

Private Antitrust Litigation

in 24 jurisdictions worldwide

2014

Consulting editor: Samantha Mobley



Published by
Getting the Deal Through
in association with:

Actecon Danışmanlık AS

Anderson Mori & Tomotsune

Aninat Schwencke & Cia

Ashurst Australia

Avah Legal

Baker & McKenzie LLP

Barretto Ferreira e Brancher (BKBG)

Berger & Montague, PC

Cleary Gottlieb Steen & Hamilton LLP

Clifford Chance LLP

Dhir & Dhir Associates

DLA Piper Spain SL

Dorda Brugger Jordis

ENS (Edward Nathan Sonnenbergs)

Jun He Law Offices

Mannheimer Swartling

McDermott, Will & Emery

McMillan LLP

Meyerlustenberger Lachenal Avocats – Attorneys at Law

Milbank Tweed Hadley & McCloy LLP

Motieka & Audzevičius

Osborne Clarke

Rajah & Tann LLP

Skadden, Arps, Slate, Meagher & Flom LLP

Skrine

Smeets van Empel advocaten

Vasil Kisil & Partners



Private Antitrust Litigation 2014

Consulting editor
Samantha Mobley
Baker & McKenzie LLP

Publisher
Gideon Robertson

Business development managers
Alan Lee
George Ingledew
Dan White

Account manager
Zosia Demkowicz
Megan Friedman

Trainee account managers
Cady Atkinson
Joseph Rush
Dominique Destrée
Emma Chowdhury

Media coordinator
Parween Bains

Administrative coordinator
Sophie Hickey

Trainee research coordinator
Robin Synnot

Marketing manager (subscriptions)
Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production
Adam Myers

Production coordinator
Lydia Gerges

Senior production editor
Jonathan Cowie

Subeditor
Anna Andreoli

Director
Callum Campbell

Managing director
Richard Davey

Private Antitrust Litigation 2014
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013
No photocopying: copyright licences
do not apply.
First published 2003
11th edition
ISSN 1742-2280

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2013, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

Plaintiff Overview Merrill G Davidoff, Michael Dell'Angelo and Zachary D Caplan <i>Berger & Montague, PC</i>	3
Australia Ross Zaurini and Elizabeth Sarofim <i>Ashurst Australia</i>	6
Austria Stephan Polster <i>Dorda Brugger Jordis</i>	12
Brazil Paulo Brancher and Luiz Eduardo Salles <i>Barretto Ferreira e Brancher (BKBG)</i>	17
Canada David Kent, Éric Vallières and Lisa Parliament <i>McMillan LLP</i>	24
Chile Luis Alberto Aninat, Javier Velozo, Ximena Rojas and Cristián Banfi <i>Aninat Schwencke & Cia</i>	30
China George (Zhao) Wang, Christine Kang, Stanley Wan and Mark H Chu <i>Jun He Law Offices</i>	34
England & Wales Elizabeth Morony and John Alderton <i>Clifford Chance LLP</i>	40
EU Overview Thomas Funke <i>Osborne Clarke</i>	57
France Jacques Buhart and Lionel Lesur <i>McDermott, Will & Emery</i>	60
Germany Alexander Rinne <i>Milbank Tweed Hadley & McCloy LLP</i>	68
India Rahul Goel and Anu Monga <i>Dhir & Dhir Associates</i>	74
Italy Mario Siragusa, Marco D'Ostuni and Cesare Rizza <i>Cleary Gottlieb Steen & Hamilton LLP</i>	79
Japan Hideto Ishida <i>Anderson Mori & Tomotsune</i>	88
Lithuania Mantas Gudžiūnas, Ramūnas Audzevičius and Beata Kozubovska <i>Motieka & Audzevičius</i>	93
Malaysia Lim Koon Huan and Jason Teoh Choon Hui <i>Skrine</i>	99
Mexico Ronald Prat <i>Avah Legal</i>	104
Netherlands Mark Smeets, Martijn van Empel and Loes Brekhof <i>Smeets van Empel advocaten</i>	108
Singapore Kala Anandarajah <i>Rajah & Tann LLP</i>	114
South Africa Mark Garden, Rutendo Hlatshwayo and Schalk van Rensburg <i>ENS (Edward Nathan Sonnenbergs)</i>	118
Spain Juan Jiménez-Laiglesia, Alfonso Ois, Raúl Partido and Samuel Rivero <i>DLA Piper Spain SL</i>	127
Sweden Tommy Pettersson, Stefan Perván Lindeborg and Henrik Andersson <i>Mannheimer Swartling</i>	134
Switzerland Christophe Rapin, Martin Ammann and Pranvera Këllezhi <i>Meyerlustenberger Lachenal Avocats – Attorneys at Law</i>	139
Turkey M Fevzi Toksoy and Şahin Ardiyok <i>Actecon Danışmanlık AŞ</i>	144
Ukraine Oleksiy Filatov and Andriy Stelmashchuk <i>Vasil Kisil & Partners</i>	150
United States Gary A MacDonald, James Keyte, Tiffany Rider and Anjali B Patel <i>Skadden, Arps, Slate, Meagher & Flom LLP</i>	154

