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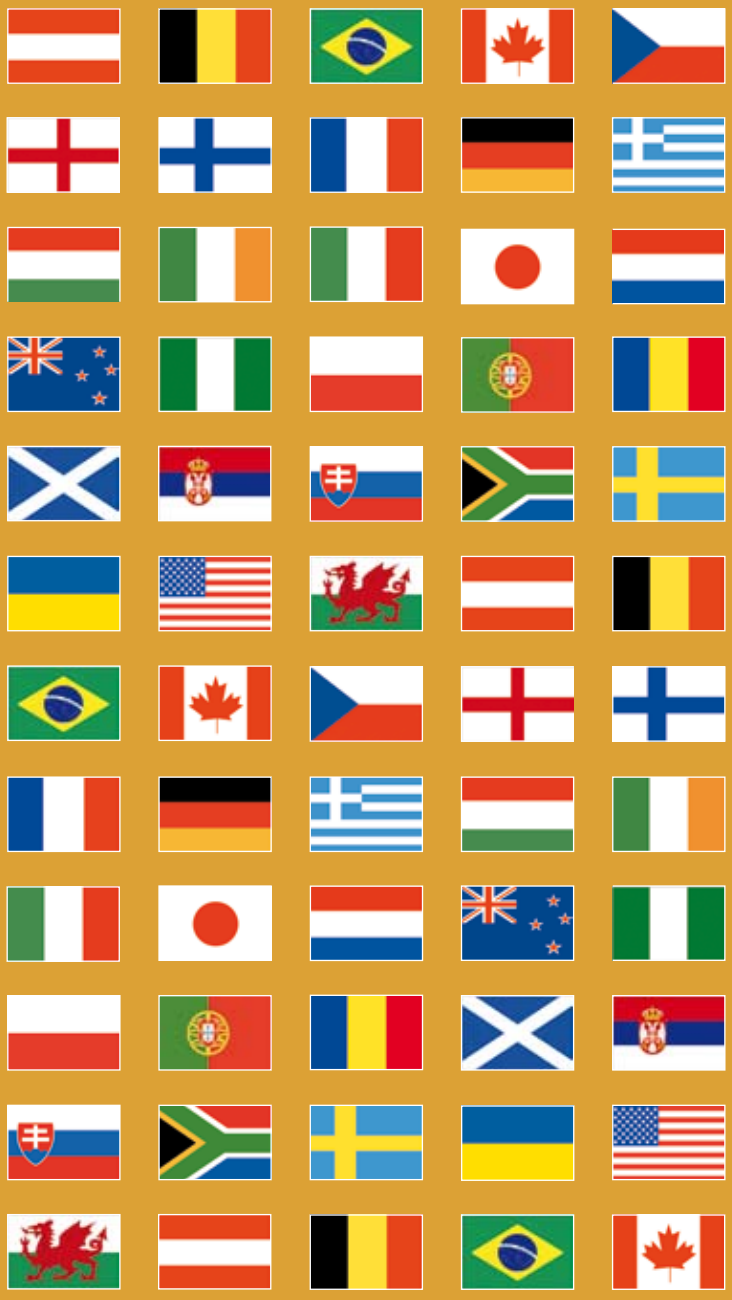

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Private Antitrust Litigation 2010

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Austria

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Legislation and jurisdiction

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

Private antitrust enforcement and litigation in Austria is, to some extent, still somewhat undeveloped. In 1993, an amendment of the Austrian Cartel Act introduced provisions on the right of individual undertakings affected by anti-competitive practices to initiate proceedings before the Austrian Cartel Court. Subsequently, private antitrust enforcement has become increasingly important in Austria. However, to date, enforcement measures have been mainly restricted to requests for cease and desist orders based on the Cartel Act and have rarely included actions for damages. Claims for damages based on general principles of tort or on the Austrian Unfair Competition Act (UWG) have been, as yet, underutilised in Austria. Reasons are, inter alia, a lack of relevant case law and various undecided legal issues as well as other practical matters such as difficulties in accessing evidence and fear of retaliatory measures.

With this background, the outcome of the Austrian Verein für Konsumenteninformation's (VKI – a consumer organisation constituted under Austrian law) case against several Austrian banks, concerning interest adjustment clauses, was eagerly anticipated. The VKI, in connection with the European Commission's antitrust decision on the Austrian bank cartel, the Lombard Club (COMP/36.571/D-1), also based its claims (on behalf of consumers) on violation of Austrian and EC cartel law. An interesting aspect of these proceedings was whether the claimant could gain access to the European Commission's administrative file relating to the *Lombard Club* cartel decision (for the related judgment of the court of first instance on the issue of access to the administrative file in competition cases, see question 19). Unfortunately, the parties reached a settlement in 2006, so it remains unclear whether the action for damages based on violation of Austrian and EC cartel law would have been successful or not (especially because the action was also based on the use of illegal provisions in the terms and conditions of the relevant contracts).

In 2007, the regional court of Graz, as appellate court, confirmed a decision of the district court of Graz-Ost to award damages to customers of driving schools in Graz on the grounds of violations of cartel law. Prior to this the Cartel Court had, at the request of the Federal Competition Authority (FCA), imposed penalties on these driving schools for having conducted a price cartel. It was the first time that damages were awarded in Austria on the grounds of cartel law infringement. The decision confirmed the presumptions of various cartel law scholars and practitioners, such as the applicability of section 1311 of the Civil Code (see question 2). However, several other questions remain open, for example, the applicability of passing-on over charges. Furthermore, in 2007 the Cartel Court imposed penalties in the amount of €75 million on the companies participating in an elevators and escalators cartel. The proceedings were conducted in parallel to the European Commission's elevators and escalators case since the Commission did not deal with the situation on the Austrian market. Several real estate businesses have applied for cease and desist orders and some have announced that they intend to file actions for damages. This case was subject to significant media attention in Austria and raised public awareness about the possibility of claiming damages for breaches of cartel law.

In the past two years, the European Commission and the European Parliament have published various papers and resolutions dealing with private antitrust litigation (eg, white paper on damages for breach of EC antitrust rules; resolution of the European Parliament on the said white paper). This might also encourage private antitrust litigation in Austria.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

In terms of private antitrust enforcement, one has to distinguish between private antitrust enforcement before the Cartel Court based on the Cartel Act; civil law disputes about and in connection with the validity of agreements (agreements in violation of the Cartel Act are generally void); and actions for damages.

The Cartel Act empowers any undertaking affected by anti-competitive behaviour (see question 4) to file an application for a cease and desist order with the Cartel Court (also by way of injunctive relief). In such proceedings, the Cartel Court acts as a specialised court. Besides undertakings, certain other institutions, such as the Federal Competition Authority, the federal cartel prosecutor, the Austrian Economic Chamber or the Austrian Chamber of Labour may initiate proceedings at the Cartel Court.

The Cartel Court is not entitled to award damages but only to issue cease and desist orders. Up until 31 December 2005, such cease and desist orders could be issued only as long as the infringement concerned was still in existence (and not after its termination). Under the new Cartel Act 2005 (which entered into force on 1 January 2006), the Cartel Court is also entitled to hold (by making a declaratory judgment) that certain behaviour was in violation of the Cartel Act even though this behaviour has been terminated in the meantime. As a precondition for any such judgment the plaintiff must prove that it has a 'legitimate interest' in such declaratory judgment. The Cartel Court recently rejected the initiation of proceedings to make such a declaratory judgment on the grounds that the plaintiff's interest in 'preparing a claim for damages at the civil courts' did not constitute a sufficient 'legitimate interest' pursuant to section 28 of the Cartel Act, since the Cartel Court was only entitled to rule on matters of public interest (and private damages were not a matter of public interest). The Austrian Supreme Cartel Court has confirmed such rule of law in a recent judgment.

With respect to actions for damages, no explicit statutory basis for bringing Austrian or EC competition law-based actions for damages exists. However, such claims may be based on:

- general principles of tort (especially sections 1295 and 1311 of the Austrian Civil Code). In such a case, the plaintiff has to prove that:

  - the defendant has violated Austrian or EC cartel law;
  - the violation has caused damage to the plaintiff;
  - such damage comes under the protective scope of the violated law; and
  - the defendant has acted intentionally or negligently. (For more details on the burden and standard of proof, see question 15.); and
- section 1 of the UWG that states that, in principle, anyone using unfair commercial practices in the course of business may be requested to cease, to desist from such practices and, if such person acted culpably, may be held liable for damages. The Austrian courts have recognised that violations of cartel law may constitute violations of section 1 of the UWG and (in a different context) that consumers may also bring claims for damages based on section 1 of the UWG.

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

For the relevant legislation, please see question 2.

