimony. The typical role of this expert is to assist the trial judge in evaluating the expert testimony proffered by the parties. The court-appointed expert gathers no data, performs no study, and may not even offer any final opinion on the economic merits of the case. Her role will be to evaluate the data-gathering, studying, and opinions of the party experts (Gavil, 2007, p. 202).

Similarly, in the EU the European courts may appoint experts under their rules of procedure “at any time…” and to “any individual, body, authority, committee or other organisation it chooses…”. The exclusive use of court appointed experts is common to the inquisitorial systems of continental Europe. For example, the French code de procédure civile of 1975 provides only for court-appointed experts (it is however possible for the parties to use shadow experts); the German Zivilprozessordnung of 1933 provides only for court experts; and the Italian Codice di procedura civile of 1940 gives the opportunity to the Court and to the parties to appoint their own expert (or consuleti) (Dwyer, 2008, pp. 184-197).

Court-appointed experts have the incentive to present a balanced position that would rely on principles and views for which there is a broad consensus in the community of academic economists. The main shortcoming of this approach is that it may preclude the court from...
having access to multiple valid views, even if this can be mitigated by the appointment of a panel of experts or through the intervention of the parties (Lianos, 2009, pp. 73-75).\textsuperscript{333}

\textbf{10.3.4. Developing judicial expertise}

Increasing recourse to economic analysis in competition has led to a focus in endowing courts with internal sources of economic expertise. This can take a number of forms:

- One approach is to allow courts to appoint assessors or experts to advise them. In the UK, courts have the authority to appoint an assessor, with the aim to assist the court in dealing with the matter of her expertise and to “educate the judge”.\textsuperscript{334} For courts that benefit from clerking services, a related option would be to recruit economists as judicial clerks.

- A possibility currently foreseen in the EU is to empower courts to obtain support and guidance from competition authorities.\textsuperscript{335}

- Yet another approach is the appointment of economists, or of lawyers with an economics background, to the bench as judges.

- A related approach is to create or use a specialist competition court to hear damages claims. This was a solution adopted in the UK, where the CAT has competence to hear damages claims related to competition law infringements. This approach is also in place in Chile, where the CAT has a specialized Competition Tribunal (of judiciary nature) composed of five Justices: three lawyers (with antitrust background) and two persons with undergraduate or graduate education in economics.\textsuperscript{336}

- It may be possible to set up a specific competition law section at the generalist court or proceed by “opinion specialization”, i.e. select the judges that will sit in competition law cases only from those judges with expertise in competition law.

- Another approach consists in the systematic training of judges in the analytical methods of competition law economics. This seems to be the situation in France, where appeals from the national competition authority are brought to a single chamber of the court of appeal. In addition, the judges of these specialized chambers receive training in competition law and economics.

\textbf{10.4. Rules of evidence under Mexican law}

In Mexico, there is no provision for “discovery” procedures, as there are in the United States. However, the Mexican legal system provides a mechanism whereby a party may ask the judge for disclosure of certain things, documents, books or papers, when this is essential for bringing a claim. In such cases, the judge must assess whether there is a right

\textsuperscript{333} This procedure raises questions regarding the selection of experts, but that is beyond the scope of this Report.

\textsuperscript{334} Rule 35.15 CPR

\textsuperscript{335} Art. 15 of Regulation 1/2003. It is also foreseen that competition agencies may intervene in judicial proceedings concerning competition matters without being expressly asked to do so.

\textsuperscript{336} Article 6 of the Competition Act, Decreto Ley 211 de 1973 [Chile].
and a need to adopt such a measure. Nevertheless, this rule actually refers to the courts’ power to obtain—officiously—such items of evidence as they deem necessary. This is different from the parties having the responsibility of disclosing the evidence available to them and not being able to produce non-disclosed evidence in the course of the proceedings. As regards collective actions, Articles 598 and 599 of the Federal Code of Civil Procedure (CFPC) take a more flexible approach, which, in a limited way, is similar to a “discovery” system.

However, the Mexican legal system does not address many of the specific issues that other jurisdictions address in connection with disclosure in the context of competition damage claims. The evidence disclosure system that exists in Mexico requires that any request for disclosure specifically identify the information or document required. This derives, in particular, from the power granted to courts in Article 89 of the CFPC, under which the judge may request disclosure of particular documents in the possession of any of the parties, under penalty, should the parties fail to disclose the relevant document, of the other party’s assertion being deemed to be true; i.e., of creating a rebuttable presumption against the party that fails to disclose evidence which will be taken into account in the final decision. In certain cases, there may be public information available allowing the identification of evidence which may be obtained. Nonetheless, given that courts seek to avoid getting involved in reviews of unspecified documents in possession of any of the parties, as this is deemed to violate human rights, the Mexican system could present obstacles to claimants on account of the information asymmetries common in this kind of cases, in which it is usual for the defendant, a third party and/or the competition authority to have better and more information and evidence than the claimant.

In analysing the need to order disclosure measures, Mexican judges should take this into account. Likewise, judges should adopt the necessary measures to limit the risks and costs inherent to disclosure orders, such as “fishing expeditions”, “discovery blackmail”, procedural abuses and attempts to create excessive costs for the other party or parties. Along these lines, the EU Directive lays down certain conditions that parties requesting evidence disclosure must meet (see section 10.1.1) which could serve as a guide in such cases.

Mexican law provides for the protection of confidential and classified information in the possession of regulated bodies or of individuals. However, in recent years, an academic debate has arisen about this legal regime, and various proposals have been advanced to adapt, develop and establish clear and precise rules on the protection of confidential and classified information which should not be disclosed in part or in full. Particular attention should therefore be devoted to the rules regarding the disclosure of documents protected by professional secrecy, commercially sensitive information, related to leniency applications or to penalty reductions, documents prepared for the purpose of the investigation, or settlement submissions withdrawn while the investigation is in progress.

In order for disclosure orders to be effective, the judge must be able to impose effective, proportionate and dissuasive penalties for non-compliance. In Mexico, the CFPC already provides for the imposition of sanctions and enforcement orders in such cases. These sanctions consist of a fine up to an amount equivalent to 30 000 Units of Measure and

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Update (Unidades de Medida y Actualización, UMA) applied in the Federal District for each day that elapses in the absence of compliance with a disclosure order. Enforcement orders include the assistance of the police force and the breaking of locks if necessary, the issuance of search warrants and detention for up to 36 hours.339

The rules on expert evidence in Mexico provide the possibility for the parties’ experts to present a joint opinion. They also provide for third-party experts for cases where there is disagreement between the experts appointed by the parties. Under Article 145 of the CFPC, each party may appoint an expert if they fail to reach agreement on the appointment of a single expert. A party wishing to present expert evidence will appoint an expert and propose a third-party expert to be appointed in case of disagreement. The other parties must then appoint their experts and state whether they are in agreement with the proposed third-party expert.340 Mexican law also provides for inquiries when the court deems them appropriate, or one of the parties requests them and the nature of the evidence so permits. In such cases, experts conduct the inquiry jointly. The interested parties may attend the inquiries, but in all circumstances must withdraw and leave the experts alone to discuss and take decisions. If there are no inquiries, the experts may conduct their appraisals jointly or separately. The experts must present their opinion jointly, signed by them either jointly or individually. If the experts do not agree on any essential point, the court will request a report from the third-party expert. It may be argued that these mechanisms serve to foster impartiality in expert testimony processes and mitigate any possible links that may be created between the experts and the parties. On the other hand, it may also be argued that the experts are not impartial or independent of the parties appointing them to begin with.

An important limitation of the system is that the rules as established make it impossible for a foreign expert, who may have specialist knowledge in competition damages cases, to be appointed.341 This could present a problem in competition damages claims, because the number of registered economic experts for both local and federal matters in Mexico is very small, and they are not necessarily experts in competition damages cases.

Judges specialising on competition, telecommunications and broadcasting matters are responsible for deciding competition damages cases. It might be thought that, while those judges have administrative law experience, they might lack experience and in-depth knowledge on civil liability claims. However, this does not have to be an obstacle. Specialist courts have also been adopted in jurisdictions such as the United Kingdom and Chile, where specialist competition judges rule on damages claims. The alleged advantage of this approach is that judges with knowledge and experience in the field are better equipped to assess expert evidence on competition matters.

In Mexico, the rules on the admissibility of expert evidence, as regards the principles and methodology used to assess such evidence, and as regards their application to the facts are set out in the CFPC. However, there are no rules in this respect specifically as regards competition matters.


341 Some observers consider that the Mexican rules do not exclude the appointment of a foreign expert, but most of the comments we have received tend to indicate that it is not possible to do so.
Chapter 11. Causation

11.1. Introduction

Causation has received remarkably little attention in the context of competition law. Yet, causation can be one of the most relevant issues in competition litigation, both when determining whether an infringement occurred (e.g. when establishing whether a conduct or practice caused anticompetitive effects), and whether loss (and what amount of loss) was caused by a competition infringement.

In law, causation has mainly explanatory and attributive functions. Causation is explanatory insofar as it is concerned with explaining how some event or state of affairs came about; it is attributive because it is used to assign liability (Honoré, 2010[105]). This dual function may help explain why the criteria for the existence of causal connection in law fall into two classes. A first class of criteria focuses on what is commonly known as factual causation – i.e. the identification of the causally relevant conditions minimally sufficient from an empirical standpoint for an outcome to occur.342 A second class of criteria are concerned with the specific features that a cause must possess in relation to the consequence in order for that causal connection to be recognised in legal proceedings: this is known as causation in law (Honoré, 2010[105]; Moore, 2009, pp. 83-84[106]). Taken together, causation in fact and causation in law delimit the scope of legal responsibility for certain acts (Lianos, 2015, p. 9[107]). The distinction between causation in fact and in law is a common one across the world (van Dam, 2013, p. 3[108]).

Causal relationships can be extremely complex to establish in practice. In the physical sciences and in economics, it is not disputed that causation can be: (i) multivariate, i.e. an event may have multiple causes; (ii) stochastic, when random factors influence the outcome of some event or conduct; (iii) dynamic, if the relevant variables have a dependency relationship with each other over time; or (iv) mutually dependent, if X causes Y but Y also causes X. The economic analysis of causation can unearth all these features as regards the relationship between prices, antitrust violations, and other price determinants (Abele, Kodek and Schaefer, 2011, p. 862[109]).

In the economic literature, it is common for causation to be established on the basis of probabilistic assessments and for causative investigations to be framed in terms of a search for regularities. However, in law the analysis of causation is often conducted in terms of an “all or nothing” question: either the defendant caused the damages or not. While this may be inappropriate from a strictly explanatory standpoint, it is a natural consequence of the attributive function of causation in law: while statistical regularities may be sufficient – or even necessary – to establish the causation between economic events, tort law requires the

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342 This builds on the Opinion of causation developed in (Mill, 2008[120]), which in turn builds on Hume – see (Wright, 1985, p. 1774[121]) (Wright, 1988, pp. 1019-1020[122]).
concrete instantiation of a specific causal link between two autonomous events (Hellner, 1997, p. 112[110]; Wright, 2011, p. 195[111]; Lianos, 2015, p. 9[107]).

The key challenge in legal proceedings is to prove causation to the requisite legal standard. In most jurisdictions, the key legal test for identifying factual causation is the “but-for” test – i.e. causation will be established only if a loss would not have occurred without an infringement taking place. This is a test of causation that focuses on the ‘necessity’ of the infringement to the existence of a loss. In recent years, however, legal systems around the world have had to deal with issues where this sort of analysis is insufficient. The paradigmatic examples of this are cases related to the role of exposure to asbestos in the development of certain types of cancer. In these cases, while it was evident that exposure to asbestos significantly increased the risk of developing cancer, courts were nonetheless unable – in light of available scientific evidence – to establish in individual cases that cancer had been caused by exposure to asbestos or, in the case of multiple instances of exposure, which event should be deemed to have caused cancer. As a result, in many jurisdictions tort law relaxed its tests of causation to allow for the assignment of liability reflecting concepts of stochastic causality and proportional damages – i.e. the claimant only needs to show that some damage was caused by the hazardous activity to a certain group of people, which lowers the legal standard for proving that each individual’s loss was caused by the hazardous activity.

Once causation in fact is established, a subsequent test of causation in law is then applied. Legal causation might be characterized broadly as a class of legal doctrines that limit liability once a factual causal nexus has been established (Broadbent, 2009, p. 184[112]). Some (factual) consequences of an illegal conduct are ‘too remote’ from the illegal act, and in these cases the imposition of liability may be thought to be inappropriate. In these cases, one may need to assess whether the causality link should be deemed to have been broken for legal purposes – e.g. by the intervention of an abnormal factor or coincidence – or whether the law excludes the identification of certain classes of events as being causative.

For example, a cartel may have caused increased fuel prices, and this increased price may have been the reason why someone decided to take a bus to work instead of driving her car. If that bus gets into an accident and the person suffers physical injuries, the cartel can be said to be a factual cause of that person having suffered injuries. However, it will generally be inappropriate to make the cartel members legally responsible for those injuries. Causation in law prevents this from happening by asking whether a particular event “broke the chain of causation”, or whether the causation relationship was “proximate”, ‘adequate’, ‘direct’, ‘foreseeable’ or ‘too remote’ (Deakin, Johnston and Markesinis, 2008, p. 245[113]; Honoré, 2010[105]). Beyond the scope of pure causative assessment, policy reasons may operate to limit legal assessments of causality for reasons external to considerations related directly to the existence of causal connections. Lastly, rules concerning the existence of presumptions or the allocation of the burden of proof may also introduce policy considerations in the assessment of causation in fact, eventually operating as alternatives to legal causation tests (Honoré, 2010[105]; Lianos, 2015, pp. 15-16[107]).

343 Statistical connections can however be used to prove causal connections in individual cases, and there is nothing to prevent the law from adopting statistical connections as sufficing to establish liability – particularly in risk offences.

344 This is in addition to lively debates about how best to deal with issues of over-determination (i.e. multiplicity of individually necessary, but only jointly sufficient causes) and of joint determination (i.e. multiplicity of individual sufficient causes).
11.2. Causation in competition cases

Even if a competition infringement is established, this does not necessarily mean that it caused damages to the claimant. A clear distinction should be made between a competition law infringement as such and its economic impact. For example, price fixing is illegal under antitrust law but it may be ineffective in some cases or during some periods of time. Hence, it remains up to the claimant to prove that it suffered loss as a result of that specific instance of price fixing (Abele, Kodek and Schaefer, 2011, p. 851[109]). As a result, some of the main goals of claimants in competition damages cases – and often the only goals, if one is considering a follow-on claim on an infringement decision binding on the court – are to prove that the competition violation caused damages, and to establish the extent of those damages.

It is in tort law that one finds the basic tests for proving causation and estimating damages, and the applicable rules on burden and standard of proof. Under tort law, there is a clear distinction between proving the existence of damages caused by a competition infringement, and quantifying their amount. However, it is common for the literature on competition damages to deal with the quantification of damages without explicitly considering causation as an autonomous issue (Abele, Kodek and Schaefer, 2011, p. 848[109]). It is clear that a number of methods developed in the literature on the quantification of damages for antitrust infringements are also useful for the analysis of causation. These methods seek to identify the relationship between prices and their determining factors. As a result, an analytical overlap exists between the analysis of causation and the quantification of damages – as is evident from our analysis of economic methodologies in Chapter 13 below. However, causation and quantification are different issues, and should be addressed separately in competition damages claims (Abele, Kodek and Schaefer, 2011, pp. 849, 867[109]).

Proving that an infringement caused harm is often a difficult and complex exercise – and the difficulty may be greater or lesser depending on the evidentiary regime in place. Proving causation usually relies on the identification of a counter-factual world which serves to demonstrate that, but for the infringement, the claimant would not have suffered loss. For example, in the US a party that is entitled to damages can recover a loss measured by the difference between her actual position and the position she would have been in ‘but for’ the antitrust violation. Thus, based on the premise that the antitrust infringement did not occur, a hypothetical “but-for world” has to be constructed and compared to the position the plaintiff is actually in. In a standard price-fixing case, the measure of damages is “the difference between the price actually paid by the [plaintiff] on the contracts and the price it would have paid absent the conspiracy.” In Europe, similar principles apply. The goal

345 MCI Comm’ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1982).
346 See: (Steiner, 1984[137]); (Howard and Kaserman, 1989[138]) ; (Baker and Rubinfeld, 1999[132]); (Clark, Hughes and Wirth, 2004[63]); (Brander et al., 2006[133]); (Schinkel, 2008[134]); (Connor, 2007[135]); (Van Dijk and Verboven, 2008[136]).
347 As demonstrated by Arkin v Borchard Lines Ltd (No 4) [2003] EWHC 687 (Comm), Crehan v Innentrepreneur Pub Co (CPC) (Office of Fair Trade Intervening) [2003] EWHC 1510 (Ch) and Enron v EWS [2009] CAT 36, all of which were damage actions which failed because claimants were unable to establish ‘but for’ causation.
348 New York v. Julius Nasso Concrete Corp, 202 F.3d 82, 88.
is to compensate victims for competition law infringements; injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest. Actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of an infringement, minus the amount of passing on that may have occurred.  

While counterfactuals seem to provide a solid basis to identify causal effects, they are extremely difficult to apply in practice. Counterfactual propositions consist of initial conditions (the counterfactual antecedent), hypothesized consequences in the but-for world (the counterfactual consequent), and a theory or causal path that explains the linkage between the antecedent and the consequent. In order to be plausible, it is often held that counterfactuals need to be both realistic and reflect minimal changes to the world. These conditions, however, are in tension with one another. A counterfactual is likely to be more relevant if it involves as few changes as possible to the real-world situation – the so-called ‘minimal-rewrite rule’. In damages claims, this minimum change is the illegal conduct: i.e. the only difference between the actual and counterfactual world is that in the counterfactual world the defendant engaged in legal behaviour (Rose, 2014[114]). However, this is not as simple as it sounds. Saying that a conduct is illegal is not the same as determining the threshold at which conduct becomes illegal: depending on this threshold, different counterfactuals can be imagined. Secondly, the counterfactual needs to be realistic. As a result, counterfactuals need to take into account additional changes that would have likely happened if the defendant’s conduct had been lawful (Tetlock and Belkin, 1996, pp. 19-23[115]). To change only one condition might be artificial and unrealistic, and therefore other related changes may justified (Veljanovski, 2018, p. 152[116]). Lastly, a causal change can be explained by reference to different theories, each of which may lead to the identification of significantly different plausible consequences flowing from the same competition law infringement. As a result, decision-makers will be able to identify multiple, similarly likely counterfactuals in all but the simplest cases.

In short, it is often hard to identify causative links. To use cartels as an example – which will typically be the simplest damages case –, if the victim is an intermediary instead of a final consumer, its loss will often correspond merely to the lost profits from reduced sales caused by the (cartelised) higher prices. This is because intermediaries will typically have passed part or all of their actual loss (i.e. the price increase) onto final consumers (David Ashton and David Henry, 2013, p. 39[117]). Even in this simple case, proof of a causal link between the infringement and a loss may be particularly difficult to achieve due to the economic complexity of the issues involved – such as the amount of the higher price, the elasticity of demand, and the rate of passing on of price increases to final consumers.

349 Recital 97 of the EU Damages Directive. Passing on is not a concern in the US, as was explained in Chapter 7.2.1 above and in Chapter 12.3.1 below.

350 A third concept often identified in the literature is ‘cotenability’- i.e. a belief that all changes to the real world observed by reference to the counterfactual are likely to occur as a result of the minimal change required to set up a counterfactual. See (Arlo-Costa, 2016[139])

351 A good example of this can be found in a number of UK court decisions concerning the unlawful nature of multilateral interchange fees in payment and credit cards: see Case T-111/08 MasterCard v Commission ECLI:EU:T:2012:260; Case C-382/12 P MasterCard v Commission ECLI:EU:C:2014:2201; Sainsbury’s Supermarkets v. MasterCard (Case No 1241/5/7/15) [2016] CAT 11; ASDA Stores Ltd & ors v. MasterCard Inc. [2017] EWHC 93 (Comm); Sainsbury’s v Visa [2017] EWHC 3047 (Comm).
Furthermore, loss may have been suffered by a large number of entities present in the market (e.g. not only direct and indirect purchasers, but also competitors who saw their sales diminish as a result of the higher market prices). The situation gets more complicated the further we move from straightforward cartel cases.

Ultimately, courts may find significant difficulties when trying to establish causation. Markets are complex institutions. Complex infringements very often impact on sophisticated supply chains working in highly complex market structures, which make the identification of causative links particularly difficult. While microeconomic and industrial organisation theory are devoted to understanding how markets work and the conditions under which anti-competitive behaviour might occur, even at their simpler level they are technical and complex – and have become even more so with the incorporation of game theory. In effect, a constant complaint is that, under these theories, economists are often able to produce data that is consistent with these theories but are unable to rule out alternative theories (Hovenkamp, 2005, pp. 45-46[8]). As a result, economic models may demonstrate the likelihood of a loss having been caused by an infringement of competition, but will often be unable to exclude other possible causes – and thereby will be insufficient for a court to establish causation. In this context, decision-makers are often forced to fall back on generic legal rules on the standard and burden of proof – and, in particular, on direct evidence of loss which can be extremely hard to come by in competition law cases (Honore, 1997, pp. 372-374[119]).

The combination of complexity of markets, dispersion of losses and difficulty in identifying causal links creates a broad range of potential claimants. Economic injuries have a way of rippling through markets, creating a much larger number of victims than the typical contract or tortious dispute. The victims are not only competitors, but also rivals, suppliers, and firms operating in complementary market. As noted by the US Supreme Court: “An antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but [...] there is a point beyond which the wrongdoer should not be held liable.” In other words, liability for pure economic loss must be limited in order to constrain socially wasteful litigation and undue restrictions on individual freedom. If antitrust infringers could be held liable for all individual losses that may be causally linked with their wrongdoing, this would entail significant risks of over-deterrence and, therefore, result in an undue restriction on commercial freedom (Franck et al., 2017, p. 1[4]). This accounts for many rules that deny recovery to those who are too “remote” from the infringement, such as the prohibition of the passing on defence and the lack of standing of indirect purchasers in the US (Hovenkamp, 2005, p. 49[8]).