Switzerland

Christophe Rapin, Martin Ammann and Pranvera Këllezi

Meyerlustenberger Lachenal Avocats – Attorneys at Law

Legislation and jurisdiction

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

Private antitrust litigation started with the first law on the protection of competition in 1962. It has developed slowly but surely. In the past decade private claims, in particular requests for interim measures, have increased significantly. The procedure before the Competition Commission remains the most used way by competitors.

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

In Switzerland private antitrust actions are mandated by statute. They can be introduced by claimants being affected by a restriction of competition, including indirect purchasers.

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

The Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995 RS 251 (the Cartel Act) provides for civil antitrust action against undertakings infringing the Cartel Act. Under article 12 of the Cartel Act, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request from the courts:

- the elimination of or desistance from the hindrance;
- damages and satisfaction in accordance with the Code of Obligations RS 220 (CO); or
- the surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Hindrances of competition include in particular the refusal to deal and discriminatory measures.

Claims against competition restrictions can be also found in article 28 of the Swiss Civil Code of 10 December 1907 RS 210 (CC). Article 28 CC protects personality rights, including economic rights. The applicant may ask the court to prohibit a threatened infringement, to order that an existing infringement cease, or to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

Besides the Cartel Act, the Swiss Federal Law against Unfair Competition of 19 December 1986 RS 241 (the Unfair Competition Act) is also pertinent for private antitrust actions. According to article 9 of the Unfair Competition Act, whoever suffers or is likely to suffer prejudice to his clientele, his credit or his professional reputation, his business or his economic interests in general through an act of unfair competition may request the courts:

- to prohibit an imminent prejudice;
- to remove an ongoing prejudice; or
- to establish the unlawful nature of a prejudice if the consequences

still subsist. He may, further, institute proceedings for damages and redress and may also require the surrender of profits in accordance with the provisions on agency without authority.

The actions should be brought before the higher civil cantonal courts. As was the case in the past, the new Swiss Federal Code of Civil Procedure of 19 December 2008 RS 272 (CCP), in force as of 1 January 2011, requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the Unfair Competition Act. The 'single cantonal court' has exclusive jurisdiction to order interim measures. The parties are exempted from filing an ordinary prior compulsory conciliation procedure. Concurrently to the Cartel and Unfair Competition Acts, the plaintiff may base its claim on other legislation and present it before the single cantonal court. The respondent may however only bring counterclaims falling under the jurisdiction of the same single cantonal court.

- 4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

Private actions are available to any natural or legal person hindered from an unlawful (horizontal or vertical) agreement according to article 5 of the Cartel Act or from a unilateral abuse of a dominant undertaking according to article 7 of the Cartel Act. A finding of infringement by the Competition Commission is not a precondition to initiate a private antitrust action. No action can be brought for infringement of merger control provisions.