The relevant courts are:

- the Cartel Court, regarding applications for cease and desist orders (also by way of injunctive relief) directly based on the Cartel Act;
- regarding actions for damages:
  - district courts, for claims of up to €10,000; or
  - regional courts, for claims of more than €10,000; and
- if the claim is brought against a registered entrepreneur or an undertaking and related to a commercial transaction on the side of the defendant:
  - district commercial courts, for claims of up to €10,000; or
  - regional commercial courts, for claims of more than €10,000 and UWG claims.

4 In what types of antitrust matters are private actions available?

Individuals or undertakings affected by one of the following types of anti-competitive behaviour may under certain circumstances file requests for cease and desist orders or declaratory judgments with the Cartel Court (sections 26 and 28 of the Cartel Act):

- illegal cartels;
- abuse of a dominant position;
- completion of a concentration without non-prohibition or without observing remedies; and
- prohibition of retaliatory measures.

Actions for damages on the basis of section 1295 in connection with section 1311 of the Austrian Civil Code or section 1 of the UWG may be filed with the competent courts in case of any violation of the Cartel Act or EC competition rules that causes damage to the plaintiff.

5 What nexus with the jurisdiction is required to found a private action?

From a procedural point of view, any natural or legal person having full legal capacity (regardless of nationality or location of registered seat) may, in principle, file an action for damages with the Austrian courts, provided that the defendant is an Austrian resident (natural person) or has its registered seat in Austria (legal person). Furthermore, defendants resident or with registered offices outside of Austria but within the European Union may be sued in Austria on the basis of Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Actions against non-EU residents may be brought before Austrian courts if the Lugano Convention applies or the defendant owns property in Austria, has a permanent representation in Austria or employs some kind of entity in Austria doing business for it (section 99 of the Jurisdiktionsnorm – JN).

Claims for damages based on the Austrian Cartel Act mandatorily require that Austrian cartel law is applicable. Having incorporated the effects doctrine, the Cartel Act only applies if the facts of a case – regardless of whether realised in Austria or abroad – (potentially) affect the Austrian market.

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

Yes, private actions can generally be brought against both corporations and individuals including those from other jurisdictions in certain circumstances (see question 5).

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

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

Austrian lawyers are prohibited from agreeing any form of contingency fee with their clients (section 879, subsection 2, number 2 of the Austrian Civil Code). However, since a ban on arranging contingency fees is exclusively applicable to lawyers, an increasing number of court proceedings are financed using legal expenses insurance. This trend can be observed in recent 'class actions' (for a closer definition of class action under Austrian law see question 19), where specialised companies offer process financing against participation in the profit.

9 Are jury trials available?

No, Austrian law does not provide for jury trials in actions for damages. However, *fachmännische Laienrichter* (lay judges recommended by the Chamber of Commerce, the Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture) may sit together with professional judges in proceedings at the Cartel Court and the commercial courts (for the various competent courts see questions 3 and 18).

10 What pre-trial discovery procedures are available?

The Austrian Code of Civil Procedure (ZPO) does not provide for pre-trial discovery procedures as such. In actions for damages the parties have to produce evidence on their own (in contrast to ex officio proceedings before the Cartel Court). Only in specific cases may a party ask the court to request the submission of evidence (for example, documents) from the other party to the proceedings or from third parties. General requests for unknown evidence ('fishing expeditions') are generally not allowed in Austria. However, evidence produced in the course of pre-trial discovery proceedings outside of Austria may be admissible in Austrian proceedings. Further, if feasible under the Cartel Act (see question 2), one may first initiate proceedings for a declaratory judgment at the Cartel Court (which may ask the defendant ex officio to provide certain evidence and subsequently initiate a follow-on action for damages before Austrian civil courts).

11 What evidence is admissible?

Basically, everything that serves to assist with the assessment of facts can be used as evidence.

12 What evidence is protected by legal privilege?

It is subject to academic discussion whether there is a legal privilege for counsel advice at all pursuant to Austrian competition law, since neither respective regulations nor jurisprudence exists on this subject. However, the FCA has announced on various occasions that it is of the opinion that there is no legal privilege for client-attorney communications or in-house counsel products in Austria.

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

The Cartel Act does not provide for criminal sanctions in the case of its violation. However, section 168b of the Austrian Criminal Code qualifies certain forms of anti-competitive agreements with regard to tender procedures as criminal offences (bid rigging). Private actions for damages are available even where there has been a criminal conviction within the meaning of section 168b of the Austrian Criminal Code.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

There is no explicit statutory provision covering the issue of whether civil courts are bound to use the findings of criminal proceedings in the same matter. However, case law provides that civil courts are bound to use the findings of criminal courts in the same matter after there has been a verdict (there is no binding effect in the case of acquittals).

Evidence gathered in the course of criminal proceedings and for non-contentious litigation may be relied upon without hearing (taking) such evidence for a second time in the civil court proceedings if: all parties have been involved in both proceedings and none expressly vetoes its use; the evidence cannot be taken or heard for a second time; or a party to the civil proceedings, which has not been involved in the criminal proceedings, expressly agrees.

There is no specific statutory provision or explicit jurisprudence protecting leniency applicants from follow-on litigation. There is a possibility to provide an oral application for the leniency programme, which is recorded by the FCA, instead of filing an application form. Since there is no obligation for the FCA to disclose such protocols and third parties do not have access to the FCA's files, an oral application should prevent claimants from making use of such an application in a possible follow-on litigation scenario against the applicant (eg, by way of US civil discovery proceedings).

15 What is the applicable standard of proof for claimants and defendants?

The court has to be fully convinced of the claimed facts of a case. According to the case law of the Supreme Court, there is a slightly lower standard of proof if an act with protective effect, such as the Cartel Act, has been infringed. If the plaintiff proves that it has suffered damage and the defendant violated an act with protective effect (for example, the Cartel Act), there is a legal presumption that the violation of cartel law caused the damage.

Where the plaintiff could not or could only with unreasonable difficulty prove the exact amount of damage in the course of the proceedings, the court may fix the damages at its own discretion provided that it has been proven that damage was caused by the defendant (section 273 of the ZPO).

In general, it is the plaintiff who bears the burden of proof (has to prove anti-competitive behaviour, damage, causation, fault, etc). The burden of proof is reversed with respect to fault in a case where the defendant has violated contractual obligations or an act with protective effect.

There is no jurisprudence concerning the passing-on defence in litigation for cartel damages. As a general rule, a set-off regarding compensation of damages by benefits received is possible if such a set-off does not exonerate the injuring party inequitably. The injuring party should not merely be discharged on the grounds that the claimant could pass on the damage to his customer.

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

There is no specific timetable for class or non-class proceedings. In particular, there is no absolute maximum time limit for proceedings. There are no specific measures to accelerate proceedings. Only if a court fails to perform specific procedural steps within a reasonable time (for example, hearings, the decision) can the parties apply to a higher court for a time limit to be set.

17 What are the relevant limitation periods?

Claims for damages generally become time-barred after three years from the time the damage and the author of the damage are known to the plaintiff. If damage has occurred and the author of the damage is known to the potential plaintiff, but the precise amount of the damage cannot be quantified or additional damage may occur at a later stage, it is recommended that an action for a declaratory judgment be filed within a three-year period to prevent claims from becoming time-barred.

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

Decisions of the Cartel Court (for example, cease and desist orders) are subject to appeals, which are heard by the Supreme Court as the Appellate Cartel Court. The appeal has to be filed within four weeks after service of the decision. The Appellate Cartel Court serves as a court of last resort. As a general rule (with certain exemptions), an appeal against a decision of the Cartel Court is only available on the law.

Judgments on actions for damages are to be appealed – on the facts and on the law – to the following courts:

- in general:
  - judgments of district courts go on appeal to the regional courts; and
  - judgments of regional courts go on appeal to the higher regional courts; or
- if the claim is brought against a registered enterprise and is related to a commercial transaction on the side of the defendant:
  - judgments of district commercial courts go on appeal to the regional commercial courts; and
  - judgments of regional commercial courts go on appeal to the higher regional courts.

A further appeal to the Supreme Court as a court of third (and last) instance is only available in extraordinary cases (and primarily on questions of law).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

The Austrian Code for Civil Procedure does not provide for class actions comparable, for instance, to US class proceedings. However, one may distinguish between two cases where several plaintiffs may combine their actions against one and the same defendant:

- Several plaintiffs may join their claims for damages provided that, inter alia, their claims are directed against the same defendant, are based on the same title (for example, the plaintiffs have been

parties to the same contract with the defendant) or result from the same fact pattern (for example, the plaintiffs have all been affected by the same unlawful behaviour of the defendant). It has to be noted, however, that in all such cases, even though only one proceeding takes place, the claims of the plaintiffs remain separate. The court may hold that some of these claims are justified and some are not and each plaintiff may freely dispose over its claims (for example, settle the dispute regardless of the will of the other plaintiffs).

