

# Private Antitrust Litigation

In 24 jurisdictions worldwide

*Consulting editor*  
**Samantha Mobley**



**2015**

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Private Antitrust Litigation 2015

*Consulting editor*  
**Samantha Mobley**  
**Baker & McKenzie LLP**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
George Ingledeu  
george.ingledeu@lbresearch.com

Alan Lee  
alan.lee@lbresearch.com

Dan White  
dan.white@lbresearch.com

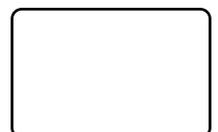


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014  
No photocopying: copyright licences do not apply.  
First published 2003  
12th 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 August 2014, be advised that this is a developing area.

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



## CONTENTS

<b>Plaintiff Overview</b>	<b>5</b>	<b>Italy</b>	<b>80</b>
Daniel C Hedlund and Michelle J Looby Gustafson Gluek PLLC		Mario Siragusa, Marco D'Ostuni and Cesare Rizza Cleary Gottlieb Steen & Hamilton LLP	
<b>Defendant Overview</b>	<b>8</b>	<b>Japan</b>	<b>88</b>
Van Beckwith, Charles Loughlin and Matthew Adler Baker Botts LLP		Hideto Ishida Anderson Mōri & Tomotsune	
<b>Antitrust in American Health Care</b>	<b>11</b>	<b>Lithuania</b>	<b>92</b>
Richard Feinstein, Nicholas Widnell, Chris Renner and Jenné Ayers Boies, Schiller & Flexner LLP		Ramūnas Audzevičius Motieka & Audzevičius	
<b>EU Overview</b>	<b>14</b>	<b>Malaysia</b>	<b>97</b>
Thomas Funke Osborne Clarke		Lim Koon Huan and Jason Teoh Choon Hui Skrine	
<b>Australia</b>	<b>17</b>	<b>Mexico</b>	<b>101</b>
Ross Zaurrini and Elizabeth Sarofim Ashurst Australia		Ronald Prat Avah Legal	
<b>Austria</b>	<b>23</b>	<b>Netherlands</b>	<b>105</b>
Stephan Polster Dorda Brugger Jordis		Mark Smeets, Martijn van Empel and Loes Brekhof Smeets van Empel advocaten	
<b>Canada</b>	<b>27</b>	<b>Scotland</b>	<b>111</b>
David Kent, Éric Vallières and Lisa Parliament McMillan LLP		Catriona Munro and Jennifer Marshall Maclay Murray & Spens LLP	
<b>Chile</b>	<b>32</b>	<b>Slovakia</b>	<b>117</b>
Luis Alberto Aninat, Javier Velozo and Ximena Rojas Aninat Schwencke & Cía		Michal Pališín White & Case sro	
<b>China</b>	<b>36</b>	<b>South Africa</b>	<b>121</b>
Christine Kang, George (Zhao) Wang, Stanley Wan and Mark H Chu Jun He		Mark Garden and Lufuno Shinwana ENSafrica	
<b>Denmark</b>	<b>42</b>	<b>Spain</b>	<b>128</b>
Henrik Peytz, Thomas Mygind and Katrine Lapp Nielsen Nørager Law Firm LLP		Juan Jiménez-Laiglesia, Alfonso Ois, Raúl Partido and Samuel Rivero DLA Piper Spain SL	
<b>England &amp; Wales</b>	<b>47</b>	<b>Sweden</b>	<b>134</b>
Elizabeth Morony and Ben Jasper Clifford Chance LLP		Tommy Pettersson, Stefan Perván Lindeborg and Henrik Andersson Mannheimer Swartling	
<b>France</b>	<b>63</b>	<b>Turkey</b>	<b>138</b>
Jacques Buhart, Lionel Lesur and Louise Aberg McDermott Will & Emery		Bahadır Balkı, Sinem Uğur and Sera Erzene Yıldız ACTECON Competition & Regulation Consultancy	
<b>Germany</b>	<b>70</b>	<b>United States</b>	<b>143</b>
Alexander Rinne Milbank, Tweed, Hadley & McCloy LLP		James A Keyte, Gary A MacDonald, Tiffany Rider and Anjali B Patel Skadden, Arps, Slate, Meagher & Flom LLP	
<b>India</b>	<b>76</b>		
Rahul Goel and Anu Monga Dhir & Dhir Associates			

# Preface

## Private Antitrust Litigation 2015

12th edition

**Getting the Deal Through** is delighted to publish the 12th edition of Private Antitrust Litigation, which is available in print, as an e-book, via the GTDT iPad app, and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured. Our coverage this year includes Denmark, Scotland and Slovakia and new chapters on Antitrust in American Health Care and a Defendant Overview.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com). This title is also available as an e-book and through the GTDT iPad app.

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

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

GETTING THE   
DEAL THROUGH 

London  
August 2014

# France

Jacques Buhart, Lionel Lesur and Louise Aberg

McDermott Will & Emery

## Legislation and jurisdiction

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

In France, private antitrust litigation and damages actions have been possible since competition law provisions were adopted in the European Union and in France, based on the French general rules of civil liability.