In short, causation in competition cases can be very difficult to establish, but the reasons underpinning these difficulties also create the conditions for liability to extend very widely in competition cases. In order to deal with this, legal regimes around the world have adopted rules and mechanisms which are specific to the operation of causation in competition cases. We shall now review them.

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11.3. Examples of rules on causation

11.3.1. United States

In the US, a distinction should first be made between the legal tests of causation for the purposes of identifying an infringement, and for the purposes of identifying relevant harm. Regarding the former, courts have developed different tests for causation for the purpose of identifying an infringement when it is necessary to demonstrate that anticompetitive effects were caused by business conduct. These tests include whether the conduct is “reasonably capable of contributing significantly to a defendant’s continued monopoly power”353, that there must not be any likelihood that causes other than the challenged conduct resulted in harm354, and that the conduct must “increase the likelihood” of a business attaining a monopoly position355 (Carrier, 2011, pp. 402–406[120]).

As regards causation of loss, on the other hand, the general test of factual causation is the but-for test. This test will be met when it is proved that “the harm would not have occurred absent the [unlawful] conduct.”356 Given the difficulty of proving causation to this legal standard, a plaintiff is permitted to draw reasonable inferences from the evidence. Furthermore, the standard of proof merely requires that a ‘preponderance of the evidence’ standard be met, which means that plaintiffs need only prove that it is more likely than not that the business conduct caused the loss.357 In addition, some courts have replaced the but-for standard with a requirement that a plaintiff show a: “reasonable connection between defendant’s act or omission and plaintiff’s damages or injuries.”358 Other courts have been satisfied with: “evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.”359 Determining whether loss stems from conduct infringing competition law is straightforward in most cases, but can be problematic when the loss could have arisen from multiple causes (Carrier, 2011, p. 409[120]). When there are multiple necessary and sufficient causes, each of which would be viewed as the but-for cause (in the absence of the others), US law deems each of them to be a factual cause of loss.360 Furthermore, the predominant test is that the conduct must only be a “material cause” or “substantial factor” contributing to the injury361, even if the practical application of this test differs. One reading

355 Broadcom Corp. v. Qualcomm Inc. 501 F.3d 297 (3d Cir. 2007)
360 Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 27 (2010).
of this test is that courts cannot deny a finding of antitrust injury (i.e. causation) just because there are other causes for the loss. Another reading, however, is that the antitrust infringement must constitute a “necessary predicate of the injury”, i.e. the claimant must prove that no alternative cause is at the origin of the loss.

Concerning causation in law, the Supreme Court has introduced rigorous doctrines of foreseeability and remoteness. Foreseeability limits liability for damages “of a type that a reasonable person would see as a likely result of his or her conduct” or, to put it differently, to “harm within the risk.” Under these tests, liability “is limited to those harms that result from the risks that made the (...) conduct tortious.” Regarding antitrust, an important doctrine of causation in law is that damages are limited to antitrust injury (an injury “of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful”). This injury must be proved with a “reasonable degree of certainty” by a preponderance of the evidence. The antitrust injury doctrine is important because it limits the harm that can be claimed – i.e. damages can only be claimed regarding loss stemming from the competition-reducing / inefficient aspects of a conduct (Carrier, 2011, p. 407).

11.3.2. Europe

In Europe, in the absence of EU law it is the laws of the Member States that provide the legal basis for cartel damages claims and that lay down the detailed rules governing those legal proceedings. However, pursuant to the principle of effectiveness embodied in Article 4(3) TEU, which imposes a duty of loyal cooperation between the Member States and the EU institutions, those laws must not render the right to claim damages “practically impossible or excessively difficult.” This principle was codified in Article 4 of the EU Damages Directive.

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362 Lee-Moore Oil Co. v. Union Oil Co. 599 F.2d 1299, 1300 (4th Cir. 1979) at 1302; Costner v. Blount National Bank, 578 F.2d 1192 (6th Cir. 1978).

363 This position has been adopted exclusively by the 6th Circuit – see Hodges v. WSM, Inc 26 F.3d 36 (6th Cir. 1994), at 39; Valley Products Co. v. Landmark 128 F.3d 398 (6th Cir. 1997) at 404.


366 Mostly Media Inc. v. U.S. West Commc’ns, 186 F.3d 864, 865 (8th Cir. 1999); Greater Rockford Energy Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 401 (7th Cir. 1993).

367 Brunswick Corp v Pueblo Bowl-O-Mat, Inc 429 US 477 (1977), at 489. However, this does not exhaust the scope of antitrust injury. For example, in State Oil v Khan 93 F.3d 1358 (7th Circuit, 1996), Judge Posner held that per se infringements where no welfare loss was observed had to give rise to some kind of damages for the rule to have some domain of application. The result, when this decision was appealed to the Supreme Court, was the substitution of a per se prohibition of vertical maximum price fixing for a rule of reason approach – see State Oil v Khan 522 US 3 (1997)


369 Which sets out that: “In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages
Causation remains, in the main, a matter for the Member States’ laws. The European courts have held that it is for the Member States’ laws to prescribe the application of the concept of causal relationship between an illegal restrictive practice and the harm suffered, as long as those rules comply with the principle of effectiveness. As a result, EU law does not exclude a priori the possibility that Member States will deny compensation for certain types of harm on the basis of doctrines such as remoteness, proximate causation, or directness of injury.

A cursory view of the different general tort law regimes of some EU Member States reveals important differences in causation regimes. Probably the only general remark that can be made is that courts tend to take a practical, case-by-case approach to causation. Nonetheless, it would seem that in most Member States similar issues and questions arise such as whether the conduct complained of was really a necessary cause of loss, how predictable the damage suffered was, and whether intervening events are sufficient to exclude liability (Clark, Hughes and Wirth, 2004, pp. 72-73). We shall now review a few select jurisdictions, after which we shall discuss a number of EU measures that may limit Member State autonomy in this matter in the future.

11.3.3. England and Wales

In England, as elsewhere, the assessment of causation is sub-divided in academic writing into two legal tests: causation in fact and causation in law (Deakin, Johnston and Markesinis, 2008, p. 244). The test for causation in fact is the “but-for test”, subject to a standard of proof on the balance of probabilities – which means that a claimant must show that it is more likely than not that the damage would not have occurred ‘but for’ the defendant’s infringement of competition law (Lianos, 2015, p. 23). However, and given the limitations that strict ‘but for’ tests reveal when confronted with situations of causal uncertainty described above, English law developed a number of alternative factual causation tests.

When more than one potential cause (and tortfeasor) has been identified and the probabilities regarding which of two defendants caused harm are equally split, each of the
defendants has to show that his conduct did not produce the harm in order to avoid being found liable.\textsuperscript{374} Regarding similar situations of uncertainty where a tortious conduct competes with non-tortious explanations for the claimant’s injury, liability may be imposed upon a defendant whose negligence increases the risk of a particular loss occurring if that risk is subsequently realised, except if the defendant demonstrates that it did not cause the loss.\textsuperscript{375} Both these scenarios amount, in practice, to a change in the burden of proof.\textsuperscript{376}

Furthermore, in situations where the actions of more than one tortfeasor were each deemed causes of the loss, the tortfeasors will be found to be jointly and severally liable – which defers matters of apportionment of liability between tortfeasors until after causation has been established (Deakin, Johnston and Markesinis, 2008, p. 224\textsuperscript{[113]}; Lianos, Davis and Nebbia, 2015, pp. 23-24\textsuperscript[20]).

There is also an exception to the strict ‘but for’ test for factual causation in situations where the loss could have been caused by more than one causal mechanism operating in the same way (Deakin, Johnston and Markesinis, 2008, pp. 256-257\textsuperscript[113]; Mulheron, 2016, pp. 420-429\textsuperscript[121]). This exception to the ordinary application of principles of causation is narrowly confined to situations of genuine causal uncertainty where the potential causes are of the same type, and where there is scientific – as opposed to merely evidential – uncertainty as to the cause of a certain outcome (Lianos, 2015, pp. 22-26\textsuperscript[107]). In these (exceptional) circumstances, it may be possible to establish causation in fact merely by establishing that an event or conduct led to a material increase in risk, because it is (scientifically) impossible to prove a causal link on the balance of probabilities.\textsuperscript{378} In such cases, a defendant will be liable only for a proportionate share reflecting its contribution to the total risk, and claimants should seek compensation from each party in relation to the harm that party caused.\textsuperscript{379} If the increase in risk is caused simultaneously by a tortious action and by a non-tortious cause, however, the claimant may recover full damages.\textsuperscript{380} It is unclear whether such a test extends to competition damages case, and there is an argument that this legal doctrine is limited to situations of physical injury.

\textsuperscript{374} Cook v Lewis [1952] 1 DLR 1; Fitzgerald v Lane [1987] QB 781.

\textsuperscript{375} McGhee v National Coal Board [1973] 1 WLR 1. This presupposes that it has been established that both the tortious conduct and the non-tortious cause were sufficient causes of loss, but it was unclear which one was the operative cause. It is different from the assessment (on the balance of probabilities) that the conduct was a cause of loss. In such situations there is no liability, unless it is proven that without the conduct harm would have occurred on the balance of probabilities. See (Mulheron, 2016, p. 413\textsuperscript[146]).

\textsuperscript{376} (Deakin, Johnston and Markesinis, 2008, pp. 250-253\textsuperscript[113]).

\textsuperscript{377} Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32; Barker v Corus UK Ltd [2006] 2 AC 572, para. 24 (Lord Hoffman). In situations where multiple distinct causal agents can be in play, the but-for principle would continue to apply and causation will not be established – Wilsher v Essex AHA [1988] AC 1974.

\textsuperscript{378} Sienkiewicz v Greif (UK) Ltd [2011] UKSC 10.

\textsuperscript{379} Barker v Corus UK Ltd [2006] 2 AC 572, para. 43. This was reversed by Compensation Act 2006 regarding solely to the extent of liability for mesothelioma claims arising from unlawful exposure to asbestos.

Regarding causation in law, findings of causation in fact can be limited by reference to two requirements. First, causation will not be established in law when the event is too ‘remote’ from the defendant’s wrongful act. The criterion of “reasonable foreseeability” is traditionally used to limit the effects of causation in English law.\(^{381}\) A loss is to be considered “too remote” if, by its very nature, it could not be foreseen by a reasonable person. Remoteness is also relevant for the determination of the extent of liability.\(^{382}\) Secondly, since competition damages are usually granted in the context of torts of breach of statutory duty, it must be determined whether the harm suffered by the claimant relates to the statutory duty breached by the defendant (Deakin, FBA, Johnston and Markesinis QC, FBA, 2013, p. 218\(^{122}\)). In addition to actual loss, a particular harm that may fall within the scope of situations of pure economic loss such as competition damages is loss of chance.\(^{384}\) In this context, courts must determine whether the infringement of competition law caused loss related to loss of opportunity or not; however, if it is found that the infringement led to a loss of chance, damages can be quantified in such a way as to reflect the likelihood of the chance coming about.\(^{385}\)

11.3.4. Germany

Since the adoption of the 7\(^{th}\) Amendment to the Law against Restraints of Competition (GWC), whoever causes harm by negligent infringement of competition law shall be liable for compensation.\(^{386}\) However, the GWC provides no special rules on the assessment of causation. Therefore, the general principles of German tort law apply.

In Germany, as elsewhere, the causal inquiry is bifurcated between a factual phase (causation in fact) and a more normative/policy-oriented one (causation in law) (Lianos, 2015, pp. 30-36\(^{107}\)). As regards causation in fact, German tort law applies a sine-qua-non condition or but-for test. This is then tempered by causation in law requirements concerning the adequacy of the cause to the loss (“Adäquanztheorie”). Regarding situations of multiple causality, German law imposes joint and several liability subject to contribution between the tortfeasors. For situations of genuine causal uncertainty, German tort law requires evidence that the defendant created a risk of harm, and that the claimant suffered or may have suffered a risk-related loss in order to impose liability. Furthermore, the law sets a strict limit in time and space between the defendant’s act and the damage, and requires that

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\(^{381}\) This is a straightforward textbook example of a legal transplant: originating from France in the late 18th century, the rule was adopted in the United States and then found its way to England and to the Judges of Hadley v Baxendale [1854] 9 Ex 341; 156 ER 145.

\(^{382}\) Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound), [1961] AC 388, 422–423. On the status of the “foreseeability” doctrine in English tort law, see (Deakin, Johnston and Markesinis, 2008, pp. 271-276\(^{113}\)).


\(^{384}\) Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602. Pure economic loss are losses that bear no connection to personal or physical harm, but relate instead to financial or pecuniary loss.


\(^{386}\) Since the 9\(^{th}\) Amendment of the GWC, this is set out in section 33a GWB.
the particular risk must be likely and apt to cause the concrete damage in the particular situation (Magnus, 2013, p. 153([123])). If causation is established, liability for the full damage is then due (Lianos, 2015, pp. 32-33([107])).

Rules of causation in law in Germany – and particularly the requirement of adequacy of cause to the loss – have been described by different formulas. For example, a cause will be adequate if: (i) it generally increases, in a significant way, the objective probability of a result of the kind which occurred; or (ii) if it could engender the damage in question only under particularly unique, improbable circumstances which would have been disregarded had events followed their usual course. These probabilities are assessed from the point of view of an "optimal observer" which knows all the circumstances surrounding the injurious event which could be known at the time of that event, and is furthermore equipped with the general experience of mankind. In addition, German law requires that the damages claimed derive from the sphere of dangers which prevention was the purpose of the infringed provision (Clark, Hughes and Wirth, 2004, p. 74([63])). The rule postulates that: 'an obligation to make reparation will only arise if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against'.

As regards specifically competition claims under Section 33a GWB, a causal connection between an anticompetitive agreement and the damage suffered must be established. Given the tort principles outlined above, in practice the anticompetitive conduct must be sufficient to cause the specific financial loss suffered, and the loss must be connected to the protective purpose of competition law. In practice, in the case of cartels the direct purchaser can easily prove a causal connection between the cartel agreement and the damage suffered. This is a less stringent approach than that which applies to indirect purchasers, which loss must be proved to have been caused by the infringement of competition law on a case-by-case basis (Lianos, 2015, p. 34([107])).

11.3.5. Spain

As in all the jurisdictions reviewed above, the assessment of causation in Spain proceeds in two steps. A first step focuses on causality in fact and applies a sine qua non or but-for test. When it is known that damage has been caused by one or more unlawful conducts but it is unknown which one was the actual cause, joint and several liability will apply to all parties except if a party is able to show that there was no causal relationship between its conduct and the damage sustained by the claimant. Joint and several liability also typically applies to joint tortfeasors (Martín-Casals and Sole, 2013, pp. 301-302([124])). The second test focuses on causation in law and looks at whether the infringement is a “natural, adequate and sufficient” cause of loss (Clark, Hughes and Wirth, 2004, p. 74([63])). Whether this is the case will have to be ascertained by the court according to its conscience – a requirement that has been interpreted as requiring sufficient certainty (Martín-Casals and Sole, 2013, p. 295([124])).

Notes to VI.-4.101 of the Common Frame of Reference referring to German tort law, p. 3432; (Markesinis and Unberath, 2002([141])).

Notes to VI.-4.101 of the Common Frame of Reference referring to German tort law, p. 3342; (Lianos, 2015, p. 32([107])).

See also the Bundesgerichtshof’s decision of 28 June 2011 (KZR 75/10 – ORWI), which both decided that indirect purchasers were entitled to claim in damages and set out the conditions for a passing on defence to succeed. This is now set out in section 33c GWB.
11.3.6. European Union

While causation is a matter left to the Member States, it is subject to control by the European courts inasmuch as causation can be used to preclude the effective exercise of a victim’s right to claim damages for infringements of competition law. A recent question concerning this related to the application of national causation tests that precluded the possibility of damages actions as a result of umbrella pricing.

As noted in Section 7.3 above, umbrella pricing occurs when companies not party to a cartel set their prices higher than would otherwise have been expected in the absence of the cartel. Victims of the cartel in this case include customers of the cartelised product from non-infringing sellers. In the relevant case, a national causation rule of a Member State set out that loss had to be caused directly by the anticompetitive conduct. This would have precluded victims of umbrella pricing from bringing damages actions suffered as a result of a cartel. The European courts found that such a national causation rule breached European law. Under EU law, the effectiveness of the right to competition damages would have been: ‘put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto’.

This decision limits the autonomy of Member States as regards their rules of causation in law – and in particular as regards their rules concerning foreseeability – by holding that damages for umbrella pricing should be available as long as: “it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.”

The European Court further held that, in the context of a cartel: “a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard.”

11.4. Proving causation

Typically, the party that must prove its case and persuade a court bears the burden of proof. Even if the defendant was found guilty of an infringement in the context of public enforcement, the burden of proof – of proving the infringement or, more often, proving that the infringement caused loss – will usually still lie with the claimant. Parties with the burden of proof must provide evidence that meets the standard of proof – the legal standard which must be met in order for a court to find that a fact has been proved.

11.4.1. Basic rules on the standard of proof

Common law and civil law jurisdictions differ with regard to the standard of proof applicable to causation.

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390 Case C-557/12 Kone AG and others v. ÖBB-Infrastruktur AG, ECLI:EU:C:2014:1317 para. 33.
391 Case C-557/12 Kone AG and others v. ÖBB-Infrastruktur AG, EU:C:2014:1317, para. 34
392 Case C-557/12 Kone AG and others v. ÖBB-Infrastruktur AG, EU:C:2014:1317, para. 30.
Civil Law

Civil law systems base their rules on the standard of proof on the level of subjective belief that the fact-finder should have about a certain fact. The key notion is that the evidence should be enough to persuade the judge, who will adjudicate the case on the basis of his/her personal persuasion at the end of the proceedings, of the facts claimed by the relevant party. The applicable standard is one of *intime conviction*, which applies equally in civil and criminal cases (Gippini-Fournier, 2010, p. 190[125]). In France, Article 427 of the Code of Criminal Procedure establishes the principles of ‘free appreciation of the evidence’ and ‘intime conviction’ (‘le juge décide d’après son intime conviction’). Section 261 of the German Code of Criminal Procedure states: “The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole”. Section 286 of the German Code of Civil Procedure further sets out that: ‘Paying due regard to the entirety of the proceedings, including the evidence presented, if any, it is for the court to decide, based on its personal conviction, whether a factual claim is indeed true or not.’ This means that the law requires a firm belief, and the absence of any reasonable doubts on the part of a judge in order for a fact to be found to have been proved (Magnus, 2013, pp. 158-159[123]). The courts have clarified that even a finding of very high likelihood would not suffice if a judge did not reach a personal conviction about the case at hand.

In Spain, Article 741 of the Ley de Enjuiciamiento Criminal sets out that: ‘The court, evaluating according to its conscience the evidence reviewed in the proceedings, the arguments of the accusation and defence and the statements of the accused, shall deliver its decision’. While courts have not interpreted this as requiring full certainty, causation must still be proved with sufficient certainty (Martín-Casals and Sole, 2013, p. 295[124]).

Common Law

By contrast, common law countries tend to view proof from a more objective perspective. The main standard of proof is the ‘balance of probabilities’ or the ‘preponderance of evidence’, which requires that there be a probability greater than 50% - i.e. more likely than not – to satisfy the burden of proof (Gilead, Green and Koch, 2011, p. 20[126]). In the UK,

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393 French Code de Procédure Pénale, Art. 3531; German Zivilprozessordnung, § 286 I 1; German Strafprozessordnung, § 261, Art. 116 Italian Codice di procedura civile.

394 Article 353 contains a clause that must be read to the jury and is prominently displayed in the deliberation room in criminal cases, which illustrates this very clearly: “The law does not ask judges to justify the means by which they have been convinced, it does not set any particular rules by which they must gauge the fullness and sufficiency of the evidence; it stipulates that they must search their conscience with sincerity, and serenely and thoughtfully ask themselves what impression the evidence given against the accused and the defence’s arguments have made upon their mind. The law asks them only one question which sums up all of their duties: ‘What is your personal conviction?’” Translation (Gippini-Fournier, 2010, p. 191[125]).

395 BGH, 17 February 1970 (‘Anastasia Decision’), 53 BGHZ 245, 256 (German Federal Court of Justice) (interpreting s 286 of the German Code of Civil Procedure as requiring ‘full judicial conviction in the form of a degree of certainty that silences doubt for practical purposes, even if it does not eliminate them entirely’).

396 Translation in Eric Gippini-Fournier (Gippini-Fournier, 2010, p. 191[125]).
this has been made clear in a number of competition law judgments. In the US, while the predominant test for civil cases is the preponderance of evidence, in some cases the courts require facts to be proved by clear and convincing evidence. For antitrust cases, the normal test seems to apply for proof that an infringement caused harm, while the causation test may be somewhat relaxed for proof of the extent of harm.

11.4.2. Relaxing the standard of proof

As noted Chapter 10., claimants face significant challenges when trying to meet the burden and standard of proof required to be awarded damages for a competition law infringement. Defendants typically have much more information than claimants about the infringement, creating an informational asymmetry that makes it hard for the claimants to provide proof up to the requisite legal standard (Bailey, 2003, pp. 847-849[127]). In common law jurisdictions, this asymmetry is alleviated by a less strict standard of proof than in civil law jurisdictions and by the possibility of extensive disclosure. For civil law jurisdictions, however, evidentiary rules and the standard of proof can pose significant obstacles to the success of competition law claims.

In Chapter 10., a number of evidentiary rules that seek to remedy the information asymmetry between claimants and defendants were described. In addition, jurisdictions influenced by civil law have also adopted a number of rules that make it easier to meet the standard of proof as regards causation of loss.

First, there are examples of jurisdictions which relax the rules on burden and standard of proof as regards causation of harm. In Spain, Articles 217(6) and 217(7) of the Ley de Enjuiciamiento Civil allows the court to take into account the availability of the proof which each of the parties in proceedings must submit, thereby allowing the courts to shift the burden of proof when the other party has better access to the evidence (Martín-Casals and Sole, 2013, pp. 296-297[124]). In Germany, courts consider it prima facie evident that cartels lead to higher prices. The claimant therefore did not have to meet the full burden of proof by claiming and – if contested by the defendant – prove that it suffered a loss damages: instead, the courts held that it is the normal and typical sequence of events that cartel infringements cause harm. This did not amount to a reversal of the burden of proof, however, but merely a relaxing of the normal standard of proof. In order to avoid the presumption that cartels cause harm, the defendant only needed to show that the circumstances of the case were considerably different from a normal cartel case, so that damages to claimants could not be seen as the normal and typical consequence of the defendant’s behaviour (OECD, 2015, p. 17[5]).