- The Austrian Code for Civil Procedure further provides for a second option, which has also been used in the past. Several plaintiffs can assign their individual claims to a collective plaintiff which then opens proceedings against one and the same defendant. This has been the case, for instance, in the proceedings of VKI against several Austrian banks concerning interest adjustment clauses.

It has to be considered that in all such cases, one main obstacle to proving anti-competitive behaviour and the respective damages related to this lies in the difficulties one may face in obtaining access to files from previous administrative competition proceedings. In this context, VKI applied to the European Commission for access to the administrative file relating to the *Lombard Club* decision. When the European Commission rejected this request in its entirety, VKI brought an action for annulment of the rejection before the Court of First Instance of the European Communities. On 13 April 2005, the European Court of First Instance annulled the European Commission's decision and, inter alia, held that the European Commission was bound in principle to carry out a concrete, individual examination of each of the documents referred to in the request to determine whether any exceptions applied or whether partial access was possible. The European Commission has not appealed this decision.

Due to the increasing number of cases where many plaintiffs combine their actions or assign their claims to one plaintiff against one and the same defendant, the Ministry of Justice has proposed a draft statute on class actions amending the Civil Procedure Code. The draft statue is currently being discussed. However, the proposed Austrian class action will still not be comparable to US class actions.

20 Are collective proceedings mandated by legislation?

Not yet; see question 19.

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

There is no certification process.

22 Have courts certified collective proceedings in antitrust matters?

As indicated in question 21, there is no certification process. However, Austrian class actions have been initiated in several cases.

23 Are 'indirect claims' permissible in collective and single party proceedings?

Austrian class actions and single claims for damages are treated equally in this respect. In general, Austrian tort law only awards damages in respect of direct damage. Austrian case law recognises indirect damage claims only in exceptional cases (eg, in the case of indirect representation (*mittelbare Stellvertretung*) or if damage is contractually passed on from the directly affected party to a third party). According to the case law of the European Court of Justice (C-295-298/04, *Manfredi*, rec 61), any individual who has suffered harm caused by an antitrust infringement (article 81 or 82 EC) must be allowed to claim damages before national courts; this also applies to indirect purchasers. Austrian courts would have to follow this principle in the application of article 81 and 82 EC. Furthermore, there is the argument that the protective effect of the Austrian Cartel Act also aims to protect indirect purchasers. However, this issue has yet to be clarified by respective case law or statutory provisions.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Austrian law on civil procedure does not provide for class settlements.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

No plaintiffs' class-proceeding bar has developed in Austria so far.

Remedies

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

Austrian tort law follows the principle that the person or undertaking suffering losses shall primarily be granted natural restitution. Since natural restitution is not feasible in most cases (for example, damage through anti-competitive behaviour), plaintiffs are generally granted pecuniary compensation. The compensation amounts to the actual losses in the case that the damage has been caused by the defendant through minor negligence. A plaintiff may additionally claim loss of profits provided that the damage has been caused by the defendant intentionally or through major negligence. If a claim is based on section 1 of the UWG, loss of profits can always be claimed (even in cases of minor negligence).

29 What other forms of remedy are available?

Injunctions are available in the course of proceedings before general civil courts and in cease and desist proceedings before the Cartel Court (section 48 of the Cartel Act).

Austrian civil procedure principles further provide for the possibility of an 'execution for security', which requires a valid judgment that does not need to be enforceable.

30 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Austrian law.

31 Is there provision for interest on damages awards?

According to section 1,000 of the Austrian Civil Code, interest of 4 per cent per annum can be claimed from the date of the claim's specification towards the author of the damage. A higher interest rate, amounting to 8 per cent above the base rate in force at the end of the respective elapsed mid-year as published by the Austrian National Bank, may be claimed if the claim constitutes a claim between enterprises outside of a commercial contract.

32 Are the fines imposed by competition authorities taken into account when settling damages?

Under Austrian law, proceedings for damages do not have any punitive character, the aim is only to indemnify the aggrieved party.

Therefore, fines are not taken into account when settling damages; this would impair the plaintiff's position and contradict Austrian tort principles.

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

With reference to actions for damages, the Austrian Code of Civil Procedure is applicable, which follows the principle that the legal costs of the party that wins the case shall be compensated by the losing party. If one party is only partially successful such party's legal costs will only be reimbursed by the other party in proportion to its success. The amount of legal fees to be compensated is fixed by statute.

With regard to private antitrust enforcement based on the Cartel Act (cease and desist orders, declaratory judgments) the losing party is obligated to compensate the winning party only if the proceedings were unreasonably provoked by the losing party (section 41 of the Cartel Act).

34 Is liability imposed on a joint and several basis?

If several individuals or legal persons have caused damage by way of joint and intentional action (which is normally the case with infringements of cartel law), such individuals or legal persons are generally jointly liable for the entire amount of damages claimed. If the authors of the damage did not act jointly or intentionally (minor or major negligence) and specific parts of the damage can be allocated to each of the authors of the damage, these authors may only be held liable for the part of the damage caused by them.

35 Is there a possibility for contribution and indemnity among defendants?

If only one out of several individuals or legal persons jointly liable for damages is sued and held liable to pay the whole damages, such defendant may recover respective proportions of the damages from the other authors of the damage (section 896 of the Austrian Civil Code). In the case that specific shares of the damages cannot be allocated to these authors, each author has to bear an equal share.

36 Is the 'passing-on' defence allowed?

There is no statutory 'passing-on' defence under Austrian law. Even though an 'adjustment (or compensation) of damages by benefits received' needs to be taken into account under Austrian tort law principles, it is doubtful that a defendant would fully succeed in applying the 'passing-on' defence before Austrian courts considering current case law. However, the European Commission in its white paper suggests that defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge, while indirect purchasers should have the passing-on sword as a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

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

Not applicable.

38 Is alternative dispute resolution available?

Arbitration proceedings are possible under Austrian law but only when arbitration has been agreed to between the parties to the proceedings. Private antitrust enforcement is, however, generally not conducted through alternative means of dispute resolution.

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Legislation and jurisdiction

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

Competition was regulated for the first time in Hungary by Act V of 1923, which incorporated the main characteristics of the German UWG (Unfair Competition Act of 1909). Since then, competition rules have been further developed by Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices, which was a significant step forward in the course of the harmonisation of Hungarian competition law with EU law principles, and thereafter by Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act). The Competition Act has been further amended by Act LXVIII of 2005, Act CIX of 2006 and Act LXXXII of 2007. These most recent amendments to the Competition Act are not related in any way to the topic of private enforcement.

Competence relating to competition law issues directly based on the Competition Act is divided between the Hungarian Competition Authority and the county courts. Issues relating to unfair market practices fall within the competence of the county courts; other issues regulated by the Competition Act, such as, inter alia, cartels and abuse of a dominant position fall primarily under the competence of the Competition Authority.

The most important amendment of the Competition Act (the amendment), which entered into force on 1 November 2005, clarified various aspects of the private enforcement of claims for damages. The amended Competition Act specifically provides for the possibility of direct civil law actions for damages arising from competition law infringements. Such private antitrust enforcement may take place before courts of regular competence without the need to involve the Competition Authority beforehand as to the question of whether a breach of competition law has occurred.

To date there have only been a few court decisions in Hungary covering private antitrust litigation and there is no significant case law regarding claims for damages based on breach of the competition rules on cartels and on abuse of a dominant position. One such decision confirmed that claims for damages are permissible if a violation of any of the provisions of the Competition Act has occurred.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Applications for cease and desist orders and for damages with regard to unfair market practices on the basis of section 86 of the Competition Act may be filed with the relevant county court. The claimant may demand that the alleged violation is established by the court, that the violation must be terminated and that continued violation by the offender is prohibited.

Claims for damages, and cease and desist orders arising from the breach of other provisions of the Competition Act may be filed with the courts of regular competence on the basis of the general rules of indemnification under the Civil Code and the Civil Procedure Act (for details see question 4).

Further, civil law disputes sometimes involve challenges to the validity of agreements which constitute a breach of the Competition Act. The legal basis for such actions is section 200(2) of the Civil Code which sets out that agreements concluded in breach of legal regulations are generally null and void.

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

The relevant legislation is outlined in questions 1 and 2.

The relevant courts are as follows:

- In the first instance, county courts are competent for claims filed on the basis of chapter II (in accordance with section 86) of the Competition Act. In such cases, regional high courts serve as courts of appeal.
- Claims for damages arising from the breach of other provisions of the Competition Act (chapters III to V) may be filed with the courts of regular competence. If the value of the claim is below or equal to 5 million forints, it may be filed with the relevant local court in which case appeals are heard by the relevant county court; if the value of the claim exceeds 5 million forints it may be filed with the relevant county court, in which case appeals are heard by the relevant regional high court.
- In the case of civil law disputes involving challenges to the validity of agreements, the competent courts are the local courts.