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

Only natural or legal persons hindered from entering or competing in a market may bring an action before courts. The person should be an undertaking within the meaning of the Cartel Act to be likely to be hindered in the competition process. The hindrance need not take place on the same market of the defendant. Actual or potential competitors, as well as direct or indirect purchasers, have legal standing against restrictive practices or agreements impeding them to enter a market, but not final consumers.

Trade or consumer organisations possess legal standing provided they are undertakings under the Cartel Act (which means that they exercise a commercial activity) and are hindered in the process of competition. The issue of their standing to protect members' interests as was the case under the former Cartel Act of 1962, however, remains disputed. In principal, the legal literature tends to recognise trade or consumer organisations' active legal standing with regard to actions for injunctions to terminate a restriction of competition, but not with regard to actions for damages incurred by their members.

The new CCP recognises active standing to associations and other organisations of national and regional importance to bring action in their own name against violations of the personality rights under article 28 CC of their members. Personality rights also include in principle economic rights and thus, at least in theory, trade or consumer organisations may claim for the prohibition of an existing or threatened violation of personality rights (for instance prohibition of a boycott or a refusal to deal). The question of individual consumers is disputed in the legal doctrine, however any consumer would have legal standing to bring an action for damages under tort law.

For individuals, the jurisdiction lies with the court of respondent's domicile or with the court of the injured party's domicile. For legal entities and other institutions, the jurisdiction lies with the court of their seat or with the court at their place of business (or place of their branch offices). In addition, the court of the place where the tortious act was committed or produced effects is competent.

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

Private antitrust actions can be brought against corporations and individuals. For corporations and individuals from other jurisdiction the Swiss Federal Act on Private International Law of 18 December 1987 RS 291 (the PIL Act) or the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention) apply.

Private actions can be brought against individuals from other jurisdictions at the Swiss court of the respondent's domicile in Switzerland or, in the absence of domicile, those at his place of habitual residence. The domicile in the meaning of the Civil Code comprises (i) an objective element of residence: the centre of personal activities in Switzerland creates a preponderant link; and (ii) a long-lasting intention to settle in Switzerland. In addition, action may be brought before the Swiss court at the place in which the harmful event occurred or the resultant injury was produced.

Regarding corporations having their seat abroad, jurisdiction lies with the Swiss court of their branch office in Switzerland. In addition, action may be brought before the Swiss court at the place in which the harmful event occurred or the resultant injury was produced.

In case of several respondents, a claim based essentially on the same facts and grounds can be referred against all of them to a cantonal court having jurisdiction; the first judge has exclusive jurisdiction.

Private action procedure

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

Litigation costs may be funded by a third party.

Contingency fees conditional upon a favourable result are prohibited. In addition, a lawyer cannot accept to waive the fees in the event of an unfavourable judgment. However, additional fees calculated according to the result obtained are permitted (*pactum de palmario*).

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

Pretrial discovery procedures are not available in Switzerland. In exceptional circumstances, the court may take evidence at any time, even before the proceeding becomes pending, where the plaintiff establishes in a plausible manner that evidence is endangered (eg, there is a risk of evidence destruction or disappearance) or that it has an interest worthy of protection. The parties to a lawsuit have a

general duty to cooperate, but there are no administrative or criminal sanctions for refusal to cooperate, contrary to the situation of third parties. The court takes the parties' refusal into account when weighing evidence and may regard the alleged facts as established.

Discovery toward a person or corporation that is not party to a lawsuit (third-party discovery) is possible. Third parties have a duty to cooperate in the taking of evidence. In particular, they may be compelled to make a deposition, to produce documents and to allow inspection of their property. The court's order should make a general description of the required documents in relation to specific facts and a determined period; fishing expeditions are prohibited. If a third party refuses to cooperate without justification, the court may impose a fine up to 1,000 Swiss francs, may threaten it with a criminal penalty for non-compliance with an official order, and eventually order law enforcement.