Secondly, a number of jurisdictions have expressly adopted presumptions that certain infringements of competition law cause loss. In 2008, Hungary introduced a rebuttable


398 Bigelow v. RKO Pictures, Inc. 327 U.S. 251 (1946), at 264-266.

399 David Bailey ‘Standard of Proof in EC Merger Proceedings: A Common Law Perspective’ (2003) CMLRev 40 845, p. 847-849. Bailey points out that: “the burdens of proof and persuasion should be distinguished from the ‘evidential’ burden. The evidential burden simply denotes the need to adduce sufficient evidence to raise a particular issue. Typically, the party which bears the legal burden of proof will also bear the evidential burden to prove its case, though this is not always so.” See (Bailey, 2003, p. 849[127]), fn. 21.
presumption that hard-core cartels cause a 10% price increase (OECD, 2015, p. 17\(^{[5]}\)). More recently, the EU’s Damages Directive also introduced a rebuttable presumption that cartels cause harm.\(^{400}\) This presumption refers only to cartels and not to other infringements such as abuses of a dominant position, following the example of German competition act law.\(^{401}\) While the infringer may rebut this presumption, it amounts to a reversal of the burden of proof as regards causation of loss. Furthermore, the EU Damages Directive also creates a rebuttable presumption that harm was passed on to indirect purchasers if: (a) the defendant has committed an infringement; (b) the infringement resulted in an overcharge for the direct purchaser; and (c) the claimant shows that he has purchased affected goods or services from the direct purchaser. The combined effect of these evidentiary rules is that claimants benefit from a presumption of the existence of harm, and defendants are subjected to a demanding evidentiary burden to rebut this presumption (Graells and Odudu, 2017, pp. 163-164\(^{[79]}\)).

As a result of the transposition of this Directive, the laws of a number of EU Member States now contain presumptions that cartels cause loss. In Germany, sec. 33a(2) GWB now establishes a rebuttable legal presumption that cartel infringements cause harm. Unlike the presumption that flowed from the courts’ finding it \textit{prima facie} evident that cartels cause harm, rebuttal of this presumption now requires the defendant to prove the opposite of the presumption i.e. that no harm was caused.\(^{402}\) In Belgium, Parliament also introduced a rebuttable presumption that cartels cause damages.\(^{403}\)

A third way through which proof of causation may be made easier is through reliance on infringement decisions issued by competition authorities. Such decisions usually include extensive and detailed explanations of the infringement of competition law investigated by the authority. In a cartel case, for example, this will often include a description of the companies involved in the cartel, the mechanisms of the cartel arrangement, the duration of the cartel activity, its geographic scope, and so forth. Allowing claimants to rely on the findings of a competition authority simplifies their task not only as regards proving the infringement, but potentially also as regards proving that the infringement caused loss. However, this does not mean that claimants will be exempted from demonstrating that they suffered loss or the extent of damages suffered. Since quantification of harm often proves to be the most expensive and time-consuming aspect of follow-on damages claims, prior infringement decisions will not eliminate the high costs and difficulties faced by claimants (Peyer, 2016, p. 109\(^{[64]}\)).

\(^{400}\) Article 17(2) of the EU Damages Directive. Such a presumption may reflect the Commission’s reliance on studies indicating that only 7% of cartels do not lead to overcharging. However, the presumption of harm is limited to the higher prices paid as a result of the anticompetitive conduct or reduced sales leading to a loss of profit. Thus, other types of loss such as reductions in consumer choice, or reductions of innovation or quality, do not benefit from equivalent causal presumptions. See (OECD, 2015, p. 7\(^{[5]}\)), (Lianos, 2015, p. 46\(^{[107]}\)).

\(^{401}\) Article 17 of the Damages Directive. See also (OECD, 2015, p. 15\(^{[5]}\)) (Truli, 2016, p. 309\(^{[67]}\)).

\(^{402}\) See article 292 of the German Code of Civil Procedure. Section 33a(3) GWB further declares section 287 German Code of Civil Procedure to be applicable, which allows courts to estimate the amount of damages. See (Kersting, 2018, p. 10\(^{[78]}\)).

\(^{403}\) Belgian Act on Damage Claims for Breaches of Competition Law.
11.5. Causation of harm in Mexico

Under Mexican law, the same causation rules apply to all civil liability regimes. Redress is given for harm which can be attributed to the unlawful conduct of the tortfeasor or, exceptionally, to the tortfeasor’s risky behaviour under Article 1913 of the Federal Civil Code (CCF). Causation fulfils a dual role in Mexican law: (i) on the one hand, it is the basis for liability, since liability arises for damage caused by the offender; (ii) on the other hand, causation limits liability, because liability extends only to the harmful consequences which, by virtue of a normative judgment, are directly attributable to the action or omission that caused them. 404

The CCF provisions on civil liability do not make express reference to causal requirements, although it is clear that they presuppose it. Thus, for instance, Article 1910 states that “Any person who, acting unlawfully or immorally, causes damage to another…” In turn, when dealing with the general effect of obligations, Article 2110 of the CCF states that: “Damage and loss must be an immediate, direct consequence of the breach of the obligation, whether damages have been caused or must inevitably be caused.” Although the article referred to is formulated from the perspective of contract law, Mexican legal literature has seen no obstacle to extending it to non-contractual liability (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 702 et seq.[30]). The courts have shared the same approach. 405

In Mexico, neither the courts nor legal literature has dealt with the distinction between “causation in fact” and “causation in law”, but this distinction may be observed in practice. The most traditional distinction that has been followed is to apply, initially, the “but for”

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404 In this connection, the courts have ruled: “OBJECTIVE CIVIL LIABILITY. CAUSAL NEXUS. According to Article 1913 of the Civil Code of the Federal District, objective civil liability arises when use is made of mechanisms, instruments, appliances or dangerous substances that cause damage and oblige their owner to take responsibility therefor, but the clause in question must be understood in the sense that the damage caused is the consequence of a direct link between the condition and the harmful outcome, in other words that no other event occurred to break that linkage, for which reason if, in the case at issue, objective civil liability were claimed, on the basis that a fire originated in the premises of the party that is now the claimant, this is what must be taken into consideration, that is to say determining with the evidence in the proceedings whether the circumstance of the causal nexus is proved for the purpose of applying the aforementioned Article 1913, in other words what was the cause of the event that gave rise to the loss, whether it was because of the use or handling of flammable substances, whether the fire originated in the premises of the claimant, by virtue of flammable substances, or was due to external factors, thus determining what was the origin of the fire and hence establishing the corresponding liability.” SECOND COLLEGIATE COURT IN CIVIL MATTERS OF THE FIRST CIRCUIT. Direct amparo 2027/89. Ultraespuma de México, S.A. 30 June 1989. Unanimous opinion. Reporting judge: Martín Antonio Ríos. Court Clerk: Anastacio Martínez García. Register No. 229078. Discrete Thesis. Area(s) of Law: Civil. Eighth Period. Level of Jurisdiction: Collegiate Circuit Courts. Source: Judicial Weekly of the Federation. Volume III, Second Part-2, January to June 1989, page 690.

405 Direct amparo 7781/57. Register No. 272113. Sixth period. Third Chamber of the National Supreme Court of Justice (SCJN). Judicial Weekly of the Federation, fourth part XX, page 63: “DAMAGE AND LOSS. The link between breach of an obligation and the damage and loss resulting from its breach must be so close that no other cause must exist to which the origin of the damage and loss may also be attributed. As set out in Article 2110 of the Civil Code, there must be an immediate, direct causal link between the conduct of the obligor and the production of the damage and loss.”
doctrine, also known as *condictio sine qua non*, which corresponds to causation in fact. It operates by hypothetically eliminating the action or omission that is alleged to have caused the harm. If the harm does not occur in this counterfactual, then the eliminated action or omission is found to be the cause. If there are various causes, and eliminating each one removes the harm, then they are all treated as equivalent causes of the loss. On account of its simplicity, this test is much used by the courts, but it does not allow for distinction between proximate and remote causes that have given rise to harm.

In the light of the above, the most relevant provision in this matter is the aforementioned Article 2110 of the CCF, which, as we have seen, requires the damage to be a direct, immediate consequence of the breach of an obligation, imposing a condition similar to that for causation in law in other legal systems. This latter situation presupposes a judgement as to whether the harm can, in normative terms, be attributed to the fact. Here, the doctrine of adequate cause arises. In its most widely accepted formulation, the entity causing harm will be liable only for the damage which, from the viewpoint of an impartial, experienced observer, situated *ex post* in respect of the facts and the various causes that have contributed to their occurrence, does not seem implausible, i.e. too remote. This doctrine has been used on occasion by the Mexican courts.

However, as regards compensation for competition infringements, it is clear that the courts must apply not only Article 2110 of the CCF, but also the two doctrines mentioned above, i.e. the “but for” approach and the causal adequacy doctrine, when determining the amount and scope of the damage eligible for compensation. It is also important to remark on the possibility open to judges, by means of his or her rulings, or to the legislature, by means of legal reforms, to adopt a new concept of damages which includes losses caused by discontinuous causal links, as suggested in section 7.4.
Chapter 12. Damages and their quantification

Quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be achieved. In practice, the total overcharge by a cartel is usually used as a proxy for cartel damages, and this can be relatively simple to calculate. However, it is well known that the total overcharge tends to neglect the output effect – i.e., the loss suffered by purchasers who did not acquire a product as a result of the price increase caused by the overcharge. Ideally, a corporation which engaged in anticompetitive conduct should internalize the social costs of its behaviour – i.e., the net harm caused by its conduct. In such an ideal world, the infringing company should at least be forced to pay the deadweight loss borne by persons other than cartelists, plus the cartel overcharge (Landes, 1983, p. 656; Breit et al., 1985, pp. 410-412; Page, 1985, p. 1455).

Given difficulties in quantifying harm, courts will usually only be able to arrive at best estimates relying on assumptions and approximations. This can be done in a number of ways. On the one hand, there may be legal rules allowing or setting up mechanisms for the estimation of damages. On the other, there are a number of economic tools developed throughout the years for the purpose of estimating damages. A recent summary of such methods was compiled in a Practical Guide prepared by the European Commission to assist courts (European Commission, 2013, pp. 9-10). This guide sets out various methods which can be used to calculate damages, which are broadly divided into comparator

406 The economics literature has pointed out that there is no clear relationship between damages awarded on the basis of overcharge and true harm. See, e.g., (Van Dijk and Verboven, 2008); (Han, Schinkel and Tuinstra, 2009).

407 Another issue, which need not deter us here, is whether efficiency gains that might occur—e.g., due to savings in production costs—should also be disgorged from the cartelists. Arguing that efficiency gains should also be disgorged see (Wils, 2006, pp. 191-193); arguing that they should not be disgorged, (Landes, 1983).
models, simulation methods, and cost and finance-based approaches. These methods and techniques are based on different approaches, and vary in terms of the underlying assumptions and the variety and detail of data needed. They also differ in the extent to which they control for factors other than the infringement that may have affected the situation of the claimant. As a result, these methods and techniques may be more or less difficult, time-consuming and cost-intensive to apply (European Commission, 2013, p. 11).

In the specific circumstances of any given case, the appropriate approach to quantification must be determined under the applicable rules of law. Relevant considerations may include, alongside the standard and burden of proof applicable, the availability of data, the costs and time involved, and the balance between these costs and the value of the damages claim at stake (European Commission, 2013, p. 39). A more detailed discussion of these methods will be pursued in Chapter 13, below.

In practice, and in addition to the identification of harm actually suffered, the amount that a claimant may obtain in damages proceedings can depend on a number of factors. This chapter will review such factors, in particular: (i) the relationship between harm suffered and the amount of damages award; (ii) the scope of the harm that is taken into account when calculating a damages award; (iii) mechanisms that address the difficulties created by the passing on of harm down the economic chain; (iv) the impact of interest; (v) rules regarding the promotion of effective enforcement that may limit the liability of an infringing party.

These methods estimate what would have happened without the infringement by looking at the time periods before or after the infringement, or at other markets that have not been affected by the infringement. Such comparator-based methods take the data (prices, sales volumes, profit margins or other economic variables) observed in the unaffected period or in the unaffected markets as an indication of the hypothetical scenario without the infringement. The implementation of these methods is sometimes refined by the use of econometric techniques: (European Commission, 2013, p. 14). The greatest advantage of comparator models is that they use real-life data that are observed on the same or a similar market. A number of specific methods – comparison over time in the same market, comparison with other geographic market, comparison with data from similar product markets, and comparisons across all these dimensions – are reviewed in pages 16 to 32 of (European Commission, 2013).

These economic models are fitted to the actual market to simulate the likely market outcome that would have occurred without the infringement. These models draw on economic Opinion to explain the likely functioning of a market in view of its main features (e.g. the number of competitors, the way they compete with each other, the degree of product differentiation, entry barriers): (European Commission, 2013, pp. 14, 32-35).

These models use production costs for the affected product and a mark-up for a ‘reasonable’ profit margin to estimate the hypothetical non-infringement scenario; or finance-based approaches that take the financial performance of the claimant or the defendant as a starting point: (European Commission, 2013, pp. 14, 35-38).
12.1. Measuring loss

12.1.1. General principles

Loss suffered by the claimant as a result of the competition law infringement is the primary measure when determining the amount of a damages award. While identifying harm is often a difficult and complex exercise in individual cases – and the difficulty may be greater or lesser depending on the evidentiary regime in place – in abstract there are significant similarities in how different jurisdictions measure harm. Such similarities ultimately arise from the fact that an action for competition damages is usually an action in tort, and that across the world actions in tort have a predominantly compensatory goal, i.e. they seek to put a victim in the situation that it would have been in but for the wrong it suffered.

For example, in the US a party that is entitled to damages can recover a loss measured by the difference between her actual position and the position it would have been in but for the antitrust violation. Thus, based on the premise that the antitrust infringement did not occur, a hypothetical “but-for world” has to be constructed and compared to the position the plaintiff is actually in. For example, in a standard price-fixing case, the measure of damages is “the difference between the price actually paid by the [plaintiff] on the contracts and the price it would have paid absent the conspiracy” times the number of units sold under the antitrust violation.\(^{411}\)

In Europe, the goal is to compensate victims for competition law infringements; injured persons must be able to seek compensation not only for actual loss (\textit{damnum emergens}) but also for loss of profit (\textit{lucrum cessans}), plus interest. Actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement.\(^{412}\) Loss of profit relates to opportunities that the victim was unable to take advantage of as a result of the infringement. It is worth noting that the European courts made a point of emphasising that loss of profit must also be recoverable given that, in the context of economic or commercial litigation in which competition actions often occur, restricting compensation to actual loss would make reparation of loss suffered practically impossible.\(^{413}\) To use cartels as an example, the loss that intermediaries in a competitive market suffer may correspond merely to the lost profits from reduced sales caused by the higher prices, since they may have passed the actual loss (i.e. the price increase) onto final consumers. This principle was codified in Article 3 of the EU Damages Directive. Article 3(1) holds that any natural or legal person who has suffered harm caused by an infringement of competition law should be able to claim and to obtain full compensation for that harm. Paragraph 2 describes what full compensation means: i.e. awarded damages should place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed, and must therefore cover actual loss and loss of profit, plus the payment of interest.\(^{414}\)

\(^{411}\) \textit{New York v. Julius Nasso Concrete Corp}, 202 F.3d 82, 88.

\(^{412}\) Recital 97 of the EU Damages Directive.


\(^{414}\) See also (European Commission, 2013, p. ara. 6[156]).
12.1.2. Tools to assist the measurement of loss

As noted above, competition damages claims are fact-intensive and difficult to prove. In addition to difficulties in obtaining the necessary evidence to make out a case, victims often also find it difficult to quantify their loss. Quantification of harm in competition cases has always, by its very nature, been characterised by considerable limits to the degree of certainty and precision that can be achieved. Sometimes only approximate estimates are possible. Comparing the actual position of a victim of a competition infringement with the position it would have been in without the infringement is something that cannot be observed in reality. It is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement: all that is possible is an estimate of the scenario likely to have existed without the infringement (European Commission, 2013, p. ara. 9[132]). As a result, jurisdictions around the world have adopted mechanisms that allow the award of damages even when it has impossible to precisely identify the extent of loss.415

Reducing the Burden and Standard of Proof, and Estimating Damages

A first tool used for this purpose is to modify the burden of proof, or to lower the standard of proof required for the quantification of the harm arising from a competition infringement. This is justified by a general principle of effectiveness of judicial action, which requires that damages actions should not be rendered practically impossible or excessively difficult. This means that, once it is established that the claimant has suffered harm from the defendant’s competition infringement, a court cannot exempt itself from awarding damages simply because the claimant cannot prove in a sufficiently precise manner the amount of loss suffered. As a result, lowering the standard of proof usually entails granting the power to courts to estimate the amount of damages – at least as long as the claimant has made sufficient efforts to prove its claim despite the obstacles to its precise quantification.

In the US, courts take into account the “practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries” and acknowledge that “damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.”416 The jury “may make a just and reasonable estimate of the damage based on relevant data, so long as it is not based upon “speculation or guesswork”.417

In Europe, the appropriate standard of proof and the required degree of precision in establishing the extent of loss suffered are matters left to the laws of the EU’s Member States, subject to the principles of effectiveness and equivalence. As a result, the methods that courts may use to quantify the harm suffered are broadly left to the Member States, except when such methods pose excessive difficulties to the exercise of the right to damages guaranteed by EU law. Examples of this would be disproportionate costs, or excessive requirements regarding the degree of certainty and precision applicable to the quantification of the harm suffered (European Commission, 2013, p. ara. 8[132]).

415 This is in line with the trend to facilitate proof of competition damages claims reviewed in Chapter 10. above.
In practice, European courts tend to have the power to estimate damages. For example, German law expressly authorizes judges to estimate the amount of damages, as long as the results are economically reasonable and possible.\footnote{Zivilprozeßordnung [ZPO] [Code of Civil Procedure] Jan. 1877, Reichsgesetzblatt [RGBl] 30, § 287. See also the recent judgment of 12 July 2016 – Case KZR 25/14; Judgment of 9 November 2016 – Case 6 U 204/15 (Kart) Judgment of 21 December 2016 – Case 8 O 90/14 (Kart); judgment of 28 June 2017 – Case 8 O 25/16.} The judge is thus free to choose which methodology is best suited to approximate reality in a probabilistic sense.\footnote{Kammergericht [KG] [Higher Regional Court of Berlin] Oct. 1, 2009, Case 2 U 10/03 Kart (F.R.G.). See also (Abele, Kodek and Schaefer, 2011, p. 850\textsuperscript{109}).} In the Netherlands, damages are calculated in the manner considered most appropriate by the judge hearing the case – and profits made by the defendant can be used as a yardstick to determine the amount of damages instead of the victims’ losses (Clark, Hughes and Wirth, 2004, p. 80\textsuperscript{63}). Even when they are not used as a yardstick, the defendant’s profits from the anticompetitive conduct can be used to assist in the assessment of the extent of a claimant’s loss.\footnote{This was said to be the case in Italy, Lithuania, Luxembourg, Netherlands, Poland and Spain, in (Clark, Hughes and Wirth, 2004, p. 80\textsuperscript{63}).} In Spain, the Supreme Court has acknowledged the ‘impossibility of a perfect reproduction of what would have been the situation if there had been no unlawful conduct’.\footnote{Supreme Court Judgment of 7 November 2013, Nestlé et al v Ebro Foods (STS 5819/2013). See, for details (Marcos, 2015, pp. 217-218\textsuperscript{26}).} Recent amendments to the competition law have set out that courts may estimate damages when it has been established that the claimant suffered damages but it is impossible or excessively onerous to identify their precise amount.\footnote{Art. 76(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.} Against this background, the European Commission issued a practical guide on the quantification of harm in actions for damages in Europe. This guide provides insights into various forms of harm typically caused by anticompetitive practices, and sets out information on the methods and techniques available to quantify such harm. Furthermore, the EU Damages Directive requires Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In particular, the EU Damages Directive requires Member States to ensure that national courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the available evidence.\footnote{Article 17 of the EU Damages Directive.} The use of this type of mechanisms is not restricted to Europe and America. Korean law sets out that, when it is established that damage was caused by a competition law infringement but it is extremely difficult to determine the amount of such damage: “the court may recognise a reasonable amount of damages based on the gist of entire arguments and the outcome of investigating evidence”\footnote{Article 57 MRFTA (Determining Damages).}. Similarly, in Japan there is a general rule of law that: “Where it is found that any damage has occurred and it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import

419 Kammergericht [KG] [Higher Regional Court of Berlin] Oct. 1, 2009, Case 2 U 10/03 Kart (F.R.G.). See also (Abele, Kodek and Schaefer, 2011, p. 850\textsuperscript{109}).
420 This was said to be the case in Italy, Lithuania, Luxembourg, Netherlands, Poland and Spain, in (Clark, Hughes and Wirth, 2004, p. 80\textsuperscript{63}).
421 Supreme Court Judgment of 7 November 2013, Nestlé et al v Ebro Foods (STS 5819/2013). See, for details (Marcos, 2015, pp. 217-218\textsuperscript{26}).
422 Art. 76(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.
423 Article 17 of the EU Damages Directive.
424 Article 57 MRFTA (Determining Damages).
of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage”.425

Presumptions

In addition to modifying the normal rules on burden and standard of proof, the EU Damages Directive includes a second tool to make it easier to quantify damages: presumptions. In particular, the EU Damages Directive establishes a rebuttable presumption that cartels cause harm and allows national courts to estimate such harm. In practice, this amounts to a complete reversal of the burden of proof as regards causation. However: (i) the infringer may rebut this presumption; and (ii) the presumption refers only to cartels and not infringements of abuse of a dominant position.426

Even before the Directive was adopted, a number of countries already had similar presumptions in place. Some presumptions went merely to causation – i.e. it is presumed that the anticompetitive practice causes harm, as discussed in Chapter 11. above – but, when coupled with the power for courts to estimate damages, their practical effect was to reverse the burden of proof regarding not only the existence of damages but also their extent. A good example of this can be found in Germany. German courts had created a presumption that the existence of a cartel provides prima facie evidence of harm, including as a result of umbrella pricing.427 At the same time, German courts have a general power to estimate harms. Although the burden of proof lies with the claimant, if the competition law infringement is proven and if the claimant has a plausible story about the damage it suffered, German courts do not hesitate to award damages (OECD, 2015, p. 16[5]). The result is that while, technically, the presumption of harm only operated as to causation and claimants needed to prove the amount of damages, in practice the defendant faced a burden to demonstrate that “normal damages” did not follow from its anticompetitive conduct.428

Furthermore, in some cases the extent of loss is explicitly presumed. For example, in 2008, Hungary introduced a rebuttable presumption that hard-core cartels cause a 10% price increase on the market (OECD, 2015, p. 17[5]).