4 In what types of antitrust matters are private actions available?

In the case of a breach of the provisions prohibiting unfair market practices, individuals and undertakings may file petitions for cease and desist orders and make claims for damages on the basis of section 86 of the Competition Act at the relevant county court.

In accordance with the general rules of tort, actions for damages may be filed on the basis of:

- prohibition of unfair competition;
- unfair manipulation of consumer choice;
- any agreement restricting economic competition; and
- abuse of a dominant position.

According to the related commentaries and legal literature, the provisions of the Competition Act relating to merger control are practically irrelevant in the context of private antitrust litigation as a breach of merger control regulations does not typically result in damage. It seems to be arguable, however, that actions for damages should also be possible in this context on the basis of the general rules of tort (ensuring claims for damages arising out of any unlawful conduct which is in breach of any legal regulation).

5 What nexus with the jurisdiction is required to found a private action?

Any individual or legal entity, regardless of nationality or domicile, may in principle file an action for damages with the relevant Hungarian court provided that the defendant fulfils certain criteria. Generally, the defendant must have a domicile or be resident in Hungary for a Hungarian court to be competent. In particular, actions against EU residents may be filed before Hungarian courts on the basis of Council Regulation 44/2001 on the jurisdiction and enforcement of judgments in civil and commercial matters.

In addition, pursuant to Hungarian conflict of law rules, Hungarian courts have jurisdiction with respect to a foreign defendant having domicile in a non-EU member state, inter alia, in the following cases:

- if the place of performance of the contractual obligation in question is in Hungary;
- for legal disputes relating to a tort if such tort was committed in Hungary, or if, as a consequence thereof, damage has occurred in Hungary;
- if a foreign enterprise has a branch or representative office in Hungary and the litigation pertains to the operations of the latter; or
- if the defendant owns assets in Hungary that may be subject to judicial execution.

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

Private actions can be brought against both corporations and individuals including those from other jurisdictions in certain circumstances (see question 5).

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

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

There is no explicit or implicit statutory regulation that would restrict or exclude the possibility of stipulating contingency fees for attorneys. Contingency fees are therefore legal in Hungary, but not very common.

To our knowledge, as yet, there exists no litigation funding by third parties in Hungary.

9 Are jury trials available?

Jury trials are unknown in the Hungarian court (judicial) system.

In Hungary, courts proceed with the involvement of professional judges. Trials before courts of first instance are generally heard by a single judge, whereas courts of second instance hear cases in councils comprising three professional judges. Labour law cases are exceptions to this rule (in the first instance two laymen sit with a professional judge).

10 What pre-trial discovery procedures are available?

Under Hungarian law pre-trial discovery procedures may be requested by an interested party before the initiation of or during a civil lawsuit, inter alia, if:

- evidence during the upcoming trial or at a later stage thereof would be impossible or such evidence would be seriously hindered;
- pre-trial discovery facilitates the completion of the trial within a reasonable period;
- the other party has a warranty obligation for the deficiency of certain items; and
- if a separate law makes it permissible to initiate a pre-trial discovery procedure.

The pre-trial discovery procedure is carried out in accordance with the general rules of taking evidence with minor differences, for example, if the pre-trial discovery procedure is initiated prior to the submission of the statement of claim, the competent local court based on the residence (seat) of the applicant or the local court in the territory where it is most practical to hold the pre-trial discovery procedure has competence for such pre-trial discovery. The evidence obtained in the course of the pre-trial discovery procedure may be freely relied on by all parties during the entire proceedings.

11 What evidence is admissible?

The Civil Procedure Act sets out the main forms of evidence admissible in civil proceedings such as the statements of the parties, witness testimonies, expert opinions, (on-site) inspections, documents and other physical objects. This list is not, however, exhaustive. Any other form of evidence may also be permitted as there are no limitations or restrictions in this respect.

12 What evidence is protected by legal privilege?

The Competition Act generally provides for a legal privilege covering certain documents prepared by an attorney for his or her client and further communication between an undertaking and its attorney. In-house counsel are not covered by such legal privilege.

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

Private actions before a civil court are available even if there has been a criminal conviction with respect to the same matter. It is also possible for criminal and civil procedures with respect to the same matter to be pending in parallel.

A civil law claim for damages arising from a criminal act may also be enforced in the course of the respective criminal procedure. Amounts recovered in a criminal procedure may not be claimed again in a separate civil procedure.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

On the basis of the principle of the 'free use of evidence' and judicial practice, evidence and findings from a criminal procedure can be freely relied upon in a parallel civil procedure.

Civil courts, however, do not have the authority to hold that the convicted person has not committed a criminal act if this has already been established in a final and binding judgment delivered as a result of a criminal procedure. Civil courts, of course, do not have the authority to find somebody guilty of a crime. However, damages may be awarded even if the criminal court has not convicted the person accused.

There is no specific statutory provision or explicit jurisprudence protecting leniency applicants from follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

The Hungarian rules of civil procedure do not require a specific standard of proof either for claimants or for defendants. The court

may freely assess the evidence in its entirety and deliver its judgment on the basis of such evidence at its own discretion.

Pursuant to the general rules of the Civil Procedure Act, the burden of proof lies with the party in whose interest it is that the court accepts certain facts or evidence to be true. No evidence is taken ex officio, except if otherwise provided by law.

The Hungarian law on damages is a 'exculpation system', in the course of which the defendant has to prove that he or she behaved in a given situation as it is generally expected that someone would act in that situation to exempt him or herself from liability.

The principle of a passing-on defence in private proceedings for damages has not yet been established in Hungarian legislation. However, the Hungarian Supreme Court developed a similar principle on the basis of which the claimants cannot demand compensation for loss that has already been otherwise reimbursed.

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

As class actions do not exist under Hungarian law, the procedural deadlines set out herein are generally applicable with respect to regular (non-class) proceedings.

There is no absolute time limit for the duration of the procedure. To facilitate a timely completion of the procedure, however, several procedural deadlines are set out in the Civil Procedure Act (for example, the court must complete the preliminary examination of the claim within 30 days of its filing, the court has 30 days from the date of filing of the statement of claim to schedule a date for the court hearing and the first hearing must be scheduled to take place within four months following the date of filing of the statement of claim).

In addition, the Civil Procedure Act provides for a general rule pursuant to which a civil procedure must be completed within a reasonable period.

17 What are the relevant limitation periods?

Legal proceedings may be instituted on the grounds of conduct in contravention of chapter II of the Competition Act within six months of becoming aware thereof (subjective term). However, no legal proceedings may be instituted after five years following the date of such conduct (objective term). In the case of a continuous offence, the above-mentioned period will not commence as long as such offence endures.

Claims for damages on the basis of other competition law provisions, such as an infringement of the cartel prohibition or the abuse of a dominant position, etc (see question 4), may be filed by the plaintiff. Claims must be filed within five years of the date of occurrence of the damage or – if the plaintiff was unable to exercise its rights for justifiable reasons – within an additional one-year period as of the date when the reason that prevented it from exercising its rights ceases to exist.

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

In the case of applications for cease and desist orders and claims for damages based on a breach of provisions relating to unfair market practices (chapter II of the Competition Act), appeals must be filed with the relevant regional court. In the case of damages claimed on the basis of a breach of the provisions of chapters III to V of the Competition Act, appeals must be filed with:

- the relevant county court if the appeal is against a decision of a local court; or
- the relevant regional high court if the appeal is against a decision of a county court.

Appeals must be filed within 15 days of the date of the receipt of the written decision of the court of first instance. Appeals at the first instance are available both on the facts and on the law.

An extraordinary appeal for review of the second instance decision by the Supreme Court is only available on questions of law (to be filed within 60 days of the receipt of the written decision of the court of second instance). This extraordinary appeal can be filed solely on the basis of procedural mistakes by the Court.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective actions comparable to US class proceedings are not available under Hungarian civil procedural law. There are, however, certain possibilities for combining the claims of different plaintiffs against the same defendants.

Two or more plaintiffs may initiate a joint action against the same defendants if:

- the subject matter of the lawsuit is a joint right or obligation that may only be resolved consistently, or the court's decision affects the plaintiffs or defendants irrespective of their participation in the procedure;
- the claims of the different plaintiffs are based on the same legal relationship; or
- the plaintiffs' claims have a similar legal and factual basis and the same court has competence for all defendants.