10 What evidence is admissible?

The following means of evidence are admissible: witness testimony, party testimony and testimony given under oath, documents, inspections, expert opinions and written information. The parties may agree that certain facts shall be established by an expert arbitrator; the arbitrator's opinion is binding to the court, unless the opinion has been established in an impartial manner or is manifestly incorrect.

11 What evidence is protected by legal privilege?

Parties to a lawsuit and third parties may refuse to produce correspondence of independent, qualified lawyers to the extent it concerns the professional representation of that party. The protection covers all documents exchanged with the counsel irrespective of the location where the documents are kept in custody (client or lawyer's office). The protected documents extend to letters, emails, advice, briefing notes, internal notes taken by lawyers, meeting minutes, strategic documents or memos, draft contracts, or settlements, irrespective of when such documents were drafted, including before or after the initiation of the procedure.

Advice from in-house counsels is not privileged.

Trade secrets such as know-how, a list of business clients, or financial accounting documents, are specifically protected during the taking of evidence. The parties may request the non-disclosure of documents or censor trade secrets.

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

There are no criminal provisions condemning infringements of competition under the Cartel Act.

If, however, the same matter is prohibited by the Swiss Criminal Code (eg, destruction of a competitor's plant), aggrieved parties may raise a civil claim within the framework of the criminal procedure or separately, based on article 41 CO. In principle, the judge in charge of the criminal procedure also rules on civil claims, except where the damage was not clearly determined in the request or the damage calculation requires substantial efforts.

The judgment of a criminal court as to the guilt and to the determination of the damage and the provisions of the criminal law concerning criminal responsibility are not binding upon a civil judge.

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

Leniency applicants are not protected from litigation based on an earlier infringement decision by the Competition Commission

(follow-on litigation). However, the Competition Commission is under no express legal duty to cooperate and provide judicial assistance to civil courts. It may thus refuse to grant access to documents produced by and detrimental to leniency applicants. To date, the Competition Commission has not disclosed documents submitted by leniency applicants to civil courts. The protection of leniency applicants from follow-on private litigation is one of the objectives of the Competition Commission, which justifies oral submissions by leniency applicants and restricts the right of access to files for other members of the cartel (see article 9(1) of the Commission notice on fines). This objective was clearly stated in a recent decision of the Competition Commission, whereby it held that the other concerned parties to an investigation have the right to consult documents submitted by leniency applicants only at its premises and denied such concerned parties the right to make photocopies (decision of 10 August 2011, case 22-0385, *Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau*).

As explained above, there are no criminal proceedings with regard to the Cartel Act. A plaintiff who was party to a criminal proceeding may produce any document before the civil judge. A party that was not party to a criminal proceeding may request that the civil judge orders the transmission of the files to the civil procedure; however, the judge will consider the necessity of such transmission and the interest of all parties, in particular the other party's interest to the secrecy of their criminal proceeding.

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

A party may request the stay of civil proceedings particularly if the decision depends upon or is liable to be influenced by the outcome of another proceeding, or to allow the parties to settle the case through mediation or negotiation.

In addition, the court should stay the proceedings and refer to the Competition Commission for an expert opinion if the legality of a restraint of competition is questioned in the course of civil proceedings (article 15(1) of the Cartel Act). The judge is obliged to request an expert opinion if there are doubts on the qualification of a competition restraint and the issue has an influence on the outcome of the case presented before it. The expert opinion is not binding on the civil judge. The provision does not apply to interim measures.

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

In private litigation, the burden of proof lies with the plaintiff. The judge decides on the balance of probabilities.

The Cartel Act establishes rebuttable presumptions for hardcore horizontal agreement and vertical price fixing, which apply to private litigation. According to article 5(3) of the Cartel Act, agreements between actual or potential competitors to directly or indirectly fix prices, to limit the quantities of goods or services to be produced, purchased or supplied, and agreements to allocate markets geographically or according to trading partners are presumed to lead to the elimination of effective competition and are therefore unlawful. Vertical agreements between undertakings at different levels of the production and distribution chain imposing a fixed or minimum price, and allocating territories (provided that sales by other distributors into these territories are not permitted) are also presumed restricting competition and are thus regarded as unlawful.