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425 Article 248 of the Code of Civil Procedure – translation included in (OECD, 2015, p. 16[5]).
426 Article 17 of the EU Damages Directive. See also (OECD, 2015, p. 15[5]; (Truli, 2016, p. 309[67]). This was adopted in Spain by Art. 76(3) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.
427 See LG Karlsruhe judgment of 9/11/2016 – Case 6 U 204/15 Kart and LG Dortmund judgment of 21/12/2016 – Case 8 O 90/14 (Kart); judgment of 28/06/2017 – Case 8 O 25/16. See also (Kuijpers et al., 2018, p. 68[157]).
428 It is worth mentioning that the change from a rule that a cartel provides prima evidence of harm to a rule that presumes that a cartel caused harm can have significant practical consequences. In order to refute the prima evidence rule, the defendant only needed to show that the circumstances of the case were considerably different from a normal cartel case, so that damages to claimants could not be seen as the normal and typical consequence of the defendant’s behaviour. However, in order to refute a presumption that a cartel caused harm such as the one inserted into the German Competition law to implement the EU Damages Directive – see section 33a(2) GWB – the defendant now has to prove the opposite of the presumption (as per Article 292 of the German Code of Civil Procedure), i.e. that no harm was caused. See (Kersting, 2018, p. 10[78]). See also the discussion at Chapter 11.4.2 above.
12. DAMAGES AND THEIR QUANTIFICATION

**Assistance from a specialised body**

A last mechanism that may assist courts in the assessment of damages is for courts to request the competition authority to assist them in this exercise. The EU Damages Directive, for example, provides that a national competition authority can assist in the determination of the quantity of damages upon request of a national court.\(^{429}\)

12.2. Compensatory, punitive and exemplary damages

12.2.1. Compensatory damages

As we saw above, a successful claimant will be entitled at least to compensatory damages – i.e. the damages award will be equivalent to the harm suffered, since the objective is to put the victim in the position he was before the infringement (OECD, 2015, p. 7\(^{[5]}\)). The question is whether the claimant should be entitled to additional damages as well.

In Europe, where the goal of competition damages is purely compensatory, the award of damages is limited to the loss to be compensated (Clark, Hughes and Wirth, 2004, pp. 57, 80\(^{[63]}\)). As we shall see below, in some Member States punitive or exemplary damages could be imposed as well. However, the EU Damages Directive prohibits “overcompensation, whether by means of punitive, multiple or other types of damages”. Instead, compensation is merely intended to place: “a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed”.\(^{430}\) As a result, following the implementation of the EU Damages Directive only compensatory damages can be awarded in the EU.

12.2.2. Punitive and exemplary damages

In some jurisdictions it is foreseen that the party will be entitled to damages awards in excess of the amount of compensatory damages. This is usually related to punitive goals that underpin some private enforcement systems. Hence, it is common in these jurisdictions for private enforcement to be infused with deterrence goals or to be used to compensate for the limitations of public enforcement. The case for damages awards which amounts exceed the victims’ losses finds support in various arguments. First, many competition violations are covert; hence, they are difficult to detect and prosecute. Damages beyond compensation may more accurately reflect the harm caused by cartel activity to the economy and better serve as a deterrent to such activities. Second, competition violations may so dislocate competitive conditions as to make re-creation of a “but for” market as a yardstick for damages impossible. Damages exceeding mere compensation may provide rough justice for injured claimants. Third, competition litigation is both complex and costly, making it a riskier proposition than most other forms of litigation. Punitive damages provide an incentive for claimants to undertake the enhanced risk of litigating private competition cases. Fourth, multiple damages provide a higher degree of deterrence than actual damages. Fifth, some types of competition infringements, such as horizontal price-fixing, serve no purpose other than to destroy competition, and therefore should be punished (Cavanagh, 2010, p. 642\(^{[133]}\)).

These reasons presuppose that at least one reason for promoting private enforcement is to punish and deter anticompetitive conduct. The most obvious example of a jurisdiction that

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\(^{429}\) Damages Directive, Article 17(3).

\(^{430}\) Damages Directive, Article 3.
imposes punitive damages is the US where, as we saw, private parties are expected to play a central role in the enforcement of competition law, to the point of having been described as “private attorneys general”. Section 4 of the Clayton Act allows “any person (…) injured in his business or property by reason of anything forbidden in the antitrust laws” to “recover threefold the damages by him sustained.”\textsuperscript{431} Successful antitrust plaintiffs may, in addition, recover attorneys’ fees and, in certain circumstances, pre-judgment interest. The treble damages provision is a direct descendant from the original Sherman Act, passed in 1890, which already included a similar provision (Cavanagh, 1986, p. 779\textsuperscript{[17]}).\textsuperscript{432} Senator Sherman and others argued that multiple damages should be “commensurate with the difficulty of maintaining a private action” and have a punitive effect.\textsuperscript{433}

The origins of the treble damages rule seem to lie in old English laws against monopolies which, since the 17\textsuperscript{th} century, allowed private persons or firms to sue monopolies and, if they won, to obtain treble damages.\textsuperscript{434} Despite its grounding in History and legal practice, the treble damages rule has been the subject of criticisms, and there have been proposals to abolish it or apply it selectively only to the most egregious competition law infringements.\textsuperscript{435}

The first criticism is that antitrust rules are somewhat vague about which conduct is deemed anticompetitive. Imposing treble damages may be unfairly punitive in this context, particularly where the law or facts are not clear (Antitrust Modernization Commission, 2007, pp. 243-247\textsuperscript{[18]}). Trebling may seem particularly inequitable when liability turns on close questions of law or fact, on a novel interpretation of the law, or on a reversal of prior precedent.\textsuperscript{436} A second criticism is that treble damages may result in duplicative recovery and lead to over-deterrence. Much conduct potentially subject to antitrust law may be pro-competitive, or may at least be competitively neutral. The application of treble damages can discourage pro-competitive behaviour by making a company’s exposure to damage exceed the benefits of the conduct for the company and its customers (Cavanagh, 2009, p. 792\textsuperscript{[28]}).\textsuperscript{437} Third, while some argue that the multiplier of damages should be higher than one in covert cases to compensate for the low likelihood of detection, there are many cases where the unlawful conduct is not covert (Lande, 2004\textsuperscript{[134]}; Antitrust Modernization Commission, 2007\textsuperscript{[18]}).

\textsuperscript{431} 15 U.S.C. § 15(a)
\textsuperscript{432} Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890).
\textsuperscript{433} 21 Congressional Records 2456 (1890).
\textsuperscript{434} The English Statute of Monopolies, 21 Jac. I, ch 3 (1623) provided that an aggrieved party: “shall recover three times so much as the damages which he or they sustained by means or occasion of being so hindered, grieved, disturbed , or disquieted…” This seems to have influenced Senator Hoar, who added the treble damages provision to the Sherman Act – see (Cavanagh, 1986, p. 782\textsuperscript{[17]}).
\textsuperscript{435} For an overview of these criticisms, see (Cavanagh, 1986, pp. 791-802\textsuperscript{[17]}). For an overview of these proposals, see also (Cavanagh, 2010, pp. 642-643\textsuperscript{[133]}) (Cavanagh, 2005, pp. 175-177\textsuperscript{[159]}).
\textsuperscript{436} (Cavanagh, 2009, p. 794\textsuperscript{[28]}).
\textsuperscript{437} Cavanagh states that mandatory treble damages may far exceed the harm caused. In (Antitrust Modernization Commission, 2007\textsuperscript{[18]} however, it was held that no actual cases or evidence of systematic over-deterrence had been presented to the American Antitrust Modernisation Commission.
Commission, 2007, p. 247\[18\]). Instead, in some cases – such as mergers and most joint ventures, distribution contracts, and single-firm conduct – the probability of detection is close to 100%. In cases where the public is aware of the conduct or the conduct is otherwise overt, there may be no need for multiple damages (Antitrust Modernization Commission, 2007, p. 248\[18\]). Lastly, being subject to mandatory trebling of damages may impair a firm’s ability to compete. Despite these criticisms, and periodic efforts to eliminate or limit their availability, treble damages have remained the rule in antitrust cases in the US. Treble damages are thought to serve five related and important goals, summarised in a 2007 Report by the Antitrust Modernization Commission (Antitrust Modernization Commission, 2007, pp. 246-247\[18\]):

- **Deterrence** – To eliminate incentives for companies to engage in anticompetitive conduct, the law must ensure that an infringing party risks losing the potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge.

- **Punishment** – The second recognized purpose of treble damages is to punish offenders. This purpose is closely related to deterrence: multiple damages help deter unlawful conduct. Furthermore, anticompetitive conduct not only raises prices but causes allocative inefficiency (e.g. reduced sales) that reduces consumer welfare but is not reflected in damage calculations. Treble damages more fully reflect the harm to society caused by anticompetitive conduct.

- **Disgorgement** – The payment of treble damages results in, and can go beyond, the disgorgement of unlawfully obtained gains (or profits) arising from anticompetitive conduct, thereby removing incentives for companies to engage in anticompetitive conduct.

- **Providing Full Compensation** – Given that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover “speculative” damages), treble damages help ensure that victims will receive at least their actual damages.

- **Promoting Private Enforcement** – Treble damages create incentives for the private enforcement of the antitrust laws. This is thought to be of particular importance in light of limited government resources to identify and prosecute all anticompetitive conduct. Incentives for private enforcement also reinforce the other objectives of treble damages reviewed above.

In the EU, while the rule is that only compensatory damages can be awarded following the implementation of the EU Damages Directive, it used to be possible for punitive damages to be awarded as well. The European courts held that, in the absence of EU rules governing the matter, it was for the domestic legal system of each Member State to set the criteria for determining the extent of damages. Under the principle of equivalence, if punitive damages could be awarded in similar domestic law actions, it must have also been possible to award

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\[438\] (Cavanagh, 1986, pp. 783-788\[17\]) discusses all these goals of treble damages, with the exception of promoting private enforcement.
such damages in actions founded on EU competition rules.\textsuperscript{439} Prior to the implementation of the Directive, only Cyprus expressly allowed punitive damages (Clark, Hughes and Wirth, 2004, p. 84\textsuperscript{63}). However, exemplary damages – which are punitive damages by another name – are available in Cyprus, Ireland and the UK. The objective of exemplary damages is to “punish and deter”.\textsuperscript{440} Like punitive damages, exemplary damages are awarded in addition to compensatory damages for the purpose of “vindicating the strength of the law” and “to teach a wrongdoer that tort does not pay”, and should be awarded only if compensatory damages are insufficient to punish the defendant.\textsuperscript{441}

Exemplary damages have been awarded in the UK in the context of competition law damages. In 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd, exemplary damages of £60,000 were awarded in addition to compensatory damages because the infringing party deliberately decided to disregard the law and the competition authority had not imposed any penalty.\textsuperscript{442} Regarding situations where the competition authority has pursued public enforcement, the High Court held that the principle of \emph{ne bis in idem} precludes the award of exemplary or punitive damages in an action for damages following an infringement decision by a competition authority.\textsuperscript{443}

\subsection*{12.3. Passing on}

Full compensation in competition cases is intimately connected with the idea of passing on. In the context of distribution or production chains, an illegal overcharge can be passed through the chain, which means that each of the parties in that chain may suffer antitrust injury – and that the extent of loss suffered by parties at each level of the chain is reduced by the amount of overcharge that a party was able to pass on downstream. The question of pass-on does not affect the calculation of the overcharge in itself – only the distribution of the harm caused by the overcharge along the supply chain.

An example may be useful to illustrate this. When a price-fixing manufacturer overcharges for the goods it sells, a “direct purchaser” will buy the goods directly from that manufacturer and pay the overcharge. This “direct purchaser” may then incorporate the goods subject to the overcharge into its own products, and sell those products at a higher price to reflect the cost of its inputs (including the overcharge) – thereby passing on to its

\begin{itemize}
\item \textsuperscript{439} Joined Cases C-295/04 to 298/04, \emph{Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni Spa and others}, EU:C:2006:461, para. 91-93, 99.
\item \textsuperscript{440} \emph{Rookes v Barnard} [1964] AC 1129, at 1221.
\item \textsuperscript{441} \emph{Rookes v Barnard} [1964] AC 1129, at 1221, 1226-1228; \emph{Kuddus v Chief Constable of Leicestershire} [2002] AC 122, para. 62. It is generally accepted that exemplary damages can only be awarded under English law in one of three circumstances: (i) oppressive, arbitrary or unconstitutional action by servants of the government; (ii) conduct calculated to make a profit in excess of compensation payable to the victim; (iii) statutory authorisation for the imposition of exemplary damages. See (Deakin, Johnston and Markesinis, 2008, pp. 944-951\textsuperscript{113}).
\item \textsuperscript{442} 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19.
\item \textsuperscript{443} \emph{Devenish etc. v. Sanofi-Aventis etc.} [2007] EWHC 2394 (Ch) (Lewison J). This is so even when the defendant has not paid any damages as a result of having benefited from a leniency program. The High Court also held that restitutionary remedies are not available in cartel damages actions. See also (Wils, 2017, p. 25\textsuperscript{6})).
\end{itemize}
distributors all or some portion of the original overcharge. In turn, the distributors may be able to pass on all or part of the overcharge to consumers in the form of higher prices. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are commonly called “indirect purchasers.” Thus, the damages from the original competition law infringement may flow from direct to indirect purchasers (Antitrust Modernization Commission, 2007, p. 265[18]). A compensation-oriented system will often allow indirect purchasers to sue for the damages they suffered. But, to ensure that compensation is allocated with losses effectively suffered, this logically requires that a passing-on or similar defence be made available to defendants.

A challenge with passing on is that it requires judges to determine exactly who suffered which loss. This creates serious difficulties, since it is extremely hard to identify who ultimately bore the harm. The situation is analogous to the intractable problem of determining the ultimate incidence of a tax in Public Finance theory (Butlin., 1937[135]). In both competition and tax contexts, a charge will be shifted in varying degrees backwards to suppliers, employees, and shareholders; or forward to direct and indirect purchasers depending on elasticities of demand and supply in input and output markets. The charge will also create inefficient substitution effects (deadweight losses) that will be next to impossible to measure with any degree of accuracy and at reasonable cost in any compensation-based regime (Breit et al., 1985, p. 415[129]; Roach and Trebilcock, 1996, p. 491[9]).

Rules that set out that passing on is not a relevant consideration, and that indirect purchasers are not granted standing to sue, concentrate antitrust claims in the hands of those most likely to sue and significantly simplify damages’ litigation – allowing difficult issues of remoteness and tracing of injury to be side-stepped, and reducing the costs of litigation (Jones, 2016, p. 7[14]). At the same time, such rules will often lead to the ultimate victims of a competition law infringement not being compensated, and to awarding to companies which were able to pass on the overcharge a windfall in the form of damages.

If a jurisdiction decides that passing on must be taken into account, that jurisdiction will still need to decide which functions of passing on it will recognise: as a sword or as a shield. As a sword, passing on can be relied on by indirect purchasers who claim to have suffered loss as a result of overcharges on the purchases of products or services made to them from distributors of the infringing companies, or from other companies which have incorporated goods affected by the infringement into their own products or services. As a shield, passing on can be relied on by defendants who argue that the claimant has incorporated overcharges, or part of them, in its downstream prices of products or services, thus reducing the claimant’s loss and the amount of damages that defendants owe to the claimant.

Both the shield and sword dimensions of passing on must be present in order for everyone who suffered loss as a result of a tort to be fully compensated – to stop claimants from obtaining compensation that exceeds their loss, and to prevent defendants from paying damages in excess of the harm they caused. At the same time, it is perfectly possible to set up systems without, or with limited recourse to passing on. In such scenarios, some victims may be overcompensated; other victims may be under-compensated, or not receive

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444 See , e.g. (Butlin., 1937, p. 191[135]): “Simple and obvious as such equation of the amount of incidence and amount of tax may appear to be, the result is, in most cases, to make the distribution of incidence undiscoverable – not in the sense that there is insufficient information, but in the sense that incidence cannot be Separate even in abstraction”.
compensation at all; and infringing parties may have to pay compensation in excess of the harm they caused. Such choices are ultimately matters of policy.

From a legal standpoint, one of two things must be allowed in order for passing to be an issue during a claim for damages. First, a defendant in an action for damages must be allowed to invoke as a defence that the claimant partially or entirely passed on the overcharge resulting from the competition law infringement to its downstream customers—and, hence, that the claimant did not suffer loss (or suffered a smaller loss than what is claimed). Second, indirect purchasers must be allowed to claim for damages for a competition law infringement further up the supply chain. While each of these possibilities is able to trigger passing on issues on its own, given the difficulties that passing on raises in practice and its connection with ideas of compensation of victims, often a jurisdiction will either not contain either of them or it will contain both. We now review each situation in turn.

12.3.1. Systems that do not take passing on into account

The most prominent example of a jurisdiction where passing on is not accepted is US federal law—under which indirect purchasers are not granted standing to sue for antitrust damages, and defendants are not allowed to invoke passing on as a defence. In a 1968 decision, the Supreme Court held in *Hannover Shoe* that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had “passed on” to indirect purchasers the illegal overcharges initially paid by the plaintiff—i.e. a defendant cannot not use passing on as a shield. As we saw in Chapter 7.2.1 above, the Supreme Court held almost ten years later in *Illinois Brick Co.* that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges—i.e. a claimant cannot use passing on as a sword. One important reason given for this decision was that defendants could not rely on passing on under *Hannover Shoe*. The Supreme Court argued that not granting standing to indirect purchasers meant applying the same rule to both plaintiffs and defendants: neither could rely on the pass on of overcharges to either bring, or defend against, a suit based on federal antitrust law. Underpinning this decision is also the fact that, as seen above at 12.2.2, the goal of damages in US antitrust law is not solely compensation—it is also to deter anticompetitive conduct. While defendants need to pay treble damages, claimants may not receive only three times their loss—they may also receive damages for which they may not even have suffered any loss in those cases where they were able to successfully pass on the overcharge in the first place.

Another reason for the Supreme Court not allowing pass on as a relevant consideration in any of its forms is its assessment that this approach promotes more effective private enforcement.

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445 This is particularly evident in the Bundesgerichtsof’s decision of 28 June 2011 (KZR 75/10 – ORWI), which both decided that indirect purchasers were entitled to claim in damages and set out the condition of a passing on defence. This is now set out in section 33c GWB.

446 However, and as remarked above at notes 168 to 169, indirect purchasers can claim damages under state antitrust laws.


enforcement and avoids the need to “trace the complex economic adjustments” necessary to determine the impact on indirect purchasers. The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers was emphasized in Illinois Brick Co. and has remained an important concern (Page, 1999, pp. 12-19). On the other hand, a dissent to the majority opinion in Illinois Brick was based, at least partially, on a different assessment of the complexity and burdens of taking passing on into account: the dissenters were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues.

12.3.2. Systems that take passing on into account

Private enforcement systems that focus on compensation tend to take passing on into account – both as a shield and as a sword. This is the situation in Europe, particularly within the EU, where passing on is frequently raised in competition damages claims. Nevertheless, passing on has not to date been determinative of many case outcomes, and has seldom been subject to a detailed expert quantification. In the majority of cases where the issue has been determinative of the outcome of the case – a recent study put the number of cases at 24 as of December 2016 – passing on had been raised as a defence. In more than half of those, the court rejected the passing on defence entirely, whereas in about 40% of the cases the court determined that the claimant had passed on the overcharge entirely (Hitchings, 2016, pp. 4-5). The EU Damages Directive contains a number of provisions devote specifically to passing on. The Directive sets out that if price increases caused by an infringement have been passed on along the distribution chain, those who ultimately suffered the harm will be the ones entitled to claim compensation, irrespective of whether they are direct or indirect.

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452 Particularly in the context of class certification exercises. Holding that, while recent advances in econometrics and other methodologies have made passing on assessments somewhat more manageable, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem, see (Antitrust Modernization Commission, 2007, p. 274).
454 Note that, of the 10 cases in which pass-on was totally successful, three were cases brought before the French courts in which passing on was raised as a defence and where the burden of proof was on the claimant to show that it had not passed on the overcharge. In one case – Danish Maritime and Commercial Court, Case no. U-4-07 Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB, judgment of 15 January 2015 – 50% passing on was held to have occurred (reducing the overcharge harm by half) and loss of profits was also quantified and awarded.

A description of a number of follow-on damage cases related to the European Commission’s vitamins cartel that addressed passing on issues can be found in (Oxera, 2009, pp. 119-120). In all cases, the courts did not engage in complex analysis to determine the exact amount of passing on. Instead, they either concluded that 100% passing on must have had occurred, held that the burden of proof had not been met, or did not address the issue at all.
The Directive also explicitly confirms that there is a passing on defence, with the defendant having the burden of proving passing on in such cases. At the same time, the Directive adopts a number of mechanisms to facilitate the administration of passing on. These include a legal presumption of pass-on for indirect purchasers subject to certain conditions; measures to ensure that direct and indirect purchaser claims are rendered coherent so that a defendant does not end up paying more than the harm it has inflicted; a provision allowing courts to estimate passing on; and a requirement for the European Commission to issue guidelines providing guidance to national courts on how to address passing on issues.