In the event of a procedure initiated by a joint action of several plaintiffs, only one procedure will be pending, but, in contrast to collective proceedings, the claims of the plaintiffs will be separately resolved by the court. The plaintiffs are generally free to perform procedural acts independently of one another. The court may consolidate related actions into one procedure either ex officio or at the request of the parties.

Further, a consumer protection organisation, the Hungarian Competition Authority or an economic chamber may introduce a civil law claim on behalf of consumers against any person who caused damage to a large number of consumers or caused significant damage to consumers by an activity violating an Act of Parliament. The Hungarian Competition Authority may file such a claim only if it has competence for such cases and has already established a breach of the Competition Act, which could be a cartel or a dominant position case. Claims may be filed with the court within one year of the date of the breach. The court may require the defendant to lower prices, to repair or replace products or to refund the price. The court may also authorise the plaintiff to publish the court's judgment in a national daily newspaper at the defendant's cost. The defendant must perform the obligations ordered by the court as regards each consumer, as required in the judgment. Consumers may enforce related civil law claims (for example, actions for damages) in separate lawsuits. To date, the Hungarian Competition Authority has not filed such an action.

20 Are collective proceedings mandated by legislation?

Not applicable.

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

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Are 'indirect claims' permissible in collective and single party proceedings?

A party suffering damage is entitled to full compensation including actual damages, justified expenses and lost profit. It therefore appears that indirect claims are permissible. Whether an indirect claim is permissible in fact will be decided by the court on a case-by-case basis upon consideration of all the circumstances of the case (for example, causality). In practice, however, Hungarian courts tend to be reluctant to award compensation for indirect claims.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Not applicable.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

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

The party suffering damage is entitled to full compensation (including actual damages, justified expenses and lost profit). Generally, the party causing the damage must restore the situation that existed prior to the occurrence of the damage. If this is not possible, it must compensate the other party for both material and non-material damage. The compensation must primarily be in the form of cash, except for cases when the circumstances justify natural compensation.

29 What other forms of remedy are available?

Hungarian civil procedural law recognises remedies and measures that may be requested even at the initial stages of or during the proceedings, such as partial or interim verdicts or preliminary injunctions.

A partial verdict is a decision passed by the court with respect to certain separate claims or parts of a claim that can be separately resolved, provided that there is no need for further proceedings in this respect and the hearing in respect of another claim or a claim for an offset must be delayed.

An interim verdict is a decision passed by the court with respect to the legal grounds of a claim prior to actually passing a decision on the amount of such claim.

Preliminary injunctions, which serve the purpose of preventing the plaintiff from suffering damage until a final ruling is delivered, are also available. A preliminary injunction remains in effect until the court repeals it at the request of one of the parties or in the final decision passed with respect to the merits of the case. In Hungary, preliminary injunctions are permitted only within the framework of a lawsuit and may be requested only after or simultaneously with the filing of the statement of claim.

30 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Hungarian law.

31 Is there provision for interest on damages awards?

Based on judicial practice, the party causing the damage must pay interest equal to the base rate of the National Bank of Hungary as from the date of the occurrence of the damage.

32 Are the fines imposed by competition authorities taken into account when settling damages?

Fines imposed by competition authorities are not taken into account when settling damages.

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

The court must resolve on the settlement of the legal costs in its decision on the merits of the case or in its decision closing the proceedings. Generally, the party that loses the case must bear the costs of the proceedings, including the legal costs. The plaintiff, however, must bear its own legal costs if the defendant did not provide a cause for the action and acknowledged the plaintiff's claim during the first court hearing at the latest. Further, in the event of a partially favourable result of a lawsuit, the legal costs must be borne by the parties in proportion to the claims successfully recovered in the proceedings.

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34 Is liability imposed on a joint and several basis?

If several individuals or entities have jointly caused damage, they are jointly liable for the whole damage. This means that the party suffering the damage may claim the whole amount of the damage from any or all of the defendants. The court may, however, decide that the persons who caused the damage are liable and must provide compensation in proportion to their contribution in causing the damage, provided that this does not prejudice the compensation of the party suffering the damage.

35 Is there a possibility for contribution and indemnity among defendants?

The obligation to provide compensation for damage caused jointly by more than one person will be apportioned between the defendants according to their accountability. This rule does not apply when it is not possible to determine the defendants' contribution in causing the damage. In such a case the compensation must be provided in equal shares by the parties who caused the damage.

If one of the persons who caused the damage jointly provides compensation in excess of their own proportion of accountability, such person would have a claim against the other parties who caused the damage on a pro rata basis.

36 Is the 'passing-on' defence allowed?

The 'passing-on' defence is neither recognised by Hungarian case law nor legislation, and it is as yet uncertain how Hungarian courts would respond to this kind of defence.

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

There are no other specific forms of defence in Hungary constituted either by statute or case law for the purposes of antitrust cases.

38 Is alternative dispute resolution available?

Hungarian law provides for general civil law mediation, which is also possible with respect to competition law issues. General civil law mediation includes practically all types of civil lawsuits with only specific exceptions, such as administrative lawsuits, defamation cases and certain family law issues. Private antitrust enforcement is, however, generally not conducted through mediation.

Romania

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Legislation and jurisdiction

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

Private antitrust litigation is still at an early stage of development in Romania. The Competition Law No. 21/1996 as amended (the Competition Law) only regulates private actions for damages on an abstract level, referring to the general principles of tort law, which can be found in the Romanian Civil Code. At present, there is no relevant case law on private antitrust litigation. Taking into account the rapid development of the Romanian legal framework over the past 10 years, it is likely that private antitrust litigation will become increasingly important.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

The competition law provides any prejudiced party with the possibility of using general tort law, aside from other means of protection granted by the Competition Law itself. Consequently, such claims are being grounded on the general principles of tort provided by articles 998 to 999 of the Romanian Civil Code.

In the case of a breach of antitrust law, claimants are entitled to compensation exclusively before the ordinary courts (the competent Romanian competition authority, the Competition Council, serves only as an autonomous administrative body in respect of cease and desist orders).

It has been discussed in the literature whether a decision of the Competition Council ascertaining the fact that the respective act or omission has indeed breached competition laws is a precondition for damages to be awarded by ordinary courts. In the light of the principle of the direct applicability of European cartel law (article 82 of the EC Treaty) in member states, however, it is doubtful whether the civil courts could deny direct actions for damages arising from cartel law infringements subsequent to Romania's accession to the European Union. A recent Romanian court's decision in relation to unfair competition proceedings acknowledged the fact that a decision from the competition authority is not required as a prerequisite to filing a lawsuit for damages caused by antitrust infringements.

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

For the relevant legislation, please see question 2.

- With regard to civil law suits:
  - from district courts (claims of up to 500,000 lei), appeal goes to the regional courts; and
  - from regional courts (claims above 500,000 lei), appeal goes to the higher regional courts.
- With regard to commercial cases (trials arising from acts and deeds carried out by commercial companies):
  - from commercial district courts (claims of up to 100,000 lei), appeal goes to the commercial section of the regional courts; and
  - from commercial regional courts (claims above 100,000 lei); appeals go to the Appellate Court.

4 In what types of antitrust matters are private actions available?

In the course of administrative proceedings (cease and desist orders, potential fines) the Competition Council may decide on cartel cases, abuse of a dominant position or merger control cases.

Private antitrust actions may be initiated in all cases relating to infringements of the competition law.

5 What nexus with the jurisdiction is required to found a private action?

In general, private antitrust actions should be filed with the relevant court from the jurisdiction in which the defendant resides or has its registered office, or where the damage occurred.

Romania is not yet a member of the Lugano Convention (16 September 1988/30 September 2007). Council Regulation 44/2001 became effective subsequent to the accession of Romania to the EU; however, its enforcement is not consistent throughout the territory of Romania. As a result, some courts still require the procedure of recognition and enforcement of foreign court decisions to be performed based on Romanian law, which should have been abrogated once Romania acceded to the EU.

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

Yes, private actions can be brought against natural persons and legal entities, including those from other jurisdictions in the circumstances described in question 5.

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

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

Romanian lawyers are only entitled to earn a type of contingency fee defined as a 'success fee' in addition to agreed hourly rates or a flat fee.

Pure contingency fee agreements are regarded as *quota litis* pacts, which are expressly forbidden by the Statute of the Lawyers Profession, published in the Official Gazette No. 45 of 13 January 2005.

It is however possible that third parties (eg, specialised companies), who are not attorneys, offer process financing, eventually for a participation in the profit in return.

9 Are jury trials available?

No, Romanian law does not provide for jury trials with respect to civil and commercial law matters.

10 What pre-trial discovery procedures are available?

The Romanian Civil Procedure Code does provide for pre-trial discovery procedures with regard to commercial proceedings where damages are claimed. In these cases, the plaintiff is obliged, before submitting a claim before the competent court, to invite the defendant in writing to participate in a conciliation procedure. The written invitation must include a short presentation of the case and the respective legal basis and must be sent 15 days or more before the conciliation meeting itself takes place.