In principle, the Competition Commission does not use a form-based approach for other agreements or unilateral abuses of dominant position. Therefore, the decision-making practice has not established other per se prohibitions.

If the Competition Commission has declared by decision a practice as unlawful, the civil judge will regard an unlawful act as

established under tort law. Independently of the rules on the burden of proof with regard to unlawful restraints of competition, under tort law whoever claims damages must prove the damage and quantify it. There are no presumptions or rules of thumb on quantification of damages. Therefore, any claimant, including direct or indirect purchasers, must prove and quantify its damage. The defendant has a duty to allege the passing-on damage, but the ultimate burden of proof in connection with the quantification of damages lies with the claimant. If the plaintiff cannot establish the exact amount of damages, the judge assesses them at his discretion. The assessment takes account of the circumstances surrounding the case and the degree of fault.

The same rules on the burden and standard of proof apply to competitors as well as to direct and indirect purchasers.

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

The timetable for the proceedings is dependent on the difficulty of the case, and due to the recent entry into force of the new CCP, the following timetables constitute an estimate only. A proceeding before the court of first instance may take from one to two years, and the whole procedure (including appeals to the Supreme Federal Court) may last up to three years.

Interim measures are in principle decided within one to three months, depending on the cantonal jurisdiction; it is possible to request super-provisional measures when the restraint of competition risks driving a competitor out of the market, however the plaintiff should prove that the urgency of the situation is such that it cannot afford to wait for the hearing of the other party.

With regard to collective proceedings, please see the response to question 19.

17 What are the relevant limitation periods?

The claims for damages are barred by the statute of limitations after one year from the date when the damaged person has received knowledge of the damage and, in any event, after 10 years from the date when the act causing the damage took place. If the unlawful anti-competitive behaviour constitutes a criminal offence, the corresponding (longer) statute of limitations provided for under the criminal law applies to the civil claim as well.

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

Against the decision of the cantonal court, an appeal can be brought before the Federal Supreme Court. The Federal Supreme Court decides on the points of law, and reviews the facts only if they are established in an arbitrary way by the cantonal court.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings are not available in Switzerland.

Associations may act to protect members' interests under certain conditions and subject to the same controversy applicable to individual consumers (see question 5).

20 Are collective proceedings mandated by legislation?

See question 19.

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

See question 19.

22 Have courts certified collective proceedings in antitrust matters?

See question 19.

23 Can plaintiffs opt out or opt in?

See question 19.

24 Do collective settlements require judicial authorisation?

See question 19.

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

Switzerland is divided in cantons that remain competent to organise their courts. Since 1 January 2011, civil procedure rules have been unified in a single federal legislation applicable to all cantonal jurisdictions. Cantonal courts therefore apply the same procedural rules and obviously the same substantial antitrust rules as well as other relevant federal legislation. Although forum shopping is possible in theory, the unification of procedural rules makes it relatively without interest.

A dispute regarding the same matter between the same parties cannot be brought before more than one authority. The claim is admissible only if the dispute is not the subject of a pending litigation elsewhere in Switzerland. The cantonal court having subject matter competence and territorial competence issues a single ruling in Switzerland.

With regard to collective proceedings, please see question 19.

26 Has a plaintiffs' collective-proceeding bar developed?

See question 19.

Remedies

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

The plaintiffs (the hindered party) may claim damages in conformity with the principles of tort law. The Cartel Act refers to article 41ff CO, according to which whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages. Alternatively, the plaintiff may request the surrender of unlawfully earned profits according to article 12 I/c of the Cartel Act. The damage should be in a natural causality with the unlawful anti-competitive conduct (see judgment of the Supreme Court of 23 May 2013, cause 4A_449/2012, pt 12, where the court held that loss of profit cannot be compensated in absence of natural causality with the anti-competitive conduct).