**Passing On in Theory and in Practice**

In order to understand the logic of passing on, and why the EU decided to adopt measures to facilitate its administration, it is important to understand the underlying economics. To use cartels as an example, the overall harm suffered by a claimant can be broken down into three elements: the overcharge, the passing-on effect, and the volume effect. Passing on arises as a result of the incentives that firms operating at an intermediary level of a production or distribution chain may have. In particular, a firm in such a position may respond to an increase in its costs with price increases of its own. Economic theory indicates that the strength of those incentives will depend on the type of costs that are affected, as well as on the market environment in which the affected firm operates (including the intensity of competition, buyer power, and the volume effect of the anticompetitive practice).

Looking at each of these elements in turn (following (Durand and Williams, 2016, pp. 8-9):

- **Type of Costs** – An overcharge can affect fixed costs and variable costs. It is usually thought that an overcharge affecting variable costs is more likely to be passed on. However, where the overcharge affects a fixed cost of the claimant, it is unclear what impact this may have on the pass-on rate.

- **Intensity of Competition** – Under textbook conditions of perfect competition and elastic supply (i.e. supply that is highly sensitive to even very small changes in price), 100% pass-on is predicted when an overcharge is ‘industry-wide’ and all competitors are similarly affected. Conversely, if the overcharges are specific to an individual firm in these conditions there will be not be any scope for passing-on. This may also be the case if, for example, an entire industry is affected by the overcharge but that industry competes with another industry that uses a different

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455 Articles 3 and 12 of the EU Damages Directive.
456 Article 13 of the EU Damages Directive.
457 Articles 14 to 17 of the EU Damages Directive. See also (Veljanovski,(n.d.)).
458 The section below follows closely (Durand and Williams, 2016, pp. 8-9).
459 As explained in (Oxera, 2009, p. 120): “fixed costs do not directly determine price in the same way as marginal costs, at least in the short run (in the longer run, many fixed costs tend to become variable). Therefore, a change in fixed costs due to an infringement may not be passed on in the same way.”
upstream input not subject to the overcharge and that can therefore leave its prices unchanged.\footnote{See (Oxera, 2009, p. x\textsuperscript{[71]}): “This result (which can seem counterintuitive) simply follows from the fact that, under perfect competition, prices equal marginal costs in equilibrium. In contrast, for a cost increase that affects only one, or some, of the competitors in the market, the expected pass-on rate would be 0%, since those competitors that do not face the increase can leave their prices unchanged. This may also be the case if, for example, an entire industry is affected by the overcharge but that industry competes with another industry that uses a different upstream input not subject to the overcharge and that can therefore leave its prices unchanged.” See also same report, p. 117.}

In practice, few markets fulfil the conditions of “perfect” competition. For conditions of imperfect competition, predicted pass-on will vary widely depending on the precise market context. Economics also predicts that, even if only one of a number of competitors is affected by the overcharge in circumstances of imperfect competition, that firm will be able to pass on at least part of the overcharge when competition is imperfect – but the extent of passing-on will typically be less than for industry-wide overcharges of the same magnitude. Yet another relevant consideration when estimating the amount of overcharge is the elasticity of demand (Oxera, 2009, pp. 117-118\textsuperscript{[71]}).

- **Buyer power** – The amount of passing on will also depend on how the overcharge changes the parameters of negotiations between the parties. The result of buyer power may be slightly counter-intuitive. For example, if customers are so strong that negotiations result in prices anchored to the manufacturer or seller’s costs, substantial pass-on of any overcharges affecting those costs may be expected. On the other hand, if the price that a buyer secures from a firm is affected by competition from another firm, the extent to which an overcharge that is specific to the first firm is passed-on may be limited if the customer has the option of switching to the latter firm (Oxera, 2009, p. 121\textsuperscript{[71]}).

- **Volume Effect** – The volume effect is also known in economic theory as deadweight welfare loss. Volume effects arise from the fact that some purchasers are not willing to pay a higher price caused by the competition law infringements, and therefore cease purchasing a product they would have acquired in the absence of an overcharge (Oxera, 2009, p. 100\textsuperscript{[71]}). As reviewed above at Chapter 7.3, identifying victims that suffered loss from the infringement because they did not buy the product at an increased price is very difficult – and even more difficult to prove, since evidence must be adduced showing that these customers would have acquired the product were it not for the price increase (Oxera, 2009, p. 15\textsuperscript{[71]}). It may be easier to identify the victims in a situation of volume effect where purchasers have merely bought fewer units than they otherwise would have absent a price increase. A good example of this situation is when a victim of an overcharge is an intermediate seller (i.e. a direct or indirect purchaser of the product). In addition to the overcharge paid, this intermediate seller will suffer harm as a consequence of the volume effect – i.e. the intermediate seller will forego profits as a result of the volume reduction in sales arising from the increased price of its products caused by the overcharge.

In effect, the most common cases in which volume effects will be raised in court will be those where the claimant is at an intermediate level of a production and distribution chain. However, when the claimant is an intermediate seller, passing-on and volume effects will
have opposing impacts. Whilst passing on reduces damages, the volume effect increases those damages. The magnitude of each effect depends on the specific conditions of the market. When the claimant is a monopolist on the downstream market, economic theory indicates that the volume effect will exceed the passing-on effect. In this case, a damages estimate based on a measure of the overcharge alone will understate the harm caused. Outside monopoly, however, the balance of the passing-on and volume effects in imperfectly competitive settings will depend on the strategic interactions between competitors, and can lead to higher or lower damages awards depending on the circumstances (Durand and Williams, 2016, p. 9[138]).

The guidance that economics can offer to courts will become more accurate the more information is available about the essential facts of a case. In theory, it is possible to estimate empirically the relevant pass-on rates in the case at hand. In practice, this would require access to detailed data on actual prices and costs at all relevant layers of the supply chain (Oxera, 2009, p. 16[71]). Given that almost every case will involve imperfectly competitive markets, and that the amount of passing on depends on a multiplicity of different factors, this information seems unlikely to be fully available in practice. Furthermore, the more information is available, the harder and costlier the analysis is likely to become.

As a result, the costs and benefits of adopting more or less sophisticated approaches to quantifying passing on must be balanced carefully. Documentary evidence often drives the assessment of pass-on, because such evidence is required to properly understand the market and the dynamics at play at different levels of the supply chain. Economic evidence is, and should be, used to test the credibility of the factual pass-on evidence and the inferences drawn – but it may be the case that it is appropriate to use economic analysis only as a cross-check on the documentary evidence (Durand and Williams, 2016, p. 9[138]; Lawrence, 2016, p. 13[139]).

From Economic to Legal Assessments of Passing On

In practice, courts seem to be reluctant to engage in full-blown economic analyses of passing on. In the US, the Supreme Court has prohibited passing on defences, and denied standing to indirect purchasers in antitrust cases, at least partially due to concerns with the complexities of calculating passing on. In Europe, passing on is theoretically a relevant consideration when calculating damages awards. Nonetheless, we saw above how few cases have dealt with passing on in practice; and how, even when passing on is taken into account, courts have tended to assign it a round number (usually zero, 50% or 100%) instead of engaging in the complex assessment required to calculate the precise rate of passing on.

A number of senior court decisions across Europe have expressly resisted fully adopting an approach based on economic theory to passing on, and have instead developed “legal” approaches of their own based on the more familiar requirements of causality and reasonableness (Schreiber, 2016, p. 17[140]).

461 See, in the UK, Sainsbury’s v MasterCard [2016] CAT 11; in Germany, the Bundesgerichtshof’s decision of 29 June 2011 in Orwi; in the Netherlands, the Dutch Supreme Court decision in Tennet v ABB ECLI:NL:HR:2016:1483; C/05/244194 Tennet TSO BV and Saranne BV v ABB BV and ABB Ltd; and, in Spain, Supreme Court Judgment of 7 November 2013 – Nestle’ et al v Ebro Foods (STS 5819/2013).
A number of examples will help to illustrate this point. The issue of passing on came up recently in the UK in the context of a claim by a supermarket chain in respect of excessive fees imposed by a credit card company. The question of whether damages should be awarded hinged on whether the supermarket chain had passed on the excessive fees imposed by the credit card company to its final consumers.\textsuperscript{462} The credit card company argued that the supermarket chain had passed on the excessive fees to consumers by increasing the price of its products, and hence suffered no loss; the supermarket chain denied this; and the tribunal eventually rejected the passing on defence because of lack of evidence.\textsuperscript{463} More relevant than the result, for our purposes, is that the tribunal created a legal test for passing on which was explicitly held to be different from the economic concept of passing on. The legal test had two elements, both of which needed to be demonstrated by the defendant: (a) an “identifiable” increase in the purchasers’ prices causally connected with the overcharge; and (b) a class of the downstream claimants who paid the higher prices. This legal test differs from the economic concept of passing on a number of dimensions, including: (i) scope: the legal test is only concerned with identifiable increases in prices by a firm to its customers as a result of an overcharge, whereas an economist may define pass-on more widely (e.g. to include cost savings and reduced expenditure); (ii) attitude towards under-compensation: the increase in price must be shown to be causally connected with the overcharge. Because it is concerned with the specific passing on that occurred in an individual case, the economic approach focuses on ensuring that there is no over-compensation and that compensation is allocated exactly in line with losses. The legal approach, with its requirement that passing on be proved, is concerned with under-compensation as well.\textsuperscript{464} The imposition of a causation requirement in this context is justified with the concern that: “any potential claim becomes either so fragmented or else so impossible to prove that the end result is that the defendant retains the overcharge in default of a successful claimant or group of claimants.”\textsuperscript{465} As such, the legal approach takes the risk of under-compensation into account, and seeks to limit it.\textsuperscript{466}

\textsuperscript{462} Sainsbury’s Supermarkets v. MasterCard (Case No 1241/5/7/15) [2016] CAT 11. The claimant was Sainsbury’s, a UK supermarket chain; the credit card company was MasterCard; and the excessive fees related to the multilateral interchange fees (MIF) charged by MasterCard to acquiring banks.

\textsuperscript{463} In effect, the Tribunal had to consider three pass-on issues: the pass-on of MasterCard’s MIFs by card acquirers to merchants; the pass-on of the MIF by Sainsbury’s to its customers in the form of higher retail prices; and pass-on when awarding pre-judgment interest. The Tribunal found that the same overcharge had been fully, not, and half passed-on respectively. However, the main issue was whether Sainsbury’s had passed on the MIF to its customers, which is what is discussed here.

\textsuperscript{464} As the court put it, not doing so would: “run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation impossible or excessively difficult.”

\textsuperscript{465} In other words, the concern is that purchasers further down the chain will find it hard to prove that they suffer losses as a result of the MIF – so if compensation regimes are to be effective, causation must operate both ways. It can be remarked how this is a mechanism that brings the UK approach closer to the US’ concern with reduced enforcement as a result of allowing indirect purchasers to claim for damages.

\textsuperscript{466} Sainsbury’s Supermarkets v. MasterCard (Case No 1241/5/7/15) [2016] CAT 11, para. 484. This case was criticised by Cento Veljanovski ‘The law and economics of pass-on in price...
A second example can be found in the Netherlands, where the passing on defence is generally available. In a recent case concerning a gas insulated gear cartel – which is an input for electricity – TenneT, the Dutch electricity grid operator, sued the cartelist ABB for damages. The court found that TenneT likely had passed on the overcharge to its direct customers through higher electricity prices. It also found likely that these direct customers of TenneT passed on this overcharge to the general public in turn. Nevertheless, the court awarded damages for the entire overcharge to TenneT – i.e. it ignored the passing on. The basis for this decision was that the general public is very unlikely to initiate legal proceedings against the cartelist to recover their damages. Instead, since TenneT is fully-owned by the Dutch state, awarding damages to it was found likely to benefit the general public, including the end users who have suffered damages.\footnote{District Court of Gelderland, Mar. 29, 2017 (Tennet TSO BV, Saranne BV / ABB BV, ABB Ltd.), available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2017:1724 (in Dutch). (Kuijpers et al., 2018, p. 58\footnote{See decision of the Bundesgerichtshof of 28 June 2011 (KZR 75/10 – ORWI).} describes the court’s reasoning.)}

A third example comes from Germany, where a passing on defence is allowed but high thresholds are set for defendants raising this defence. In \textit{Orwi}, it was held that a passing on defence will only be allowed if the defendant is able to explain why, based on pertinent market conditions, a passing-on of the cartel surcharge to indirect customers can be reasonably assumed to have occurred. Assuming that this has been demonstrated, a defendant will then have the additional burden of proving that: (i) the claimant has not suffered any other form of disadvantage in connection with the anticompetitive practice, such as a decline in sales as a result of higher prices due to the cartel surcharge (i.e. losses related to volume effect); and (ii) that any increase in price by a claimant which according to the defendant provides evidence of passing on is not, instead, the result of the claimant’s entrepreneurial achievements (e.g. the increased price reflects added value due to further processing of the goods or negotiating skills).\footnote{See, for recent examples, decisions in LG Hannover 20.06.2018 - Cases 18 O 21/17 and 18 O 23/17 (Trucks) and LG Stuttgart 20.06.2018 – Case 45 O 1/17 (Trucks).} Unsurprisingly, these requirements have proven to be very difficult to meet in practice (Schweda, 2017\footnote{Kuijpers et al., 2018, p. 66\footnote{See decision of the Bundesgerichtshof of 28 June 2011 (KZR 75/10 – ORWI).} describes the court’s reasoning.}).

Following the transposition of the EU Damages Directive into Germany, there were doubts about whether an approach to passing on as strict as that in \textit{Orwi} was in line with the Directive (Kersting, 2018, p. 22\footnote{Kersting, 2018, p. 22 describes the court’s reasoning.}). Sec. 33c(1) GWB seems to have limited the scope of \textit{Orwi} by allowing the passing on defence to succeed whenever an overcharge has been passed on to indirect purchasers, and by clearly distinguishing between the overcharge and a claim for loss of profit. In particular, while a passing on defence would seem to be available as regards overcharges, claims for loss of profit would still be allowed.

A last example can be found in Spain. In a number of damages claims related to a sugar cartel, it was argued by the defendant that the claimants had not suffered any damage because they had passed on the overcharge to final consumers. The lower courts were divided: in one decision full damages were awarded because it was found that there was no fixing cases’ who argued that the tribunal’s distinction between economic and legal approaches is misguided, and arises from a limited understanding of economic passing on.
evidence that there had been any passing on;\textsuperscript{470} while another decision did not award damages because passing on had been proved\textsuperscript{471}. The Supreme Court eventually held that not only the defendant has the burden of proving that passing-on had occurred, it also has to show both that the direct purchasers have raised the price of their products and that this raise was able to transfer the harm suffered as a result of the cartel overcharge. Furthermore, if the claimant has suffered other loss that he was unable to pass on (e.g. as a result of sales diminution related to volume effect or of loss of competitiveness related to the overcharge), the passing-on defence cannot be accepted in its totality. (Diez Estella and Estrada Meray, 2014, pp. 193-194\textsuperscript{[88]}; Marcos, 2015, pp. 222-223\textsuperscript{[26]}).\textsuperscript{472}

One can discern a few trends in these cases. First, there is widespread concern with the possibility that passing on allows defendants (i.e. the entities who infringed competition law) to avoid paying damages. As a result, courts seem to favour creating high thresholds that must be met before a passing on defence can succeed. Secondly, economic approaches to passing on have often been reconfigured as matters of allocation of the evidentiary burden – which explains why such defences often either succeed or fail completely (i.e. why passing on is presumed to be either 100\% or 0\%). In other words, courts have avoided engaging in complex economic analysis and choosing between different economic models, and relied on principles of evidence with which they are most familiar.

Tools to Facilitate Passing On Assessments

Courts have demonstrated reticence in pursuing detailed economic analyses of passing on. Given how costly and difficult such analyses can be, and the institutional constraints under which courts operate, such reticence is understandable. In effect, these constraints may justify the adoption of rules and mechanisms that assist courts in taking passing on into account.

A number of such mechanisms are foreseen in the EU Damages Directive. First, the Directive establishes a rebuttable presumption that in some circumstances indirect purchasers suffered loss as a result of the overcharge paid by direct purchasers, and thereby makes it easier for indirect purchasers to prove that passing on occurred.\textsuperscript{473} An indirect purchaser is deemed to have proven that harm has been passed on by showing that: an infringement of competition law took place; that the direct purchaser paid an overcharge; and that the indirect purchaser has purchased goods or services that were the object, or were affected, by the competition law infringement. It is then for the defendant to show that the harm was not, or was not entirely, passed on to the indirect purchaser.\textsuperscript{474} The combined effect of these evidentiary rules is that indirect purchasers often benefit from a presumption of harm, while defendants are subjected to a demanding evidentiary burden to rebut the presumption (Graells and Odudu, 2017, pp. 163-164\textsuperscript{[79]}).

\textsuperscript{470} A decision upheld by Supreme Court – Judgment of 8 June 2012, \textit{Galletas Gallo´n et al v ACOR} (STS 5462/2012).

\textsuperscript{471} Judgment of Provincial Court of Madrid (s 8) of 3 October 2011, \textit{Nestle´ et al v Ebro} (JUR/2011/386351).


\textsuperscript{474} Articles 13 and 14(2) of the EU Damages Directive.
Secondly, the Directive sets out that courts must be allowed to estimate the amount of the overcharge which was passed on.\textsuperscript{475} Third, the Directive explicitly imposes on the defendant the burden of proof the existence and amount of passing on.\textsuperscript{476} Fourth, in order to avoid both over- and under-compensation, the EU Damages Directive allows national courts seized in actions for damages to take due account of any other damages actions (and their judgments) that are related to the same infringement of competition law but that are brought by claimants from other levels in the supply chain, as well of relevant information in the public domain.\textsuperscript{477}

Lastly, the Directive requires the European Commission to prepare guidelines on the passing-on of overcharges which can be used by national courts.\textsuperscript{478} The Commission has commissioned a study, which was published in 2016, that includes an extensive analysis of current thinking on the topic of passing on; a full review of national, EU and US case-law; and an in-depth analysis of economic theory. The Study also sets out and evaluates alternative approaches to quantifying the impact of passing on in damages claims (Durand et al., 2016\textsuperscript{[143]}). It concludes with “39 Steps”: a checklist providing practical recommendations for national courts, including on how to navigate and manage expert evidence and quantification methods, how to use new disclosure mechanisms introduced by the Damages Directive, and how to avoid inconsistent decisions. It is unclear whether courts – and their staff – will always be able to pursue economically-sound passing on analysis, which is why another measure that can be considered is allowing the court to appoint an economic expert. This may be particularly useful when the parties submit conflicting economic models.\textsuperscript{479}

12.4. Interest

Compensation for damages caused by an infringement of competition law is often claimed after a significant delay, sometimes many years after the damage has been suffered. Therefore, if a system wants to provide full compensation for damages suffered, the payment of interest is often essential. Interest is routinely added to damages awards to account for the effects of money losing its value over time, as well as for lost opportunities the injured party missed because it did not have this capital at its disposal.

The passing of time can be taken into account either as a separate category of damages, (interest), or as a constituent part of actual loss or loss of profit. As a result, in some systems interest begins to run from the time the claim is brought, while in others interest runs from the moment that the loss was suffered (European University Institute, 2016, p. 18\textsuperscript{[144]}).

\begin{itemize}
  \item \textsuperscript{475} Article 12(5) of the EU Damages Directive.
  \item \textsuperscript{476} Article 13 of the EU Damages Directive.
  \item \textsuperscript{477} Article 15 of the EU Damages Directive.
  \item \textsuperscript{478} Article 16 of the EU Damages Directive.
  \item \textsuperscript{479} See, as an example of this approach, Danish Maritime and Commercial Court, Case no. U-4-07 Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB judgment of 15 January 2015.
\end{itemize}
12.4.1. Compound or simple

Interest rates can be simple or compound. Simple interest is calculated solely as a percentage of the principal sum. Compound interest, on the other hand, is calculated on the principal and on interest accumulated during previous periods.

From an economics perspective, compounding interest is the usual, and conceptually correct, approach. Consider a bank deposit: the amounts which are due as a result of interest on the deposit are added to the bank deposit, and interest is applied during the following period to the increased bank deposit amount. In the short term, the difference may not be significant. However, compound rates have a significantly different effect than simple interest rates, particularly when the claim has been long-running (as are most competition law claims). A system which awards only simple interest will tend to either over-compensate claimants in short-running cases when the legal rate is higher than market rates or than returns on capital, as is often the case; or to under-compensate claimants when a case takes a long time to dispose of or when real interest rates are high (Law Commission, 2004, p. 31[^145]; Oxera, 2009, pp. 122-123[^71]). Given that in some occasions the value of interest can exceed the value of the original damages, this can have a substantial impact on incentives for litigation.

Compound interest can be calculated in several different ways, with outcomes changing depending on whether annual, quarterly or monthly periods are used, and on the exact date on which the interest starts running. It may be to avoid this that most jurisdictions opt for simple interest. The main argument for it seems to be that it easier to calculate and will minimise the cost of disputes.

In the US, the common law rule is that pre-judgment interest is generally not available. This is justified as being consistent with the traditional rule in tort lawsuits that pre-judgment interest is unavailable where damages are not readily quantifiable (“liquidated”) at the time of injury – and that damages should reflect the loss of the claimant at the time of judgment (Bueren, Hüschelrath and Veith, 2016, p. 283[^146]). However, post-judgment interest for federal civil cases will usually be compounded annually. In Europe, the predominant practice is to award simple interest (Clark, Hughes and Wirth, 2004, p. 87[^63]), even though there are numerous exceptions.^[481]

There may be good reasons to apply compound interest in competition damages claim. First, the development of IT systems and the availability of computers can go a long way

[^28]: 28 U.S.C. § 1961(b): post-judgment “[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually”); Fed. R. App. P. 37(a) (“Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.”).

[^481]: In the Netherlands and Poland, compound interest is always applied. In Austria, Czech Republic compound interest can apply once a claim is pending. In Belgium, compound interest may be awarded but courts rarely do so, except if a significant amount of time has lapsed since the date when damages were awarded. In Spain, simple interest is applied to the period between the suffering of harm and the bringing of a claim; once the claim is brought, simple interest applies to both the damages and the interest accrued during the period before the claim was brought. In France, a court may order the award of compound interest on interest that is due for at least one year (Art. 1343-2 Code Civil). See (European University Institute, 2016, pp. 19-30[^144]).
towards simplifying the calculation of compound interest. Second, simple interest fails to reflect commercial reality. Interest is intended to compensate claimants for the cost of being kept out of their money, and to put them in the position they would have been if damages had been paid when they fell due. However, delay in payment means either that claimants need to borrow or that they lose the opportunity to invest, both at compound rates (Law Commission, 2004, pp. 1-2[145]).