There is also a procedure for the preservation of proof, which is considered to be a kind of *in futurum* enquiry and is either granted by a judge and then carried out by a judicial executor, or performed directly by the judicial executor if the preservation of proof is not subject to a litigation (if it takes place before an actual claim has been lodged in front of the court). By means of this procedure, one prospective party might, for instance, ask for the ascertaining of the testimony from a person, for documents to be recognised or for a state of facts to be ascertained if there is a threat that such proof may disappear at a later stage.

11 What evidence is admissible?

The general provisions of the Civil Procedure Code do not provide for limitations with respect to the form of evidence admissible in proceedings for damages. In particular, the following evidence is admissible: statements of the parties, testimonies of witnesses, inspections or parties', independent experts' opinions and, as a general rule, written documents.

12 What evidence is protected by legal privilege?

Any type of evidence, including correspondence, is protected by legal privilege between client and attorney, while not even the client itself or any authority may release the attorney from such – temporally unlimited – obligation of confidentiality. Oral or written advice from in-house counsel to its employer is privileged in the same fashion as an attorney's counsel to his or her client.

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

Private actions for damages are available separately even where there has been a criminal conviction in respect of the same matter (see also question 14).

Romanian competition law provides for several criminal offences, such as the price-fixing of sale or purchase prices, the limitation or control of production, abuse of a dominant position, etc, provided that the offender participates with fraudulent intent and in a decisive way in the conception, organisation or realisation of the above-mentioned anti-competitive practices.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

According to article 16 of the Criminal Procedure Code, the civil courts are generally bound by the findings of the criminal courts, but only with regard to the existence of a punishable act (action or omission), the identity of an offender and the form of guilt.

Furthermore, as a general principle, any kind of evidence must be directly presented in front of every court, irrespective of whether such evidence has already been implemented in other criminal or civil proceedings. Leniency procedure is only applicable in front of the Competition Council; therefore, leniency applicants are not protected from civil follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

The Romanian Civil Procedure Code does not provide a definition of the applicable standard of proof. The evaluation of evidence is conducted by a judge based on his or her free assessment of evidence at his or her own discretion. To properly assess the case, the judge may order any evidence to be brought forward that he or she deems appropriate.

Romanian legislation reflects the Latin principle *actori incumbit probatio*; therefore it is the plaintiff who bears the burden of proof. In the case that the defendant raises counterclaims, it is the defendant who carries the burden of proof in respect of such counterclaims.

The question of passing-on defence is not specifically treated in Romanian civil law or in the court practice and therefore underlies the standard evaluation of proof by the court.

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

A term for class or non-class proceedings is not expressly stipulated by law. Thus, the term of proceedings generally depends on the specific fact pattern of the case.

Regarding measures to accelerate proceedings, the Civil Procedure Code only provides that commercial lawsuits (actions for damages) are to be conducted without delay. Consequently, the term of commercial proceedings tends to be shorter in practice than the term of non-commercial proceedings. Further, if a case for urgency is put forward during the proceedings, one or both parties may file a request to shorten specific procedural deadlines. Granting of such shortage of terms is subject to the court's decision, whereas the court is not bound by any guiding legal framework in this respect and shall decide at its own discretion.

17 What are the relevant limitation periods?

Damage claims generally become time-barred three years after the damage and the time that the author of the damage become known to the plaintiff. Furthermore, with respect to fines being imposed on the basis of competition law, the law provides for limitation periods of between three and five years depending on the provisions of the law that has been breached. The respective limitation period starts to run after termination of the anti-competitive behaviour. For continuous breaches, the limitation period starts from the date of the last act of anti-competitive behaviour.

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

Appeals against decisions of the district courts (as court of first instance) in proceedings for damages are heard by the regional courts (as courts of second and last instance). Appeals against decisions of the regional courts (as court of first instance) in proceedings for damages are heard by the higher regional courts. Appeals against decisions of first instance courts are, in general, available on the facts and on the law (third instance is available and ruled by the High Court of Cassation and Justice, in which case appeal is available on the law only). In commercial cases (as described in question 3), the courts of

second instance are regional courts for appeals against decisions of the commercial district courts, and the Appellate Court hears appeals against decisions of the commercial regional courts.

Decisions of the Competition Council (for example, cease-and-desist orders) are subject to appeal which is heard by the Appellate Court. Such appeals are available on the facts and on the law. Decisions of the Appellate Court may be revised by the High Court of Cassation and Justice, as court of third and final instance. In such case, appeal is available on the law only.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Romanian law expressly provides for collective class proceedings. It is therefore possible for individual natural persons or legal entities, each suffering individual damages, to act together as plaintiffs or defendants, combining their claims into one single claim, provided that the matter of controversy is a common right or obligation or that their rights and obligations derive from the same cause. Such cases are defined under Romanian law as *litis consortium*. In such cases, each of the parties will be awarded damages individually on the basis of actual losses incurred.

With respect to the above-mentioned cases, the Romanian Civil Procedure Code stipulates that no acts, defences or conclusions of one of the plaintiffs or defendants in the course of the proceedings may affect the other parties to the proceedings in any way.

20 Are collective proceedings mandated by legislation?

Yes, such collective proceedings are regulated by the Romanian Civil procedure Code. Please see question 19.

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

Collective proceedings are certified as such by law, provided that the matter of controversy is a common right or common obligation or that the collective claimants' rights and obligations derive from the same cause.

22 Have courts certified collective proceedings in antitrust matters?

To our knowledge, there is no case law yet.

23 Are 'indirect claims' permissible in collective and single party proceedings?

Article 1086 of the Romanian Civil Code provides that any compensation shall cover only the direct consequences of any breach of an obligation or statute. Thus, indirect claims are generally not permissible under Romanian tort law (see question 28).

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Romanian law on civil procedure regulates that settlements shall be concluded either in front of the court or by submission of the relevant documents to the court (additionally requiring a notarial act if the forwarder is a natural person). However, collective settlements are not provided for in Romanian law as such.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

No plaintiffs' collective-proceeding bar has developed in Romania so far.

Remedies

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

Romanian tort law is governed by the principle of full compensation, covering not only the actual loss (*damnum emergens*) but also the unearned benefit (*lucrum cessans*). As a matter of principle, in matters of tort law, the author of the anti-competitive behaviour is liable both for the foreseen and unforeseen consequences. In principle, compensation must be effected by natural restitution. Where natural restitution is not possible because of an objective reason, compensation shall be made by pecuniary compensation. If natural restitution is objectively possible, the plaintiff may be authorised by the court to perform the obligation instead of the defendant, whereas such authorisation shall not exclude the right of compensation of the plaintiff towards the defendant.

29 What other forms of remedy are available?

The Romanian Civil Procedure Code provides courts with the possibility of granting injunctions in urgent cases for the preservation of a claim that might otherwise be jeopardised or to prevent damage occurring that would otherwise be irrecoverable. A further requirement is that the behaviour of the undertaking represents a prima facie breach of the (competition) legislation.

30 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Romanian law.

31 Is there provision for interest on damages awards?

The statutory interest applicable to commercial matters amounts to 80 per cent of the reference rate published by the National Bank of Romania once a semester. A higher interest rate may be agreed upon between the parties in commercial matters. There are no cap limitations in respect of the amount of the interest rate applicable in commercial cases.

In civil matters, conventional interest may not exceed 150 per cent of the legal interest per year. Conventional interest must be stipulated in a written document or otherwise proved; otherwise legal interest shall apply automatically.

Finally, Romanian law provides for a special interest rate amounting to 6 per cent per year with regard to foreign trade matters provided that Romanian law applies and payment is to be carried out in foreign currency.

32 Are the fines imposed by competition authorities taken into account when settling damages?

Courts in Romania do not take into account fines imposed by competition authorities when settling damages.

Update and trends

Private antitrust litigation will be indirectly affected by the entry into force of the new Civil Code as of 24 July 2010. The new Civil Code will introduce new or amended sets of regulations in respect of tort law, regarding, for instance, forms and limitations of liability, extent and proof of damages. It is expected that the Civil Code will provide more clarifications regarding several disputed aspects of law.

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

According to the Romanian Civil Procedure Code, legal costs are incumbent on the losing party upon request of the winning party. The court may assess the amount of the lawyers' fees and ascertain whether the entire amount must be borne by the losing party, or only a partial amount where the fees charged by the lawyer and claimed from the losing party are disproportionately high in relation to the substance of the case. However, this right is seldom used by the courts.