The damage corresponds to the difference between the profits that the aggrieved person would have obtained in absence of the unlawful conduct and the current status of the profits. They are therefore limited to the actual loss. The damage includes the loss of profits (*lucrum cessans*) as well as the additional costs that the plaintiff should support due to the unlawful conduct of a competitor (*damnum emergens*). However, a pure loss of opportunity is not compensated. The burden of proof lies with the plaintiff who should prove the damage according to the standard of the highest probability, but if the damage is difficult to estimate, the judge decides the amount of damage at his discretion. The plaintiff can reserve the right to increase his claim for damages suffered after the introduction of his request.

In one of the first cases ruled in 1965, the damage resulting from a discriminatory refusal to grant rebates was calculated with

reference to the amount of the rebate that should have been granted to the plaintiff (as a percentage rate of the turnover made by him) (ATF 91 II 25, p. 38ff, pt. 5). The damage from a refusal to supply (boycott) was calculated with reference to the additional price and to the additional transport costs that the plaintiff had to pay to acquire the goods elsewhere (ATF 99 II 228). The damage resulting from an exclusive agreement between a funeral parlour and a public hospital were estimated by reference to the profit that an average funeral parlour would make in the event of a death multiplied by the average number of deaths that would have been attributed to the excluded competitor in absence of the exclusive agreement; the court compared this estimate to the market share of a new competitor in another canton (judgment of the Commercial Court of Aargau of 13 February 2003, published in DPC 2003/2, p. 451, pt. 9).

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

In addition to claims for damages, plaintiffs may request to the court injunctive or performance claims and declaratory reliefs. Courts may also order interim remedies.

Claims for performance aim to obtain that the defendant be ordered to perform, refrain from or tolerate something. In competition law, article 12(1)(a) of the Cartel Act provides for injunction relief whereby the plaintiff may request the elimination of or desistance from the hindrance resulting from an unlawful restraint of competition. The prohibition order may cover current or imminent restraints of competitions. In a recent case, the Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing a cheese maturing cellar, in addition to ordering access to the maturing cellar to a non-member (judgment of the Supreme Court of 23 May 2013, cause 4A_449/2012; the lower civil court issued such order ignoring the Competition Commission's expert opinion against the duty to deal).

Plaintiffs may seek a court declaration (declaratory relief) on the existence or inexistence of a right, including the establishment of the unlawful nature of a restriction of competition (unlawful agreement or abusive practice). Declaratory relief is admissible only if other type of claims is not available and implies a current and ongoing unlawful restriction of competition.

The courts may order interim measures if the plaintiff brings *prima facie* evidence that (i) a right to which it is entitled is being or threatened to be violated and (ii) such violation is liable to cause a not easily repairable harm to the applicant. The court may order in particular the prohibition of an act or the cessation of an unlawful situation, or the performance in kind. Given that the harm resulting from anti-competitive behaviour might not be fully compensated by damages or the restitution for the unlawful profits, interim measures constitute the main object of private civil claims. For instance, the Cantonal Court of Valais ordered the Swiss Football League to integrate the Football Club of Valais in its national soccer competitions (judgment of the Cantonal Court of Valais of 20 October 2003, published in DPC 2003/4, p. 972; cf. also a similar judgment of the Canton Aargau of 19 October 2004, published in DPC 2004/4, p. 1,203). The Cantonal Court of Vaud ordered a telecommunications company to grant access to its telecommunications network and to supply telecommunications services under reasonable conditions to a competitor (judgment of 12 February 2004, published in DPC 2004/4, p. 1,213). The Cantonal Court of Vaud ordered a European sport federation to invite an athlete to one of its competitions; a recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their doping offences from the past, was considered as infringing rules on abuse of dominant position (article 7 Cartel Act) and harming athletes' personality rights (article 28 CC) (judgment of 24 June 2011, published in CaS 2011, 282). Performance (including injunctive) claims as well as declaratory reliefs are not subject to limitation periods.