Third, competition cases typically involve large claims where damages are awarded many years after the harm occurred – this is the type of cases where the use of simple interest is likely to fail to provide adequate compensation when compared to compound interest. However, these objectives may be achieved even in a context where simple interest applies. For example, damages in an amount equivalent to those that would result from the application of pre-judgment compound interest may be awarded if the party demonstrates that it has lost or had to pay interest at a rate above the statutory rate, or by requirements that damages should make the claimant whole at the time of judgment.

12.4.2. Time from which interest starts accruing

The amount of interest due to a claimant can vary significantly depending on the moment from which it starts accruing. Where an infringement of competition law has caused harm for many years before damages are awarded, this means that the claimant has not earned interest on the lost money for that period of time. Simultaneously, the entity which infringed competition law may have earned returns on the gains from its unlawful conduct during this same period.

In practice, four moments can be identified from which interest usually starts accruing in tort actions: (i) the date of the infringement; (ii) the date when the notice to stop the breach

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482 *Sempra Metals v. Inland Revenue* [2007] UKHL 34, para. 33.

483 For the US, see note 480 above. In Germany, under Section 288(4) BGB, a claimant who had demonstrable losses or had to pay interest at a rate above the statutory rate – up to, or exceeding compound interest – may claim such losses as part of the calculation of damages. However, the claimant must set out and prove those losses on a case by case basis: see (Clark, Hughes and Wirth, 2004, p. 87[141]) (European University Institute, 2016, pp. 19-30[140]); (Bueren, Hüscherlath and Veith, 2016, p. 310[146]). In the UK, compound interest can be claimed by the parties or awarded at a court’s discretion under common law, but parties must demonstrate loss – see *Sempra Metals v. Inland Revenue* [2007] UKHL 34, para. 17, 26, 33-34, 40-49, 94-95, 112, (which contains an extremely detailed, and potentially useful discussion of the pros- and cons- of simple versus compound interest). In France, damages are determined at the time of the judgment, but in principle the assessment encompasses all losses sustained until that date, including those caused by the delay between the violation and compensation. The victim may thereby be compensated “indirectly” for having been kept out of money by adding losses to the award that arose because the violation deprived the victim of fund. See Court d’Appels de Paris, 23 juin 2004, *SARL Exploitation des Marbreries Lescarcelle, SA Pompes funebres des Memoris, L’Union Nationale des Entreprises de Services Funeraires C/Societe OGF (SA Pompes Funebres Generales)*; and (Bueren, Hüscherlath and Veith, 2016, p. 311[146]). Furthermore, after the defendant has been sentenced to payment and a time limit of two months since enforceability of the judgment has expired, the statutory rate increases by five percentage points (Art. L313-3 Code monétaire et financier).
or to effect payment is served; (iii) the date when damages claim is brought; and (iv) the date when damages are awarded. In some jurisdictions, multiple options may be available to parties and courts (Clark, Hughes and Wirth, 2004, pp. 85-86).

Pre-judgment interest helps to ensure that a claimant harmed by a defendant’s unlawful conduct is fully compensated for its loss (Antitrust Modernization Commission, 2007, p. 249). If no pre-judgment interest is available, the infringing party will be entitled to keep its returns from the overcharge, while the claimant will be deprived from the returns it would have been able to make were it not for the competition law infringement (Antitrust Modernization Commission, 2007, p. 243). This is the view that has been adopted in the European Damages Directive, and is also common in a number of European countries. It follows from the principle of effectiveness, and the right of individuals to seek compensation for loss caused by conduct liable to restrict or distort competition, that injured persons must be able to seek compensation not only for actual loss (dannum emergens) but also for loss of profit (lucrum cessans) plus interest – with interest being due from the time when the harm occurred until the time when compensation is paid. However, in practical terms a similar result can be achieved even if interest is only awarded from the date of judgment as long as the time-value of money is taken into account when calculating damages for lost profits.

The situation is different in the US. Prior to 1980, pre-judgment interest was not available for antitrust claims in the US. In 1980, in response to a recommendation by the National Commission for the Review of Antitrust Law and Procedure, Congress amended Section 4 of the Clayton Act to permit courts to award pre-judgment simple interest on the on actual (not treble) damages when it is “just in the circumstances” (Areeda and Hovenkamp, 2014, p. 391). The purpose of these provisions was to compensate claimants for dilatory tactics by defendants. The Clayton Act only permits a court to award pre-judgment interest when: (a) a party filed motions or asserted claims “so lacking in merit” that they could only

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484 This is traditionally the position under Art. 1100 of the Spanish Civil Code – see (Herrero Suarez, 2015, p. 172) and German Law. However, in Germany section 33(3) GWB stipulates that cartel damage claims automatically carry interest from the time that they arise (at a rate of 5 percentage points above the base rate per year, non-compounding) – see (Kuijpers et al., 2018, p. 69).

485 Including Austria, Belgium, Finland, and Spain. In some member states, interest can only be claimed once a claim is brought, but loss of interest may be taken into account when calculating damages. This is the case in the Czech Republic, Portugal and Slovakia. Lastly, there are some countries, such as France, where interest only starts running from the date of the damages award but where courts have nonetheless discretion to hold that interest begins to run from an earlier time; and Sweden, where interest starts running 30 days after the damages claim is brought. (European University Institute, 2016, pp. 19-30).

486 Damages Directive, Recital 12: “The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.”

487 See note 483 above.
have been intended for delay, or “otherwise acted in bad faith”; (b) a party violated any applicable rule, statute, or court order providing for sanctions for dilatory behaviour; or (b) a party engaged in conduct primarily intended to delay litigation or raise its cost (Antitrust Modernization Commission, 2007, p. 248[18]).

However, in the twenty-six years between 1980 and 2006 since the amendment, there was no reported decision awarding pre-judgment interest in an antitrust case (Bueren, Hüscherlath and Veith, 2016, p. 283[146]). While this can – and has been – criticised for preventing successful plaintiffs from obtaining full compensation, it can also be argued that treble damages adequately compensate for the general unavailability of pre-judgment interest in antitrust cases in the US. Furthermore, it has also been remarked that some courts have effectively compensated for the absence of pre-judgment interest by taking into account elements such as inflation and interest paid on borrowed capital when calculating the amount of damages due (Antitrust Modernization Commission, 2007, p. 249[18]; Bueren, Hüscherlath and Veith, 2016, pp. 308-309[146]).

12.5. Reductions in the amount of damages

While not strictly related to the quantification of damages, it is worth remarking that efforts to promote public enforcement can affect the extent of the liability for damages of some participants in anticompetitive conducts. In particular, and as already discussed above in Chapter 8.3.3, some jurisdictions have considered necessary to reduce the civil liability of successful leniency applicants in subsequent damages actions to preserve the attractiveness of leniency programmes.

Leniency applicants which co-operate with competition authorities under a leniency programme may be more exposed to private actions than companies which have not applied for leniency, particularly when the leniency application is public. There are different reasons for this increased exposure. Generally, the decision against the immunity recipient will become final much earlier than the decision against the other participants in a cartel: the successful leniency applicant would normally have no legitimate interest in appealing against the decision of the competition authority, which will thus become final against him much earlier than it will for the other cartelists. The effect of the infringement decision becoming final earlier in respect of leniency applicants, combined with the binding effect of this decision in follow-on damage claims, will make the leniency recipient an especially ‘easy target to sue’. This effect is compounded by the fact that, as a result of joint and several liability, a claimant might claim damages well in excess of the amount of the damage caused by the immunity applicant alone. If increased exposure to damage claims is a direct consequence of submitting a leniency application, the incentives for a cartelist to apply for leniency and to come forward with evidence of a cartel are adversely affected. This might ultimately undermine the attractiveness and effectiveness of leniency programmes (OECD, 2015, pp. 29-30[5]).

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490 This is the reason why the US Department of Justice tries to keep leniency status secret, unless it is compelled to report it or if the applicant reports it.
As a result, most jurisdictions have some measures in place to protect leniency applicants in subsequent claims for actions. One such measure is to reduce the leniency applicant’s liability for damages. In the United States, the successful corporate amnesty applicant is only exposed to single damages rather than to treble damages, on condition that he also cooperates with private claimants in their damage actions against the remaining cartel infringers. The US rule does not sacrifice the claimants’ interest in compensation, but rather aims to protect the effectiveness of both the US leniency program and private enforcement. The EU Damages Directive, on the other hand, limits the civil liability of the immunity recipient only to the damages caused to its direct or indirect purchasers or providers – which is an exception to the joint and several liability rule which would make the leniency applicant liable for the damages caused by the other cartelists.

A related protection is concerned with ensuring that the leniency applicant is not exposed to liability – and particularly to joint and several liability – before the other cartelists become liable. Under the Hungarian Competition Act, an applicant receiving full immunity is only liable for damages if follow-on cartel claimants are unable to obtain full compensation from other cartel members. A successful immunity recipient is still subject to civil liability, but claimants must sue the other cartel members first. Under the EU Damages Directive, while the leniency applicant could theoretically be sued before the other cartelists, injured parties other than the direct customers and suppliers of a leniency applicant can only claim damages from the leniency applicant when they show that they cannot obtain full compensation from the other cartelists. Furthermore, the amount of contribution for which the successful immunity applicant is liable cannot exceed the amount of harm caused to his own direct or indirect purchasers or providers.

12.6. Measuring loss in Mexico

12.6.1. Principle of full compensation

In Mexico, the guiding principle on loss is full compensation. As explained above, this means that a party who has suffered harm must be restored to the position it would have been in prior to the loss. In theory, a person who has suffered harm and received compensation should be in the position he would have been in if no loss had occurred. That principle is currently recognised in the Mexican Constitution. Additionally, the courts have recognised it as follows:

“FULL REPARATION OR FAIR COMPENSATION. THIS FUNDAMENTAL RIGHT WAS INCORPORATED INTO THE MEXICAN LEGAL ORDER PURSUANT TO THE

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491 Section 213(b) of the 2004 Antitrust Criminal Penalty and Reform Act, Pub L No, 108-237.
493 Section 88/D of the Hungarian Competition Act, as amended in 1998.
494 Article 11(4) (b) of the EU Damages Directive.
495 Article 11(5) of the EU Damages Directive.
496 However, the concepts of full reparation or fair compensation and punitive damages are constructed on isolated (aisladás) opinions of one of the chambers of the SCJN (Constitutional Court) and do not have binding effect. Under Article 217 et seq. of the Law on Amparo, which lays down the conditions governing the adoption of binding case law, no court thesis can be regarded as binding until it has been consistently reiterated, it receives a specific number of votes and there are no conflicting theses.
AMENDMENT TO ARTICLE ONE OF THE CONSTITUTION, PUBLISHED IN THE
OFFICIAL JOURNAL OF THE FEDERATION ON 10 JUNE 2011.

It is clear from the relevant legislative procedures that the intention of the Standing Constitutional Review Mechanism is to guarantee the effective, direct application of the human rights laid down in the international agreements entered into by the Mexican State in order to ensure that they prevail over the Mexican legal order in its entirety and are not enforced merely as secondary rules; in view of the fact that the aim of the decree reforming the Constitution of the United Mexican States, published in the Official Journal on the date above, was to broaden the legal framework for the protection of fundamental rights and to require the organs of the State to promote, respect, protect and guarantee those rights; to that end, it was deemed necessary to incorporate those rights into the Constitution and expressly to incorporate into Article I thereof the principle concerning the interpretation of international treaties on human rights, referred to as pro persona or pro homine, indicating that those rights are to be interpreted as providing the broadest possible protection and setting the strictest limits possible on rules that impair those rights. In view of the foregoing, it behoves the State to take the measures necessary to ensure that any infringement of the fundamental rights of citizens, caused by private individuals, should be remedied by the tortfeasor. Thus, the right to full reparation or fair compensation for a breach of fundamental rights as provided for in Article 63 of the American Convention on Human Rights can be regarded as having been incorporated into the Mexican legal order as of the time of entry into force of the constitutional reform in question.”

497 (Emphasis added.)


“REPARATION OF DAMAGE RESULTING FROM AN OFFENCE. PARAMETERS THAT MUST BE OBSERVED IN ORDER TO COMPLY WITH THE CONSTITUTION.

In order to comply with the object set out in the Constitution to repair damage deriving from an offence and to protect and guarantee a victim’s human rights, the following parameters must be observed: (a) following the closure of criminal proceedings in which the Public Prosecutor is required to seek an award and the court is required to impose an award when handing down a guilty verdict, reparation must be expeditious, proportionate and fair; (b) the reparation must be timely, full, comprehensive and effective in relation to the damage arising as a consequence of the offence, including the establishment of measures to achieve restitution, rehabilitation, compensation and satisfaction; (c) the aim of comprehensive reparations is to ensure that restitution restores the victim to the situation that pertained prior to the commission of the offence, and includes any type of secondary effect, whether economic, moral, physical, psychological, etc.; (d) material restitution includes the return of goods affected by the commission of the offence and, only where such return is not possible, payment amounting to their value; and (e) the effectiveness of the reparations depends on the conditions of the redress granted to the victim, which must be proportionate, fair, full and comprehensive; otherwise, victims will not gain satisfaction from the redress.” Period: Tenth Period. Register No. 2012442. Level of Jurisdiction: First Chamber. Thesis Type: Discrete. Source: Judicial Weekly of the Federation and its Gazette. Book 34, September 2016, Volume 1. Area(s) of Law: Constitutional. Thesis: 1a.
As regards non-contractual civil liability, the principle referred to above is fully adopted in respect of damage to property by the first paragraph of Article 1915 of the Federal Civil Code (CCF): “Reparation shall, at the choice of the injured party, consist in restoration of the prior situation, where possible, or in the payment of damages.” One particular application of this principle in relation to indirect damage is set out in Article 2112 CCF: “If the item has been lost or has suffered such serious damage that expert opinion deems it not fit for its intended purpose, the owner shall be indemnified for the item’s full legitimate value.” (Emphasis added.) The item’s legitimate value is construed as meaning its market value. The compensation amount is therefore bound up in the value that the market attaches to the damaged item or, in the case of loss of earnings, the income that the injured party has foregone, for example as a result of not using a vehicle he owns that a third party has damaged in order to transport goods. Invoices are the obvious means of providing evidence of such a loss.

The principle of full compensation also applies to losses incurred through an infringement of competition laws. The norm in those circumstances is for the prior situation to be restored through the payment of damages.

Generally speaking, Mexico applies the principle that the victim should provide evidence of all losses claimed and quantify them, as well as provide evidence of the unlawful act and of the causal link between this act and losses suffered (81 CFPC). There are no exceptions to the claimant’s burden of proof in respect of damages for civil liability, except in relation to damages for pain and suffering where “a person’s mental or physical freedom or integrity is unlawfully breached or infringed” (first paragraph of Article 1916 CCF). In the latter case, there is a presumption of damages for pain and suffering. However, this presumption does not extend to the amount of damages, which quantification must be proved in line with the criteria set out in the final paragraph of Article 1916, namely the rights infringed, the degree of liability, the economic situations of the tortfeasor and the victim, as well as the other circumstances of the case.

There is no reduction in the standard of proof normally required in civil matters, namely the balance of probabilities.

12.6.2. Punitive damages

The concept of punitive damages is alien to the Mexican legal tradition. As explained above, the principle governing non-contractual civil liability is full compensation. The purpose of compensation is not to increase the wealth of the injured party, neither is it to punish the tortfeasor.

There are therefore no statutory rules governing punitive damages, although this does not preclude the fact that some aspects of Mexican national legal provisions hinting at similar concepts. For example, the federal rules regulating cheques award the bearer (payee) compensation of at least 20% of the amount of the cheque in the event that it cannot be cashed (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 703).
Despite the absence of statutory regulations governing punitive damages, when reaching its decision in direct *amparo* 30/2013, the SJCN developed two discrete theses that allowed punitive damages to be imposed in instances of compensation for pain and suffering. A summary of the key aspects of the theses shows that, in thesis Register No. 2006958, the Supreme Court understands that punitive damages have significant effects. First, they allow injured parties to satisfy their desire for justice; and, second, they have a dissuasive effect against future harmful behaviour (somewhat similar to the general deterrent effect in criminal law). Concerning thesis Register No. 2006959: (i) the Court understands that the punitive nature of the damages arises from a literal, purposeful interpretation of Article 1916 (which in fact governs damages for pain and suffering); and (ii) that provision sets out the criteria that the courts must follow in order to make good damages for pain and suffering, including the degree of liability of the tortfeasor. On the latter point, the Court notes that this constitutes an aggravating factor that must be given due weight in arriving at the quantum of the compensation.

Although these two theses are not binding on other courts of the Republic, they are likely to be applied in the future. Some schools of thought in Mexico also back this conclusion: “Punitive damages can constitute an effective tool to prevent non-compliance, and the legislator should consider making such damages an integral part of the Civil Code” (Rico Álvarez, Cohen Chicurel and Garza Bandala, 2015, p. 703[30]). Therefore, punitive damages have the potential to become an important aspect of redress for competition damages.

However, the way in which the concept of punitive damages may apply in this area of law is unclear. Currently, the law does not have a scope which allows one to predict that claims for additional damages for competition infringements in line with claims for damages for pain and suffering may be successful. In other words, claims for punitive damages for competition infringements currently appear to be unlikely either to arise or to succeed.

**12.6.3. Interest**

As explained previously, the time taken by the courts to settle disputes should not adversely affect the principle of full redress to which the injured party is entitled. Accordingly, the sums claimed and awarded in civil liability court proceedings should reflect the loss of purchasing power of money over time. To that end, the courts have stated:

“**STRICT CIVIL LIABILITY. FAILURE TO MAKE TIMELY PAYMENT OF COMPENSATION FOR MATERIAL DAMAGE CAUSED IN THE EVENT OF THE DEATH OF A PERSON GENERATES STATUTORY INTEREST.**

In conformity with Article 1915 of the Civil Code for the Federal District, the calculation of compensation for material damage caused by the use of dangerous apparatus that results in the death of a person, excluding funeral costs, is obtained by multiplying the highest minimum wage in the Federal District as referred to in Article 502 of the Federal Labour Law by seven hundred and thirty, and then multiplying the product by four. It is therefore clear that, when an injured party loses his life and there has been no gross negligence on his part, the party incurring liability for the damage is required to make reparations from the time the damage is caused because the compensation is payable from that moment in time, payment cannot be refused, and no preliminary ruling establishing the amount concerned is required since the amount of the compensation is established in law. Therefore, a party incurring liability that does not satisfy that requirement from the day on which the damage is caused is obviously in default, and the beneficiary is authorised to demand payment for the prejudice arising through the failure to fulfil that obligation in a timely fashion; this
is reflected in the right to demand payment of default interest generated during the default period, calculated on the basis of the amount of compensation recognised in Article 1915 referred to above.

It is clear that, in this case, given that the law lays down the amount of the compensation, the courts interpret this as meaning that the injured party is entitled to be paid interest from the very moment that the damage occurred and not from the date of any ruling recognising the right to compensation. The interest to which the injured party is entitled is statutory interest, which in Mexico is 9% per annum, as provided for in Article 2395 of the CCF.

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Chapter 13. The Importance of economic methods in private damages claims

13.1. Legal causation and scientific methods

In order to understand the relevance of economic methods for the determination of legal cases, it is important to understand the relationship between legal and scientific concepts of causation in somewhat greater detail than in Chapter 11. Lawyers can be content with concepts of causation that fall short of the scientific ideal. In order to make law more similar to scientific practices, there are (theoretical) approaches to factual causation that rely on probability and focus on the contribution of a cause to the risk of harm. These approaches present close characteristics to scientific theories of causation, inasmuch as they focus on the regularity of the occurrence of types of events in order to infer from this a causal generalization implemented in the specific case examined.499 This involves the description of a class of events which probability must be shown to have been significantly increased by the condition or conduct in question (Hart and Honoré, 1985, p. 482; Honoré, 2010; Lianos, 2015, pp. 13-14).

There are two potential probabilistic approaches: ex ante and ex post. Ex ante probabilities underpin the law and economics movement and its approach to the allocation of liability (Calabresi, 1975; Grady, 1983; Landes and Posner, 1983; Shavell, 1980). However, this approach has not been adopted by courts, arguably with good reason – as we saw above in Chapter 11. Ex post probabilistic increased-risk concepts cannot be substituted for the actual causation requirement in the general run of cases without reaching results that are far removed from the traditional notions of liability that are applied by the courts (Wright, 1985, p. 1814; Wright, 1988, pp. 1005-1006). Even ex post probabilistic approaches, which are associated with inferential statistics, lack the attributive element that distinguishes causal explanations from mere probability statements. This attributive element, which has always been essential for tort liability, explains the courts’ refusal to admit pure or “naked” statistical evidence as proof of causation or identification (Wright, 1985, p. 1822).

The attributive element of causation also helps explain how scientific rules and ex post probabilistic inferences can be used in legal proceedings. For our purposes, it is important to distinguish between three different types of causative propositions. First, there are causal laws, which are invariable, non-probabilistic causal connections. However, we rarely have recourse to causal laws in practice. Instead, we must have recourse to causal

499 Arguing that “this notion is scientific in the sense that it is used in science”, but is merely a substitute which: “provides only a thin veneer of scientific respectability” to law, see (Honoré, 1983, p. 29).

500 Which are used to draw conclusions/inferences about the general population from a single study: see (Beecher-Monas, 2007, p. 60).
generalisations, which list only some of the elements of fully specified causal rules. These generalisations are, as a general rule, arrived at through the decision-maker’s knowledge and intuitions about how the world works.\textsuperscript{501} In competition law, a name that is often used for the causal generalisation of how the conduct led to damage is “theory of harm”. The third concept is \textit{actual cause}, which is the object of factual causation assessments, and is fulfilled by reference to the facts of the case.