If the claims of one party are granted only partially, legal costs are shared on a pro rata basis. If a defendant acknowledges the claims of the plaintiff at or until the first court hearing, under the condition that the parties are legally summoned, and he or she has not previously been in delay with the execution, such defendant will not be obliged to pay the plaintiff's legal costs.

34 Is liability imposed on a joint and several basis?

Where several individuals or legal persons have caused damage by way of joint and intentional action, these individuals or legal -persons are generally jointly liable for the whole damage claimed. If the authors of the damage did not act jointly or intentionally (minor or major negligence) and specific parts of the damage can be allocated to each of the authors of the damage, such authors may only be held liable for the part of the damage caused by each of them.

35 Is there a possibility for contribution and indemnity among defendants?

In the case of joint and severable liability, the party that paid the whole indemnification to the prejudiced party may claim a refund of an appropriate share from all other (potential) defendants in line with their actual contribution to the damages caused.

36 Is the 'passing-on' defence allowed?

The possibility of a 'passing-on' defence is not regulated per se under Romanian law. Since there has been no case law on this issue to date, it is difficult to say whether this defence would be successful.

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

No specific defences are provided for by Romanian competition law.

38 Is alternative dispute resolution available?

Alternatives to ordinary dispute resolution are: arbitration proceedings and mediation (regulated in Romania by Law No. 192/2006). Private antitrust enforcement is, however, generally not conducted through alternative means of dispute resolution.

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Legislation and jurisdiction

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

The issues of unfair competition and 'monopolistic' behaviour have received special attention under Serbian law in the past, since the respective regulations were introduced relatively early (in 1930).

One of the earliest antitrust regulations in force in Serbia explicitly stipulated that a damaged individual trader, a chamber of commerce, traders' associations, consumers and other interested bodies and organisations could, in the case of a monopolistic action, file with a competent court, within the stipulated time frame, a lawsuit for discontinuance of such action (in cases when the action caused damages and in cases where such action may only pose a threat of potential damage), and a lawsuit remedying the situation caused by the illegal actions or to compensate damage caused.

Furthermore, Serbian legal practice at that time accepted the viewpoint that by application of the general rules of civil procedural law on declaratory legal protection, a person with a valid legal interest may request a court decision that certain behaviour was in violation of the relevant provisions of antitrust regulations. However, antitrust laws did not specifically regulate civil law protection in the case of a violation of competition rules before the competent courts.

Regardless of the developed legislation, court cases regarding the abuse of a dominant position in the market and the conclusion of restrictive agreements were not frequent, considering the political and economic system in Serbia at the time.

After its enactment in 2005, the Competition Act regulated in great detail prohibited agreements between participants in the market that materially prevented, restricted or distorted competition (the restrictive agreements), the abuse of a dominant position and exceptions in its application. Further, for the first time in Serbian legislation, a merger control regime had been introduced. In line with this law, the Commission for Protection of Competition (the Commission) was established as an independent regulatory organisation and rules for the administrative procedure before the Commission for establishing violations of the Competition Act were stipulated.

However, this Competition Act did not contain special provisions regarding the legal protection of individuals that suffer damage due to violations of said law. Thus, in such cases, the general rules of the Serbian civil material and procedural law on damage compensation applied. In July 2009, the Serbian Parliament enacted a new competition act (the Competition Law). Such Competition Law applies as of 1 November 2009. To a certain extent, the Competition Law introduces private enforcement. It stipulates that compensation for damages caused by competition infringements that are assessed by the Commission shall be determined during litigation proceedings before the competent court. In addition, the Competition Law states that the Commission's decisions do, as a general rule, not establish the occurrence of specific damages, but the damage has to be proven during court proceedings.

Similarly to the Competition Act previously in force, the Competition Law does not contain explicit provisions regarding the exclusive jurisdiction of the Commission to establish that certain actions constitute a violation of the Competition Law. On the basis of the relevant provisions, it is not clear whether the possibility for an injured party to bring such issues before the competent court, in regard to damages claims or to the annulment of an agreement, is still available prior to the decisions of the Commission.

Following the enactment of the Competition Act in 2005, to the best of our knowledge the Serbian courts have not yet ruled in private lawsuits for damages or annulment of a restrictive agreement due to violation of said law. Furthermore, there is no court practice regarding the issue of the binding force of the Commission's decisions either (in cases when the Commission assessed that a violation of competition regulations was or was not committed in a specific case). We are of the opinion that in cases where there is a final decision of the Commission on violation of the competition regulations, the court would still be empowered to establish whether the specific actions of the defendant are infringing the competition regulations, and would not be bound by the resolution of the Commission.

However, considering the lack of experience of the competent courts in such disputes, as well as the court practice regarding similar issues, it would be realistic to expect that the courts would take the final decision of the Commission to be an irrefutable fact, and thus the illegality of the actions or deeds of the defendant would not need to be proven before the court. At most, the Commission's final decision would only establish a presumption that an infringement existed.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

As mentioned above, the new Competition Law explicitly provides for the possibility of direct civil law actions for damages arising from competition law infringements.

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

Apart from the Competition Law, the Serbian Law on Litigation Proceedings is applied to disputes regarding actions for damages and the annulment of agreements due to the violation of competition law.

According to the provisions of the Serbian Law on Constitution of the Courts, the Commercial Court rules in the first instance on the abuse of monopolistic and dominant positions on the relevant market and the conclusion of monopolistic agreements. The law does not provide for precise provisions on whether this is the competent court in cases where damages were not due to commercial subjects or other legal entities acting as commercial subjects. However, it could be concluded from the wording of the aforementioned law that in this case, the Commercial Court would also be competent.

The general principle of territorial jurisdiction in Serbia is jurisdiction according to the seat or permanent residence of the defendant; however, there are also other principles: among others, in cases of non-contractual damages, the plaintiff can also file an action at the court where the damaging act was committed or at the court where the damage occurred.

4 In what types of antitrust matters are private actions available?

Civil actions are available in the following cases:

- where horizontal or vertical agreements of participants in the market, or certain segments thereof materially prevent, restrict or distort competition; and
- abuse of a dominant position, when the participant in the relevant market holding the dominant position prevents, restricts or distorts competition through its actions.

5 What nexus with the jurisdiction is required to found a private action?

Regarding territorial application, the Competition Law explicitly stipulates that it shall be applied to actions and deeds committed in Serbia and to actions or deeds committed in the territory of a foreign country by which competition in Serbia is affected.

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

Any natural person and any legal entity may act as plaintiffs and defendants before Serbian courts in civil matters (including actions for damage compensation and for the annulment of an agreement).

Pursuant to the Serbian Law on Litigation Proceedings, the court may recognise the capacity of a party in cases where the form of association or organisation would not normally have standing as a party, should it find that, considering the subject of the dispute, the association or organisation essentially fulfils the material conditions for acquiring the capacity of a party.

In the case of cross-border litigation, Serbian rules on private international law contain the following rules on territorial jurisdiction:

- Serbian courts are generally competent if the defendant has its seat or permanent residence in Serbia.
- If a number of defendants are sued and at least one of them has a permanent residence or seat in Serbia, Serbian courts are competent where such defendants are in a legal relationship or the claims against them are based upon the same legal and factual grounds.
- In the case of non-contractual damages, Serbian courts are also competent if the damaging act has been committed within Serbia or if the damages occurred in the Serbian territory.
- In the case of contractual damages, Serbian courts are also competent if the place of performance of the obligation in question is Serbia.
- If a foreign entity has a branch office in Serbia or has an entity entrusted with the performance of its business in Serbia, Serbian courts are competent concerning a dispute arising out of the operations of such branch or person in Serbian territory.
- Serbian courts are also competent if any of the defendant's property is located in Serbia, if the plaintiff's seat or permanent residence is in Serbia or if the plaintiff proves that the defendant's property in Serbia is likely to be sufficient for the execution of the judgment.

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

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

Attorneys' fees are regulated by the attorneys' tariff adopted by the Serbian Bar Association. In accordance with the attorneys' tariffs, besides the fee (which is precisely defined by the attorneys' tariff depending on the complexity and value of the dispute), the attorney and client can also agree in writing a fee as a lump sum or percentage, which in civil and administrative lawsuits can amount to no more than 30 per cent of the value of the lawsuit.

To our knowledge, as yet, there exists no litigation funding by third parties in Serbia.

9 Are jury trials available?

Jury trials are not available in actions before commercial courts.

10 What pre-trial discovery procedures are available?

Pre-trial discovery procedures are not available under Serbian law. However, the Law on Litigation Proceedings stipulates that if there is a justifiable fear that certain evidence will not be able to be presented or that its subsequent presentation will be hindered, a motion can be filed to the court during or before bringing the action that this evidence should be presented.

In such motion, the proponent is obligated to state the facts to be proven, the evidence to be presented and the reasons why it believes that the evidence will not be able to be presented at a later time or that the presenting thereof will be hindered.