Update and trends

On 15 July 2010, the Swiss Federal Council prepared a bill aimed at amending the Cartel Act. The relevant provisions regarding private antitrust actions are the recognition of legal standing to final consumers and the suspension of the statute of limitations for civil actions during an investigation of alleged anti-competitive practices by the Competition Commission. On 23 September 2011, the Swiss Federal Council prepared a bill amending article 5 of the Cartel Act by introducing an un rebuttable presumption for hard-core horizontal agreement and vertical price fixing. Both bills were submitted to the parliament and are expected to be adopted by the end of the year.

29 Are punitive or exemplary damages available?

The Swiss tort law does not allow for punitive or exemplary damages.

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

Under request, the judge grants interests on damages. The interests start to apply from the date of the claim.

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

There is no case law on the subject. In principle the civil judge is not bound by decisions taken by other authorities and may grant damages caused to an aggrieved party independently of a fine imposed by the Competition Commission. The fines provided for in the Cartel Act aim at preventing restrictions of competition in the general interest, and not compensating the individual competitors or consumers for the damage suffered by them.

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

The court costs and the party compensations are charged to the unsuccessful party (ie, the plaintiff if the claim is not admitted to the court or withdrawn, the defendant if the claim is accepted). The party compensation includes the expenses and the costs for professional representation. The unsuccessful party pays the other party the awarded compensation, and reimburses it for the advances. In case of settlement, the parties agree on the cost allocation.

The court may request from the plaintiff an advance up to the amount of the expected costs. The actual costs are set off against the advances paid by the parties.

33 Is liability imposed on a joint and several basis?

Yes. Under tort law, if several persons have jointly caused damage, they shall be jointly and severally liable to the damaged party.

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

The judge decides whether and to what extent the defendants have a right of recourse against one another. In addition, the defendants can raise independent claims against each other. The same principles apply to the recourse among persons liable for the same damage based on different legal grounds, whether due to tort, in contract, or as a result of a legal requirement. However, the person who caused damage through an unlawful act shall compensate the damage in the first place.

35 Is the 'passing-on' defence allowed?

The passing-on defence is not expressly recognised and has not been the object of court decisions. However, the above-mentioned principles of Swiss tort law focus on the actual damage suffered by the plaintiff and allow a defendant to argue that the plaintiff's loss has been reduced because it has passed them partly or totally to his customers (the indirect purchasers) or the final consumers.

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

Other possible defences relate to the conditions of tort liability. The defendant may allege the absence of causality between the damage and the restraint of competition or the absence of fault. In addition, the defendant may ask the judge to reduce the amount of compensation if the plaintiff's behaviour causes the damage to increase or not to diminish.

37 Is alternative dispute resolution available?

Parties may choose to negotiate and settle their dispute through mediation or rely on arbitration.

meyerlustenberger | lachenal

Christophe Rapin
Martin Ammann
Pranvera Këllezi

christophe.rapin@mll-legal.com
martin.ammann@mll-legal.com
pranvera.kellezi@mll-legal.com

65 rue du Rhône
1211 Genève 3
Switzerland

Tel: +41 22 737 10 00
Fax: +41 22 737 10 01
www.mll-legal.com



Annual volumes published on:

Acquisition Finance	Life Sciences
Air Transport	Mediation
Anti-Corruption Regulation	Merger Control
Anti-Money Laundering	Mergers & Acquisitions
Arbitration	Mining
Asset Recovery	Oil Regulation
Banking Regulation	Outsourcing
Cartel Regulation	Patents
Climate Regulation	Pensions & Retirement Plans
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection & Privacy	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign	Restructuring & Insolvency
Judgments	Right of Publicity
Environment	Securities Finance
Foreign Investment Review	Shipbuilding
Franchise	Shipping
Gas Regulation	Tax Controversy
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property &	Telecoms and Media
Antitrust	Trade & Customs
Labour & Employment	Trademarks
Licensing	Vertical Agreements



**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association