Three steps must be followed in order to arrive at an actual cause for purposes of legal proceedings: (i) one must identify two distinct events – a cause and an effect – and some causal generalisation that connects them (Hart and Honoré, 1985, pp. 31-32\textsuperscript{[148]}; Wright, 1985, pp. 1741, 1823, 1825\textsuperscript{[153]}); (ii) proof of actual cause will be assessed by reference to the accepted strength of certain causal generalisations, and to the presence and absence in the individual case of elements that are usually also found in the relevant causal generalisation linking the identified types of cause and effect; (iii) one may then have to distinguish between different causal generalisations that may be applicable, usually by attacking the presence of conditions deemed necessary for those generalisations to apply (Hart and Honoré, 1985, pp. 31-32, 44-48\textsuperscript{[148]}; Wright, 1988, pp. 1045-1047\textsuperscript{[154]}). In other words, a judgement on what actually happened on a particular occasion is, in reality, a judgement of whether a causal generalisation was fully instantiated on a specific case. As a result, when parties plead a case, they present facts and frame them in terms of a causal generalisation that favours their case (Lopatka and Page, 2005, pp. 623-624\textsuperscript{[94]}).

In short, particularistic evidence connects the causal generalisation to the specific case (Hart and Honoré, 1985, pp. 31-32, 44-48\textsuperscript{[148]}; Wright, 1988, p. 1051\textsuperscript{[154]}). The choice between among competing explanations depends on the relative plausibility of each causal generalisation in the light of the facts of the case, as measured by reference to a number of criteria: the degree of coverage (i.e. the greater the portion of the evidence a causal generalisation is able to account for, the higher its plausibility), the completeness/consilience of the story (i.e. which causal generalisation explains more facts and has less gaps), the coherence of the narrative (i.e., how the causal generalisation mixes with the individual factual elements in order “to yield a smooth and convincing narrative of events”) and, finally, its probative force (i.e. the positive support the causal generalisation receives from the evidence) (Ho, 2008, p. 164\textsuperscript{[155]}; Lianos, 2009, p. 135\textsuperscript{[95]}). Framing a case successfully involves successfully fitting in a description of “specific consequences” (i.e. the facts of the case) within a wider framework of “general coherence” (i.e. the causal generalisation).\textsuperscript{502}

This is why purely scientific or probabilistic assessments are not well suited to the determination of legal cases. Such assessments merely look at the relationship between the types of causal generalisation and types of effect – they do not assess whether the effect actually occurred (which, in itself, often is a requirement of tort liability), do not assess whether other conditions relevant to the causal generalisation to apply are present, and do not distinguish between possible causal generalisations. As a result, probabilistic approaches are, on their own, merely proof of increased risk, and do not provide any information about whether a causal generalisation is reflected in the case at hand, or about

\begin{itemize}
  \item \textsuperscript{501} Or, as put more clearly by Learned Hand: “\textit{the major premise, i.e. that which consists the general rule, the jury supply from their common knowledge; the minor premise, i.e. that which supplies the particular instance whose predicate is the subject of the major, the witnesses or other evidence furnish}”. (Hand, 1901, p. 51\textsuperscript{[164]}).
  \item \textsuperscript{502} To paraphrase (Geertz, 1983, p. 175\textsuperscript{[182]})
\end{itemize}
whether a causal generalisation is a better explanation than another in an individual case (Wright, 1988, p. 1046\[154\]).

In other words, scientific theories and naked statistics are, quite simply, not probative. While probabilistic assessments may be relevant for the (descriptive) purposes of science, they are of dubious relevance for the (attributively inclined) purposes of law, in which judges seek to give a legitimate and persuasive solution to a legal dispute (Lianos, 2009, p. 44[95]). As noted by the US Supreme Court: “(s)cienific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly... We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes”.

On the other hand, probabilities determined ex post can help to prove causation when taken together with the particular evidence that instantiates or negates the necessary conditions for a causal generalisation to apply. Scientific models can be tools that assist courts to manage uncertainty together with other logical instruments such as inferences and deductions, and, finally, common sense.

13.2. Competition law and economic methods in practice

In judicial proceedings, the assessment of the evidence should focus on the relative plausibility of competing hypothesis presented by the parties – by reference to the relative “strength of the explanation” provided by each party, which should be assessed by taking into account the “inferential interests of the decision-maker” in the context of other evidence or other contrary explanations (Allen, 1991[156]; Pardo and Allen, 2008, pp. 229, 261[157]; Ho, 2008, p. 156[155]; Lianos, 2009, p. 136[95]).

In competition law, economic theory plays a large role in determining what the “normal scenario” is, what ‘causal generalisations’ will be found plausible, and what inferences will normally be taken from the facts – even if, ultimately, it is the decision-maker’s intuitions and perceptions regarding the validity and explanatory power of individual theories that will determine the relevant baseline for analysis (Lopatka and Page, 2005, pp. 635, 637-638[94]).

In this context, statistical and econometric evidence have an important role – to assist in the drawing of inferences from the available evidence. The objective of econometrics is “the quantitative analysis of actual economic phenomena based on the concurrent development of theory and observation, related by appropriate methods of inference” (Samuelson, Koopmans and Richard Stone, 1954[158]). Hence, this method interprets data through economic theories in order to infer effects from selected causes. Its aim is “to obtain knowledge concerning relations that exist in the social reality” through a theory-data – i.e. establish connections between causes and effects (Stigum, 2003[159]).

In practice, the econometric assessment of causation in competition law focuses mainly on counter-factuals (Heckman, 2008[160]). As noted above at Chapter 11.2, counterfactuals are prospective states of affairs which require a degree of prediction and speculation. The evidentiary burden and evidence needed to support different counterfactuals will vary along

a continuum of fact and commercial realism to sheer speculation and theoretical abstraction (Veljanovski, 2010, p. 5161). While focusing on the impact of the anticompetitive conduct, which is the relevant variable, counterfactuals in competition law are complicated by the need to take into account that rivals, suppliers, and customers will also respond to the anticompetitive action (Lopatka and Page, 2005, p. 633941). As a result, and as explained in the European Commission’s Guidance Paper to Quantification of Harm, a counterfactual: “is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement” (European Commission, 2013132). In other words, econometric counterfactuals consist in the assessment of data sets corresponding to a group of transactions to generate best estimates of whether the damage would have occurred in absence of the infringement, and of its amount if it did occur.

Economic counterfactuals, usually developed through recourse to econometrics, employ different approaches to data analysis that may lead to different conclusions depending on the researcher’s underlying assumptions and strategies (Beecher-Monas, 2007, p. 50101; Lopatka and Page, 2005, pp. 687-68994]). The context and strategies to address the pitfalls of econometric counterfactuals are outside the scope of the present work, and have been extensively addressed elsewhere.504 Ultimately, the relation between probabilistic assessments and evidence in specific cases is that ex post causal probability can be used to determine: (i) the likelihood of the relevant conduct being a cause of the relevant effect; and (ii) the likelihood of competing causal generalisations given the specific facts of the case (Wright, 1988, pp. 1049-1050154)]. The appropriateness of a proposed counterfactual depends on: (a) the underlying ‘theory’ of competition or, as it is sometimes called, the ‘theory of harm’; (b) the ‘realism’ of the counterfactual; (iii) the evidence in the case (Veljanovski, 2010, p. 6161).505

We saw in Chapter 10.3 above how competition cases very often boil down to a choice between the evidence – and interpretation of the data – provided to the court by economic experts. When doing this, courts may be influenced by the general acceptability of the theories advanced by the experts, by their (lack of) established track record in the case law, by econometric evidence, and by circumstantial evidence such as internal company documents, customer testimony or even the qualifications of the experts (Lianos, 2009, p. 12395). At the same time, in “resolving the battle of the expert witnesses” the court must ultimately choose the evidence it finds most convincing (Lianos, 2009, p. 11795).506 For example, a counterfactual will usually need to reflect the reactions of third-parties to illicit behaviour. Most economic models rely on presumptions of rationality of economic agents, but this is not how courts usually decide cases – instead, when deciding on the relevant counterfactual, courts often rely on what the actual behaviour of a third party would have

504 See (Lopatka and Page, 2005941), (European Commission, 2013132).
505 See also British Sky Broadcasting Group Plc v The Competition Commission [2008] CAT 25, para. 81.
been on the basis on evidence adduced in court (Rose, 2014, pp. 147-148[114]). Some authors have even argued that judges in civil cases identify the most plausible of the competing explanations rather than merely apply pre-confectioned probabilities (Allen and Leiter, 2001, p. 1527[162]). This is supported by practice in some courts, which have held that while epidemiological or statistical evidence can be accepted, its relevance will depend on the court’s acceptance of the evidence’s creditability, and that such evidence cannot in any event serve to reverse the burden of proof (Mulheron, 2016, p. 417[121]). Furthermore, inferences can be made where loss flows from tortious conduct which is of a kind likely to have ordinarily arisen from such conduct – even if the claimant was unable to explain the exact mechanism – as long as other explanations are, on balance, improbable.

Nonetheless, and given the prominent role of econometric models in competition litigation, economic experts have become fundamental in gauging economic data submitted to the court, as they consistently deploy different theories and standard economic models for the creation of different counterfactual scenarios. As such, it is important that courts be aware of the main techniques used in competition litigation. These are reviewed in the section below.

13.3. Different economic methods

Identifying harm caused by anticompetitive practices is extremely complex, and presents challenges even to well-staffed competition agencies. The discussion below will focus exclusively on the simplest cases, regarding the calculation of damages caused by the overcharge adopted by a cartel, and is for illustrative purposes only. For more complex situations, including how to take into account of passing on and volume effects, the European Commission’s Practical Guide on quantification of harm for courts and parties involved in damages actions can be a useful document. This Guide discusses these approaches in greater detail than here.

The underlying objective of a cartel is to reduce the quantity of a product that is sold and thus raise price above the level that would otherwise prevail. The cartel will set a price/quantity level that increases its profits, potentially to a level that is close to or equal to a monopoly price in many theoretical models. It would be unprofitable for a cartel to substantially exceed a monopoly price, so the monopoly price may, in practice, be viewed as an upper bound of cartel pricing. The price that would exist absent a cartel, in the more competitive situation, is sometimes called the counter-factual price or “but-for” price, as it represents the price that would prevail absent the cartel. The impact on consumers of a cartel can then be represented according to the Figure below, in which \( p_1 \) represents the cartel price, and \( p_0 \) the competitive and counterfactual price, with \( q_1 \) being the cartel’s quantity and \( q_0 \) being the counterfactual quantity sold at the lower price \( p_0 \).

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Figure 13.1. Illustration of cartel harm to consumers with linear demand

The harm to consumers from the cartel is showed in two parts of this figure. The first part of harm relates to the higher price charged for units that are sold in the cartel. This is represented as area A, and is often the object of damage claims concerning overcharges. In addition, consumers at the margin suffer as the price rises above the level that they would otherwise have been willing to pay. This area is represented by a triangle with area B in this simple case of a linear demand function.\(^{511}\) This area represents a deadweight loss since the loss to consumers in this case is not recaptured by cartelists. This may lead to further damages actions arising from loss profits from this reduction in demand (i.e. the volume effect). In practice, the deadweight loss is believed to be much smaller than the amount of overcharges, which is a main reason why damage claims and sanction amounts tend to be set by reference to the amount of the overcharge.

The challenge of calculating a cartel price and non-cartel price – let alone the damage from reduced demand – is non-trivial. Several alternative approaches are discussed below.

### 13.3.1. Simple averages approach

In the simplest terms, we can average prices for the cartelised product prior to the cartel period and compare these to an average of prices during the cartel period. The figure below illustrates a hypothetical set of price data and shows one version of average prices.

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\(^{511}\) With a curved demand function, as in a constant elasticity of demand case, the area is not a triangle but can be approximated to a first degree by a triangle or, with more information on the shape of demand, an integral under the demand curve.
In the time series of prices shown in the figure above, we can see how prices for a hypothetical cartelised product evolved over time. In this figure, there are at least three time periods: pre-cartel, during the cartel and post-cartel. The first vertical line indicates the time at which the cartel began and the second vertical line shows the time at which the cartel ended. The solid price line shows observed prices for the product, while the dotted line indicates the average price across each of the three periods. One approach is therefore to take the pre-cartel price as the expected price during the period of the cartel.

This figure also illustrates some of the challenges of relying on a simple before and after approach, however. First, during the period of the cartel, prices are not steady around the average, but actually increase during the initial period of the cartel. So for a substantial period of time, the cartel prices are well below the average cartel price. This sort of observation can be explained by cartels slowly adjusting their product prices up to a new higher level, to reduce customer dissatisfaction and also reduce likelihood of detection. Second, the pre-cartel period and post-cartel period have different average prices. This raises the question of how to determine the competitive price. Is it only by looking at the price before the cartel? If so, how much time before the cartel should be used? Is it by some combination of the pre-cartel and post-cartel price? If so, how should this combination be calculated? Has there been general inflation over the period of analysis, or specific cost increases related to the product in question that mean the difference between the average cartel price and the pre-cartel price is partly due to cost increases and not to cartel activity?

The detailed operational questions for implementing an approach using simple averages to distinguish cartel and non-cartel episodes raise many questions, but using simple averages may be appropriate in some circumstances, particularly if additional data is not available. There is often substantial variation in prices over time that may be confused for cartel effects, either underestimating the effects, or, in case of inflation, over-stating them. The existence of such variation suggests that it may be worth having an analysis that is more experimental in approach.

13.3.2. Comparator markets

One technique for taking into account cartel impacts that reflects variations in external factors other than the existence of a cartel is to find comparator geographic markets or products that would be governed by similar supply and demand conditions as the cartel market. Differences between the two over the period of the cartel may then potentially be explained by the cartel, while similarities would arise from underlying common causal factors that would be distinguished from the cartel. For example, a cartel in steel pipes from 5-10 cm in diameter might raise prices, while not affecting prices for smaller diameter steel pipes made by other companies and not alleged to be affected by a cartel. It could then be useful to compare the price evolution over time of the two types of products. This type of comparison is illustrated by the figure below. This figure shows the price of a “control” product against the observed price of the cartel product and the averages of the cartel product. The control product may be the same product from a comparable but different geography from that affected by the cartel, or it may be a product with a comparable cost structure as that of the cartelised product in the same geography.

**Figure 13.3. Hypothetical control product comparisons**


The method relies on prices for the cartelised product being causally related to the prices of the control product. In this case, the cartel would be found to have raised prices in the initial period of its operation more than in the control product, and thereafter to have held a similar variation to that of the control product. Importantly, in this example the control product also experienced substantially higher prices during the period of the cartel than before the cartel (and after the cartel), illustrating that part of the supposed cartel price rise that might have been estimated from a simple before-and-after comparison may have arisen instead from cost or demand drivers independent of the cartel. The comparator approach would thus help to ensure that external factors affecting pricing, outside the cartel and during the cartel period, are taken into consideration in the calculation of price differences.
The comparator approach is valuable and intuitive to understand. It may be subject to limitations, particularly to the extent that there have been changes in variables in one comparator market that occur for reasons that do not arise in the other market(s). In such an instance, a simple comparator approach may be missing variables, and a means must be found of including all known relevant variables in the analysis. Regression analysis can do this.

### 13.3.3. Regression modelling

An approach for more rigorously taking forward the comparator approach is to estimate, via a regression model, the relationship between the cartelised market and the underlying causal variables of price. There are a number of notable approaches that rely on regression modelling. The European Commission’s Practical Guide on quantification of harm for courts and parties involved in damages actions can be a useful document for discussing these approaches in greater detail than here.

In the first approach, a model is estimated in which the price of the cartelised product is driven by constant cost shifting variables and demand shifting variables from each period, as well as from those periods with the cartel and those without. The difference between the model’s actual and expected prices then yields the difference, period-by-period, between the cartel and counterfactual prices.

In the forecasting model approach, price-determining variables are again used to estimate a model of price, but this time leaving out observations from the cartel period. The model estimated is then applied to data on price-determining variables from the cartel period to estimate an expected price. The difference between the actual price and the forecast price, which is known at each separate time period, is then the price increase from the cartel. This forecasting approach leaves out some information from the model estimation, so it may be considered inefficient from a statistical perspective, potentially leading to less precise estimates. However, if the model form for cartel impacts is more complex than a simple dummy, the results from forecasting may be closer approximations to a true model than those of the dummy, even if cartel period information is ignored for estimating the model.

A third approach is to use difference-in-differences analysis. This can yield relatively simple and elegant predictions, comparable to natural experiments in which one variable is changed. The approach looks at the difference between the price in the cartel market during the cartel period and the price in comparator markets during the cartel period. If cost or demand variables are comparable across markets, and only the cartel presence is different, the approach may yield a compelling estimate of cartel impacts, perhaps more than simple time-series or cross-sectional-based estimates of impact.

Yet another approach relies on margin analysis. The underlying rationale for focusing on margins is that cartelists focus on increasing their margins during the operation of the cartel. Such an approach would calculate a competitive margin, by some means, and then quantify the difference between that margin and the cartel margin. The difference between the cartel and normal margin could be designed to take into account returns on capital in the non-cartel period. Key factors for an appropriate margin analysis are that the costs are appropriate, economically speaking, and that a satisfactory basis is found for determining the competitive margin.

A final approach to quantification of harm is to actually calculate underlying demand and cost functions to feed into estimates of a competitive equilibrium and what that equilibrium would be during the period of a cartel. The competitive equilibrium can be calculated using
data, for example, from the non-cartel period. The difference between the simulated competitive equilibrium and the observed outcome during the cartel period will then yield the differences between cartel prices and outputs and those of the competitive outcome. One particular advantage of a simulation is that its information on the demand function’s shape can feed into a reasoned estimate of the deadweight loss triangle area B in Figure 2. On the other hand, the data requirements for simulation modelling can be substantially greater than for the prior methods discussed, and the model complexity may be substantially greater than for prior approaches as well.

Ultimately, which methodology to adapt will depend on the available evidence and on the case brought before the court, in line with the considerations outlined in the first section of this chapter.
Part III. Conclusions and Policy Recommendations

A number of points emerge from this report for Mexico. These are outlined below.

Basic Underpinnings of competition damages claims

Stand-alone claims

Stand-alone claims of competition law perform an important complementary role to public enforcement around the world. Private enforcement claims can be understood as a public good, a form of identifying more anticompetitive practices than a pure public enforcement system would be able to and of increasing the costs of engaging in anticompetitive practices. Even though claimants bring private claims based on the harm they believe to have suffered, they are still contributing to public interest objectives by allowing courts to stamp out anti-competitive conduct.

In addition to closing an “enforcement gap”, private enforcement is more effective than public enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics (OECD, 2015, para. 412). A private party who has suffered a loss as a result of a competition law infringement may be in a better position, and may have better information, to enforce the law than a public official. Closer proximity to the infringement may mean that the costs of detecting possible violations and gathering evidence may be lower for private parties than for public enforcers.

Even though we understand this may present problems from a constitutional standpoint, it is a fact that stand alone claims provide an important complement to public enforcement, which is why it has been promoted across the world. We recommend that they be promoted in Mexico as well.

Recommendation:

- Explicitly allow stand-alone competition claims, either in the form of injunctions or claims for damages, instead of requiring a prior infringement decision by the relevant competition authorities (COFECE and IFT). Clarify that a prior infringement decision by the relevant competition authorities (COFECE and IFT) is not required to bring a claim for competition damages. Allow courts to identify infringements to competition law.

512 In particular, it is acknowledged that a previous version of Art. 10 LFCE VII was deemed unconstitutional because its content was ‘too open’ and did not allow defendants to know which conducts could be sanctioned. Vea la decisión de la Suprema Corte de Justicia Nacional, Recurso de Revision promovido por Warner Lambert Mexico, S.A. de C.V. en el Toca no. 2589/96.
Private enforcement and specialised courts

Competition claims can be heard either in courts of general jurisdiction or by courts specialised in competition matters. Courts of general jurisdiction can review civil, administrative or criminal matters, which include a wide range of issues. While specialisation is a matter of degree, it may be broadly said that courts are specialised when they are able to follow procedural rules better suited to the case at hand, and/or when the judges dealing with certain types of cases have expertise and experience in that particular area of law.

In the field of competition, the reason for this concentration of cases in specialised courts lies in the procedural and substantive complexity of competition law, as well as in the need to increase certainty and predictability in the markets through the expedited adjudication of cases on this matter.

In Mexico, a reform in 2011 set out that the judicial review to the competition authority’s resolutions should be referred to courts specialised in competition law. In 2013, two new District Courts specialised in competition, telecommunications and broadcasting cases, as well as two collegiate Circuit Courts, specialised in these same matters, were established. These are situated in Mexico City but have nation-wide jurisdiction. The current judges of these courts were selected by the Federal Judicature Council (CJF) on the basis of their expertise and experience in such matters. (OECD, 2016, pp. 19-21)

The goals of the creation of courts specialised in competition was to reduce the duration of the lengthy review proceedings and to increase the quality of the courts’ decisions. These goals apply equally to the judicial review of competition infringement decisions and to the resolution of civil disputes involving competition law, such as claims for damages.

Recommendations:

- With the purpose of ensuring the effectiveness of competition damages claim, greater clarity as to which courts are competent is desirable. If, as seems to result from Art. 134 LFCE, the courts responsible for hearing private competition enforcement claims, including damages claims, are the specialised administrative courts, it this should be clarified – potentially through an acuerdo issued by the Federal Judicial Council.

- Endow specialised administrative competition courts with the necessary competences to be able to hear and decide on relevant civil disputes, particularly those concerning claims for damages.

- As a subordinate alternative, and bearing in mind that the specialised courts are administrative courts, you may consider granting the competence to solve civil disputes involving competition law to civil courts. However, this would seem to be a worse option, as it would require the duplication of the experience and expertise that the specialised administrative courts have already acquired.

- In any event, ensure that the allocation of judicial competences over competition cases is clear.

Parties to competition damages claims

Most regimes – and virtually all for which competition damages perform a compensatory role – allow for claimants other than direct purchasers to bring competition claims. This seems to be reflected in Art. 134 LFCE, which sets out that ‘those to whom an
anticompetitive conduct or unlawful merger has caused loss or damage may bring a claim for damages.’