11 What evidence is admissible?

The Law on Litigation Proceedings prescribes five evidentiary means: on-site inspection, documents, the hearing of witnesses, expert witnesses and the hearing of parties.

The court decides which evidence is to be presented to establish the relevant facts. The court may present only the evidence proposed by the parties and has no power to present other evidence (principle of procedural truth). The court can decide which of the proposed evidence should be presented during the proceedings, by determining which of the proposed pieces of evidence is necessary for the assessment of the facts.

The court will permit the testimony of an expert witness when expert knowledge is not available to the court and is necessary for the establishment or clarification of a fact.

On-site inspections are conducted when the direct observation of the court is necessary for the establishment of a fact or the clarification of a circumstance.

The court will decide on admitting evidence by hearing the parties when there is no other evidence or when it finds that this is necessary, along with other presented evidence for the establishment of relevant facts.

12 What evidence is protected by legal privilege?

For the first time in Serbian legislation, a right to privileged communication between the parties to the proceedings before the Commission and their legal counsels is provided in the new Competition Law. However, it is unclear whether such legal privilege also extends to in-house counsels.

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

Yes, criminal and civil litigation proceedings are separate and independent from each other.

The Serbian Criminal Code provides for charges regarding the abuse of a dominant position. This crime can be committed by a legal entity or an entrepreneur who, by abusing a monopolistic or dominant position in the market or by concluding monopolistic agreements, causes a distortion of the market or brings the undertaking in question into a favourable position compared to others to acquire material gain for said undertaking (or for another undertaking) or causes damage to other commercial subjects, consumers or users of services.

In litigation proceedings, the court, with respect to the existence of a crime and the criminal liability of the perpetrator, is bound to the final verdict of the criminal court, finding the accused guilty.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

There is no obligation to mandatorily accept evidence established in criminal or other proceedings. The court is free to determine which evidence or facts it shall accept as decisive in the rendering of its decision and, in any case, the court undertakes the evaluation of the evidence on which the decision is based. Relevant provisions of the Competition Law do not provide for a special protection of leniency applicants from follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

In Serbian civil procedural law, there is no given standard of proof. Which facts shall be established as proven shall be determined by the court at its discretion on the grounds of careful and conscientious evaluation of each piece of evidence separately and all the evidence together, as well as on the grounds of the results of the entire proceedings. If, on the grounds of the evidence presented, the court is unable to establish a fact with certainty, the existence of the fact in question shall be determined by application of the rule of the burden of proof.

The burden of proof lies with the plaintiff (the party trying to establish the evidence). The party must lay out the facts and propose the evidence on which it bases its request or with which it disputes the allegations and evidence of the opponent. Proof includes all the facts that are relevant for rendering a decision. In the case that the defendant raises counterclaims, it is the defendant who carries the burden of proof in respect of such counterclaims.

It is further provided for that the party is obliged to submit any document it claims as evidence in support of its allegations. If the document is in the possession of a governmental authority, company or some other organisation entrusted with the conducting of public authorisation, and the party itself is unable to cause the document to be submitted or shown, the court will at the proposal of the party or ex officio obtain said document.

The question of passing-on defence is not specifically treated in Serbian civil law or in the court practice and therefore underlies the standard evaluation of proof by the court (see question 36 below).

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

The regular duration of proceedings is two years in the first instance and another year in the second instance. It is not possible to significantly accelerate the proceedings.

17 What are the relevant limitation periods?

Pursuant to the general provisions of the Law on Contracts and Torts, claims for damages expire three years from the date when the injured party learned of the damage and of the entity that caused the damage. In any event, such claim expires five years after the occurrence of the damage.

With regard to the annulment of a restrictive agreement, the right to claim nullity does not expire.

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

Pursuant to the general rules provided in the Serbian Law on Litigation Proceedings, decisions of commercial courts can be appealed within eight days, and such appeals are ruled on by the Superior Commercial Court, which renders a final ruling as a court of second instance. Such appeals are available on the law and on the facts.

In cases provided for by the above cited law, the Supreme Court of the Republic of Serbia rules upon extraordinary legal remedies against rulings of the Superior Commercial Court. Such appeals are only available on the law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

The Law on Litigation Proceedings does not recognise the legal institution of collective proceedings.

However, pursuant to the provisions of the Law on Litigation Proceedings, several entities may sue or be sued in the same action if, with regard to the subject of the action, their rights or obligations arise from the same factual or legal grounds (as a general rule).

Each jointly interested party in the action is an independent party and each party's action or inaction neither benefits nor harms other jointly interested parties.

20 Are collective proceedings mandated by legislation?

Not applicable.

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

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Are 'indirect claims' permissible in collective and single party proceedings?

In relation to single party proceedings, the rules follow the general provisions of the Law on Contract and Torts, which in general do not permit indirect claims. As indicated above, there are no collective proceedings in the strict sense.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Not applicable.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Update and trends

A new competition law was enacted in Serbia in 2009, explicitly providing for a statutory basis regarding private enforcement of damage claims due to competition law infringements (see question 1).

Remedies

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

Pursuant to the provisions of the Law on Contracts and Torts, the person that caused damage is obligated to restore the situation as it was prior to the damage. If restoration to the previous situation does not cure the damage entirely, the party that caused the damage is obligated to provide pecuniary compensation for the remainder of the damage.

In case the restoration to the previous state is not possible, or if the court deems that it is not necessary, the court may compel the injuring party to pay damages to the injured party. Should the court find that the party is entitled to damages but the amount or quantity cannot be determined, or can the amount or quantity only be determined with disproportionate difficulty, the court will assess the amount of the damages at its own discretion.

29 What other forms of remedy are available?

Pursuant to the general rules of Serbian civil procedural law, for the purpose of securing a pecuniary or non-pecuniary claim, the civil court can award temporary relief, before initiating the proceedings, during the proceedings and also upon completion of the proceedings, until the enforcement of the decision.

Temporary relief (interim injunctions) can be awarded if the proponent renders the plausibility of existence of the claim and the danger that the enforcement of the claim will be hindered, or in case the proponent satisfactorily shows that the relief is necessary to prevent the use of force or the occurrence of irreparable damage.

30 Are punitive or exemplary damages available?

Punitive or exemplary damages are not provided for under Serbian law.

31 Is there provision for interest on damages awards?

The debtor in delay of fulfilment of its pecuniary liability owes, apart from the principal amount, the amount of interest on arrears at the rate determined by the Law on the Rate of Interest on Arrears. The rate of interest on arrears consists of the fixed rate of 0.5 per cent and the monthly rate of growth of retail prices.

32 Are the fines imposed by competition authorities taken into account when settling damages?

No, fines are not taken into account when settling damages. Fines are state income, while restitution or pecuniary compensation is awarded to private subjects.

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

Each party first bears the costs caused by its actions. When a party proposes the presentation of evidence, it is, pursuant to an order of the court, obliged to deposit in advance the amount necessary for settling the expenses incurred by the presenting of evidence, and should it fail to do so within the time stipulated by the court, the court shall not proceed with the presenting of evidence.

If the court ordered the presentation of evidence ex officio, it will order that the deposit be effected by the party bearing the burden of proof of the fact for which the evidence is being presented.

A party that fully loses an action shall be obligated to compensate the opposing party for the costs incurred. Should a party be only partially successful in an action, the court shall, considering this success, decide that each party shall bear its own costs or that one party shall compensate the other for a proportionate amount of the costs.

If the action ends in a court settlement each party shall bear its own costs.

34 Is liability imposed on a joint and several basis?

For damages caused jointly by several persons, all participants shall be jointly liable. Persons causing damages acting independently of one another shall also be jointly liable for the damage suffered if the respective damage caused by them cannot be determined.

If there is no doubt that the damage was caused by one of two or more specific persons mutually connected, but it cannot specifically be determined which of them caused the damage, they shall be jointly liable.

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35 Is there a possibility for contribution and indemnity among defendants?

If only one of several individuals or legal persons jointly liable for damages is sued and held liable to reimburse the entire amount of damages, such defendant may recover respective proportions of the damages from the other authors of the damage.

36 Is the 'passing-on' defence allowed?

Serbian law does not recognise 'passing-on' issues. As there is no case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Serbian courts might deal with this concept.

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

No.

38 Is alternative dispute resolution available?

There is the possibility of parties amicably resolving a dispute by means of negotiation (mediation). The mediator is not empowered to force a binding agreement upon the parties.

An agreement reached before commencement of the litigation proceedings or during the litigation proceedings shall have the same legal effects as an out-of-court settlement, if concluded in writing and not contrary to the public order. An agreement taken on record by the judge shall have the legal effects of a court settlement.

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