However, the requirement that damages be the ‘immediate and direct consequence of the breach of the statutory duty’ may pose significant obstacles to proving damages in competition infringements, particularly where claimants are not direct purchasers. In effect, this requirement seems to oppose the scope of Art. 134 LFCE, which sets out that all who suffered loss or damage as a result of an anticompetitive conduct will be able to sue for damages. As such, the general test for causation may need to be adapted to ensure that claimants other than direct purchasers will be able to bring successful competition damages claims, perhaps in line with current developments in Mexico regarding liability for consumer and environmental torts.

Ultimately, Mexico will have to decide who will be able to bring claims for damages, and whose loss is too “remote” to allow them to start judicial proceedings. This selection will also be relevant when establishing the mechanisms for calculation of the amount of damages due. It will also have implications for the proper redress mechanisms – e.g. if the idea is to favour final consumers, then indirect purchasers may have to be allowed to sue, and collective redress mechanisms will have to be implemented.

A second dimension of the identification of parties to competition disputes concerns the clarification of who can be sued for competition damages. As a rule, parties to a competition infringement are joint and severally liable for damages – as is currently the case in Mexico. If damages are compensatory, as they are in Mexico, a party convicted to pay damages may then exercise a right of recoupment against other infringers if they pay damages exceeding their share – as is the case in Mexico.

Systems similar to Mexico adopt specific rules to protect immunity applicants (who are often either not disclosed or are subject only to individual liability) or to promote settlements (e.g. a settling party is no longer jointly liable for damages owed by co-infringers. It is advisable that Mexico adopt similar measures.

A related issue which is bound to be raised in private competition claims is what legal entities within a corporate group may be sued for competition damages. This is a decision that Mexico will have to take, taking into account the need to ensure the effectiveness of private enforcement and doctrines of parental liability/lifting of the corporate veil applicable in Mexican tort law.

Recommendations:

- Consider adopting a wider test of causation for competition damages claims than the general causation test applied in tort law. Consideration should be given to which victims should be able to claim for loss suffered as a result of a competition infringement, the need to avoid duplicative payments by infringing parties, and recent developments in Mexico regarding liability for consumer and environmental torts.

- Decide who should be able to claim damages for losses suffered as a consequence of a competition infringement. Consideration should be given to the goals of the compensation systems, and the changes to the general tort system necessary to ensure that claims can realistically be brought and succeed.

- Decide who should be liable for damages – the specific legal entity being sued or the relevant corporate group. If the corporate group, Mexico may need to clarify
how this affects related legal doctrines, such as those related to lifting the corporate veil or to corporate responsibility more widely.

- Decide on the extent to which infringing parties should be liable. In particular, decisions will need to be taken regarding whether companies will be liable solely for their share of the loss or whether they are jointly and severally liable. If joint and severally liable, thought will need to be given to the creation of mechanisms for recoupment between infringing parties.

- International practice is to impose joint and several liability for defendants coupled with recoupment mechanisms, and this seems to be the best approach for Mexico.

- Adopt mechanisms to promote settlements, such as exempting settling parties from joint and several liability for outstanding damages.

**The extent of damages for competition infringements**

The amount of damages that parties can obtain in competition damages will vary depending on a number of factors. First, if the system is compensatory a party will usually only be entitled to damages corresponding to its loss; if the system is punitive, a party will be entitled to multiple damages.

If a system is purely compensatory, a second question is whether an infringer will be able to claim that the claimant passed on part of the overcharge in order to reduce the amount of damages due (passing on as a defence). This, in turn, may have an impact on standing, i.e. who can claim. At an international level, if indirect purchasers are able to claim or if damages are merely compensatory, a discount in the amount of damages that corresponds to passing on amount is usually allowed. As a rule, if indirect purchasers are able to claim, this requires them to prove that they suffered loss as a result of passing on from purchasers higher up in the distribution or supply chain (passing on as a claim). All of this, however, has an impact on the cost and complexity of litigation.

Given Mexico’s legal tradition, and the fact that public enforcement predominates, Mexico may prefer to award merely compensatory single damages for loss, as currently occurs. The addition of passing on considerations / indirect purchasers to competition law damages claims will ensure alignment with the compensatory nature of the non-contractual liability system in Mexico, but it will add significant costs and complexity to litigation. There are, however, ways to minimise these costs and complexities, which are mostly inherent to even the simplest competition damages claim.

**Recommendations:**

- Ensure that damages are awarded to compensate for loss caused by a competition infringement. In order to ensure this, clarify that passing on is both a defence for infringers of competition law against claims brought by direct purchasers, and a ground for claims brought by indirect purchasers.

- If compensatory damages are the appropriate remedy for loss, expressly allow parties other than direct purchasers to claim for damages.
• Consider whether certain circumstances may merit the additional or alternative imposition of punitive damages, and identify which circumstances would justify the imposition of such damages.

• Clarify the rules on causation – in particular, whether indirect harm can be claimed, and to what extent – and their impact on standing, in line with point C. above.

• Adopt institutional mechanisms to simplify the resolution of competition damages claims, such as: (i) adopt presumptions of harm caused by certain competition infringements, such as hard-core cartels; (ii) adopt presumptions of passing if certain conditions are met. In the alternative, or complementarily, set out specific rules on the burden of proof for indirect harm / passing on; (iii) allow courts to estimate the amount of damages, including the amounts passed on; (iv) develop mechanisms to ensure that courts are able to deal together with different claims concerning harm throughout the distribution chain, and that courts are able to take into account of judicial decisions regarding the impact of the same infringement on other levels of the distribution chain; (v) consider adopting collective redress mechanisms that ensure that competition claims are, inasmuch as possible, all brought together in a single court and in as few cases as possible.

Practical measures to ensure the feasibility of competition claims

Making competition damages claims possible in practice

Competition damage claims are risky to bring, hard to evidence and extremely expensive. As such, a number of mechanisms have been adopted at the international level to ensure that parties have the means and the incentives to bring such claims in the first place.

Recommendations:

Adopt mechanisms to ensure that victims have financial incentives to bring competition claims. Such mechanisms may include the following alternatives, either individually or as a mix:

• Allow for the recovery of multiple damages (i.e. double or triple damages) except for leniency applicants. This approach is not recommended, however, because it clashes with the compensatory nature of damages in Mexico’s system;

• Facilitate proof and quantification of damages and of passing on. As we saw above, passing on adds to the complexity and cost of litigation. As a result, some countries – such as the US - do not allow a passing on defence. However, this may not be suitable for Mexico, since taking passing on into account is crucial to ensure that damages are compensatory of loss suffered and to allow victims other than direct purchasers to claim damages. As such, it is recommended that mechanisms to facilitate the proof and quantification of damages, including passing – such as those discussed at D. above – be adopted.

• Impose joint and several liability for infringing parties, and create a recoupment mechanism between such parties that does not impact on the recovery of damages by victims of anticompetitive conduct.

• Create incentives for third-parties to incur risks associated with assisting victims in bringing competition claims. This could involve:
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- Inasmuch as possible under applicable deontological rules, allowing lawyers to claim success fees and contingency fees, as seems to be already allowed. In this regard, it is particularly important to ensure that current caps on lawyers’ remuneration do not act as an obstacle to the bringing of claims.

- Evaluate mechanisms through which third-parties may fund or bring damages claims. This may include state funding of competition damages claims – either through state funds, or through the funding by the competition authorities of representative entities; - third-party funding; or allowing special purpose vehicles to acquire claims from victims of anticompetitive conduct and assume the commercial risk of bringing a competition damages claim.

- Ensure the timely publication of competition infringement decisions and the disseminating of their content, while also protecting sensitive or confidential information contained in those decisions. A possibility, in this regard, is for the relevant competition authorities (COFECE and IFT) to notify the decision to potential claimants.

- Ensure the binding effect of competition infringement decisions, and clarify which elements of that decision are binding – e.g. does a decision only prove that an infringement take place, or does it also bind the court as to the some facts identified in that decision.

- Adopt judicial costs rules that promote the bringing of legitimate claims with reasonable prospects of success.

**Damages claims brought by competition regulators**

At an international level, public authorities are often allowed, and sometimes required or encouraged to conduct collective action on behalf of victims. While COFECE has such powers, it is unclear whether IFT has them as well.

**Recommendations:**

- Ensure that IFT has the power to bring collective redress actions on behalf of competition infringement victims, in order to ensure that all competition agencies are able to bring compensation claims on behalf of consumers.

- Adopt practical measures to promote the adoption of these redress mechanisms by the relevant competition authorities.

- Ensure that the exercise of this power to bring collective redress actions on behalf of competition infringement victims is aligned with other redress mechanisms available to victims of anticompetitive conduct. A way to achieve this goal is for competition authorities to only bring claims subsidiarily, where it is unlikely that victims of anticompetitive conduct, or a relevant segment thereof (e.g. final consumers) will bring damages claims themselves.

**Collective redress mechanisms**

In the event of a competition infringement, individual consumers may only suffer a small loss each – and, if they are indirect purchasers, they may also be far removed from the infringement and lack awareness of it or of any loss they suffered.
Even when consumers are aware of loss, the harm suffered from competition infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases, the amounts of the damage suffered by each potential claimant can be very low and, if claimants can only bring antitrust suits individually, the costs and efforts of filing an individual claim will most likely outweigh the potential gains from a successful claim. Consequently, there will be little incentive for individual victims to bring actions for compensation in respect of “atomised” damages.

In order to overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress. A particular form of collective redress is opt-out collective actions. Opt-out systems present advantages and disadvantages. A perceived advantage is that opt-out systems may be more effective than opt-in systems in obtaining redress for consumers and SMEs, particularly in situations where the number of injured parties is extremely large. In particular with respect to hard core cartels, class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated. Without such a system, recovery of damages would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages.

An often voiced criticism, however, is that opt-out systems can fuel an excessive litigation culture, especially if accompanied by other features such as the asymmetric shifting of legal costs in favour of the claimant, punitive damages, broad rights of discovery, and contingency fee agreements. In order to limit these downsides, collective redress mechanisms deploy a number of controlling mechanisms, such as certification mechanisms, standards for commonality of harm, the identification of representative entities enabled to bring collective redress claims, potential delimitation of the context in which it can be deployed, etc.

**Recommendation:**

- Allow collective redress claims regarding competition damages and consider adopting opt-out collective redress actions for (some) competition claims, while devoting great care to ensure that such actions are manageable and subject to appropriate control – either administrative or judicial – before they are allowed to proceed.
- Ensure that the appropriate mechanisms are in place to make class actions a realistic course of action for those who have suffered loss as a result. This may include measures such as the ones discussed above to ensure that there are real incentives to bring private enforcement claims.
- While care should be taken to ensure that collective redress mechanisms for competition harm are aligned with other collective actions mechanisms (e.g. for consumer loss or environmental harm), such a concern for systemic coherence must not be at the price of the effectiveness of collective redress mechanisms.

**Alternative Dispute Resolution (ADR) Mechanisms**

ADR mechanisms are a way to ensure that courts are used by claimants as a last resort. This leads to saving by the state – in the form of reduced use of its courts – and the parties – in the form of reduced costs. There are a number of distinct ADR mechanisms that can be deployed, as is made clear by our analysis above. However, the resolution of competition law disputes in Mexico seems to be limited to out-of-court settlements.
Recommendation:

- Allow and promote Alternative Dispute Resolution (ADR) mechanisms as a way to solve competition disputes, including damages claims. There are many examples of potential ADR mechanisms that may be adopted, of both an administrative and judicial nature. These include:
  - Creating collective settlement regimes, which should allow businesses to settle cases quickly with a multiplicity of claimants on a voluntary basis.
  - Allowing competition authorities to certify voluntary redress schemes when a company has been found to have infringed competition law.
  - Adopting procedural rules that incentivise settlements out-of-court.
  - Allowing competition claims, including damages claims, to be settled through arbitration or mediation.
  - Imposing voluntary compensation of victims as a pre-condition for granting immunity.
  - Identifying voluntary compensation of victims as a mitigating factor when calculating fine amounts.

It is recommended that Mexico consider adopting ADR mechanisms such as the ones above. Consideration should be given to each potential ADR mechanism individually, and together with ADR mechanisms, in order to arrive at the most effective possible ADR system that complies with the guiding principles of the Mexican legal order.

Limitation periods

When seeking damages for infringements of competition law, claimants must not only establish that an infringement occurred – they must do so in a timely fashion. Rules limiting the time period during which a potential claimant can bring an action for damages create legal certainty, which is why they exist in all legal orders. However, limitation periods can also create considerable obstacles to the recovery of damages depending on their duration, on when they start, and on whether or not the duration period can be suspended. In particular, ‘short’ limitation periods that begin to run from ‘the moment the infringement started’ and which ‘cannot be suspended’ may render the right to seek compensation practically impossible (OECD, 2015, p. 21[5]).

As such, it is crucial that Mexico adopts statute of limitation periods that create a realistic prospect of damages claims being brought.

Recommendations:

- Ensure that the statute of limitations is long enough to allow victims of anticompetitive conduct to bring damages claims before the courts, taking into account the secrecy and concealment of many competition law infringements and the fact that such infringements usually last a long time.
- Ensure that it is possible for claimants to bring follow-on claims regarding infringements sanctioned by the relevant competition authorities, regardless of the amount of time that has elapsed since the infringement. In other words, Mexico should not allow a competition damages claim to prescribe because the administrative investigation started after the statute of limitations for that claim has run out. This will require:
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- ensuring that the statute of limitations does not begin to run before the relevant competition infringement has ceased and become known;
- ensuring that the statute of limitations for a competition damages claim is at least as long as the term during which a competition authority can start an investigation;
- Interrupt the statute of limitations for the bringing of competition damages claim once the competition authorities begin investigating a potentially anticompetitive behaviour or create a statute of limitations for the bringing of competition damages claims that only begins to run from the date when an infringement is established.

- Ensure that the limitation periods for collective redress mechanisms follow similar principles to those applicable for individual claims, including both stand-alone and follow-on claims. This may require amending Artículo 584 del CFPC.

Evidence

Access to evidence

In the event of stand-alone claimants, to establish that a competition law infringement took place requires a claimant to either prove that a conduct which is per se unlawful under competition law took place – which is difficult, since those conducts are almost always secret – or to establish that a conduct had negative effects on prices, output or innovation in the relevant market.

Even as regards follow-on claims in systems where, by granting legally binding effect to competition authorities’ decisions in follow-on private actions – such as Mexico, which should keep such a regime – parties will face significant difficulties in proving causation and loss. As such, it would be important to clarify to what extent and scope an infringement decision can be relied to establish an antitrust claim (i.e. what type of infringement, its material, personal, temporal and territorial scope).

In short, the ability to bring a successful damages claim rests on the claimants’ ability to gain access to the necessary evidence. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. “Structural information asymmetries” are common in competition cases: many of the relevant facts and information required to bring a case are not known to claimants in sufficient detail because these facts are held by the defendant or by third parties. To address the difficulties faced by claimants when bringing claims for competition law damages, however, private enforcement regimes have developed mechanisms that allow potential claimants to gain access to the evidence necessary to successfully plead a private damages case.

General Recommendation:

- Ensure that it is possible for claimants to access evidence necessary to bring successful claims.
- Adopt rules of evidence suited to the complexities of competition law. This may involve changes in the burden of proof. Some jurisdictions relax the rules on burden and standard of proof as regards causation of harm, including going as far as establishing presumptions of harm; others take into account the availability of the proof which each of the parties in proceedings must submit, thereby allowing the
courts to shift the burden of proof when the other party has better access to the evidence.

- Allow for the possibility of courts benefiting from assistance from specialised bodies, such as the competition agency.

**Evidence disclosure**

“Structural information asymmetries” are common in competition cases: many of the relevant facts and information required to bring a case are not known to claimants in sufficient detail because these facts are held by the defendant or by third parties. As a result, evidence needed by the claimant to make its case is often in the hands of the defendants, of third parties, or of the competition authority. The difficulties faced by claimant in obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions (European Commission, 2008, p. ara. 96[35]).

Disclosure is a procedural mechanism through which a party in a legal dispute or a third party is forced to reveal relevant information to the other party in a case. One of its main functions is to address information asymmetries. While typical of common law jurisdictions, civil jurisdictions that sought to promote private competition enforcement have thought it necessary to introduce elements of disclosure to facilitate the production of evidence in the context of competition cases.

**Recommendations:**

- Adopt clear discovery rules that make access to evidence easier while minimising the cost of disclosure exercises. Such rules should address how a party is to access evidence, the minimum level of disclosure, the conditions for obtaining a discovery order by a court, the methodology to determine the scope of such an order, and which documents should not be disclosed / kept confidential.

- Impose effective sanctions to ensure compliance with judicial disclosure/discovery orders.

- Adopt measures that limit fishing expeditions, discovery blackmail, procedural abuses and attempts to create excessive disclosure costs by the other parties.

- Avoid disclosing privileged or confidential information, and any documents related to leniency applications, settlements with competition authorities or other parties to a dispute, and ongoing investigations. If such evidence is essential for deciding a claim, mechanisms to minimise the extent of disclosure and to protect their confidentiality should be put in place.

- Mexico may derive inspiration for the above from other civil law jurisdictions, such as those that had to change their laws to allow access to evidence based on fact-based pleading under EU law.

**Access to competition agencies’ and investigation-related files**

Requests to access a competition agency’s file normally occur in follow-on actions that are initiated in parallel to or after a public investigation by a competition authority. Allowing a potential claimant easier access to public enforcement files can be a useful way to facilitate competition damages litigation, particularly as regards follow-on damage actions. The file of a competition authority can include useful information not only on competition
enforcement, but also about the amount of damages caused by anticompetitive conduct and the causation link between the infringement and the damage.

It is common for claimants to have access to the competition agency’s file but for that access to be limited as regards certain categories of information (e.g. leniency documents and settlement documents can never be disclosed; documents prepared for the purpose of the investigation and withdrawn settlement submissions cannot be disclosed until the competition investigation is closed). The reasons to restrict access to evidence contained in the competition authority’s file usually relate to the protection of ongoing investigations and of the effectiveness of public enforcement more generally.

**Recommendations:**

- Allow potential claimants to access a competition agency’s file, in order to grant them access to evidence that may provide support to competition damages claims. However, limit access to that evidence which the party is otherwise unable to have. In doing so, take into account that the likelihood of a party having access to certain evidence is usually related to how rules on discovery/disclosure operate.

- Limit access to file under certain circumstances, such as: (i) if the investigation it refers to is still ongoing; (ii) when it may disrupt ongoing enforcement activities, either in Mexico or abroad; (iii) when evidence is or will be available to the parties even if they are not granted access to the file.

- Never grant access to certain types of information on the file, such as: (i) leniency or immunity applications; (ii) settlement documents.

**Expert evidence**

In the increasingly complex litigation world of competition law, courts often need the assistance of economic “experts” in order to acquire specialised information which is otherwise unavailable to them. The need for expertise is the consequence of an epistemic asymmetry between judicial decision-makers (judges and/or jury in the US system) and “experts”.

While expert evidence is extremely important for the resolution of competition disputes, it is also often complex and challenging for judges to address it. Expert evidence can also significantly increase the cost of a competition case. As such, it is important that the correct rules and institutional safeguards are in place in order to ensure that expert evidence is cost-effective, relevant and manageable.

**Recommendations:**

- Ensure that experts that are adequately qualified, independently of their origin, are able to testify in court. In this regard, Mexico may want to change its law to allow that foreign experts with the relevant expertise are allowed to testify in Mexican courts.

- Develop mechanisms to screen and manage experts (regarding their qualifications and expertise) and expert evidence (regarding its relevance, reliability and fit with the facts and evidence of the case) in competition cases. This may require taking into account the rules on expert evidence that are applicable in other areas of Mexican law.
It is particularly important that these mechanisms incentivise experts to be impartial, and that they lead experts to provide objective expert evidence instead of advancing the case of the party who presented them.

Such mechanisms can take various forms, from procedural options (e.g. hot-tubbing, appointment of joint experts, appointment of court experts) to institutional alternatives (e.g. appointment of clerks or court members with economic expertise; provide for support from specialised bodies, such as competition agencies; build up the expertise of specialised competition courts, including by providing training to judges).

Mexico should also consider whether to develop the principles and rules regarding the admissibility of experts and the assessment of expert evidence.

- Ensure that competition cases are heard by specialised judges, in accordance with point B. above.
- Develop the technical skills and competences of the courts and judges responsible for dealing with competition cases. In addition to the competition training already available to them, judges and judicial staff may benefit from workshops and training provided by judicial experts from jurisdictions with experience in competition disputes between private parties, including damages claims.

**Protecting public enforcement**

**Disclosure of evidence that may imperil public enforcement**

Mexico is a jurisdiction where a system where public enforcement by administrative agencies predominates. In systems where public enforcement predominates – which are the most common around the world – the goals of competition law are achieved mainly through its enforcement by public bodies, and private enforcement will merely play a complementary role. In all such regimes, measures are adopted to ensure that private enforcement does not put the effectiveness of public enforcement at risk.

**Recommendations:**

- Prevent the disclosure of certain elements in the competition agency’s file, or make the level of access to those elements depend on the type and nature of the relevant information and documents – including the time and conditions under which they are made available – in line with L. above.
- Preserve and protect leniency and immunity programs. This will typically include: (i) limiting the amount of damages that leniency applicants may be subject to, for example by not subjecting them to joint and several liability; (ii) prevent the disclosure of leniency material; (iii) preserve the anonymity of leniency/immunity applicants.

**Ensuring coherence between public and private enforcement**

A mixed system creates checks and balances in order to ensure that public and private enforcement complement, rather than undermine each other. As such, it is of the utmost importance to adopt mechanisms that ensure that private actions complement the public enforcement regime, and that there is consistency in the enforcement of competition law regardless of whether such enforcement is pursued by public or private entities.
Recommendations:

- Courts should be required to notify the relevant competition authority when private actions cases are initiated.

- Consider allowing competition authorities to intervene in private actions cases, particularly when relevant to ensure coherence in competition law enforcement.

- In stand-alone claims, courts should be allowed, or even required to suspend cases under investigation by the relevant competition authority concerning the same set of facts. It should be ensured that this does not lead to the prescription of the private case due to the length of the competition authority’s investigation.

- Allow courts to ask for guidance and support from the competition authorities in private enforcement cases.

- Ensure the binding effect of infringement decisions as regards the existence of a competition infringement, as is currently the case. It would be important to clarify whether follow-on damage claims could be based on settlement or commitment decisions adopted by the competition authorities.
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