To summarise, to date there have been a very limited number of private enforcement cases and most decisions in the field of private antitrust litigation in France derive from individual actions. The main reason for this is the French legal principle of *nul ne plaide par procureur* ('no one shall plead by proxy'), which renders opt-out class actions inadmissible in France. At present, however, consumer associations can bring group actions, although in limited situations (see question 19).

Most judgments involving private antitrust litigation have been rendered by civil courts but other courts may have jurisdiction (see question 3).

The first important cases laying out the conditions for bringing private actions were *Mors v Labinal* (ruling rendered by the Commercial Court of Paris in 1992; initial ruling by the Court of Appeal of Paris rendered in 1993; ruling rendered by the Court of Cassation, which is the French Supreme Court for judicial matters, in 1995; and followed by a ruling of the Court of Appeal of Paris in 1998) and *CAMIF v UGAP* (ruling rendered by the Court of Appeal of Paris in 1998). In these cases, the French courts awarded damages to the claimants (respectively, in the amount of €5 million and €1.5 million) and held that the claimants were the victims of an abuse of a dominant position in both cases, and also of an illegal cartel in the first case.

A subsequent second wave of rulings occurred in 2004 and further entrenched private enforcement in France: *Vérimédia v Médiamétrie* (ruling of the Court of Appeal of Versailles), *Marbreries Lescarcelle and others v OGF* (ruling of the Court of Appeal of Paris) and *Télé2 v France Télécom* (ruling of the Commercial Court of Paris). Whereas in the two first cases, the claimants were respectively granted €100,000 and €1.5 million of damages, in the third case the court awarded the claimants the significant amount of €15 million (for 'win-back' practices implemented by France Télécom, which is the historically incumbent French telecommunications operator).

Most of these cases relate to individual exclusionary practices implemented by an undertaking in a dominant position.

Since then, there have not been many rulings by French courts in the context of private actions and only in a few cases have damages actually been awarded to the plaintiff. There are several reasons for this. First, in many cases the parties settle before the court makes a final ruling. Second, group action claims were only introduced very recently. Third, French courts are not at ease when it comes to damage assessment in antitrust cases. Despite this, courts have rendered some interesting rulings in this area, including, for example, rulings establishing conditions for the application and admissibility of the passing-on defence (rulings by the Commercial Court of Nanterre in 2006, by the Commercial Court of Paris in 2007, and by the Court of Cassation in 2010 and 2012 (see question 35)).

In April 2011, the European Commission (the Commission) launched a public consultation relating to collective redress. In response to this consultation, the French Competition Authority (FCA), formerly the Competition Council (following the adoption of the Law on the Modernisation of the Economy, enacted on 4 August 2008) indicated that follow-on actions, meaning actions pursuant to an infringement decision rendered by the Commission or by a national competition authority, should be treated in

priority before claims that are not based on an infringement decision by a competition authority.

On 18 March 2014, the French Consumer Act providing for the introduction of group actions in France was promulgated (see questions 19–26).

### 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?

Damages actions for competition infringements before a civil judge follow the general French rules governing civil liability. Consequently, whether in relation to tortious or contractual liability, plaintiffs must invoke both the provisions of the French Civil Code (FCC) and the relevant antitrust provisions. These relevant antitrust provisions can be found in either (i) the French Commercial Code, if French competition law is violated; or (ii) the Treaty on the Functioning of the European Union (TFEU), if European competition law is violated. Claims can also be based on criminal liability, since specific criminal offences cover certain types of anti-competitive behaviour. In such cases, the relevant legislation can be found in both the French Commercial Code and the French Criminal Code.

Applicable procedural rules can be found in the French Civil Procedure Code, the French Criminal Procedure Code, and the French Code of Administrative Justice.

Rules governing group actions are found in the French Consumer Code.

Finally, it must be noted that indirect purchasers can bring claims if they have standing to bring an action (see questions 4 and 35).

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

#### Relevant legislation

With regards to civil liability, (i) tort liability is covered by articles 1382 et seq of the FCC; (ii) contractual liability is covered by articles 1134 et seq of the FCC; (iii) injunctions are covered by articles 809 and 873 of the French Civil Procedure Code; and (iv) civil party petitions are covered by article 85 of the French Criminal Procedure Code.

A valid claim must be based on one of these provisions and on the relevant antitrust provisions, including (i) articles L. 420-1 (on anti-competitive agreements and concerted practices) and L. 420-2 (on abuses of a dominant position or of a state of economic dependency) of the French Commercial Code, for actions involving a violation of French competition law, and (ii) articles 101 and 102 TFEU for actions involving a violation of EU competition law. Claimants may invoke cumulatively French competition law and European competition law if both laws are violated.

Most private antitrust claims are based on theories of tort liability (articles 1382 et seq of the FCC). However, at least in theory, parties may also base their claims on contractual liability (articles 1134 et seq of the FCC), arguing that a contractual stipulation violates competition law. In this regard it is important to note that article L. 420-3 of the Commercial Code provides that contractual stipulations that are contrary to articles L. 420-1 and/or L. 420-2 of the Commercial Code are null and void.

With regard to criminal liability, several types of competition law infringements are condemned. First, according to article L. 420-6 of the Commercial Code, it is an offence for an individual to fraudulently take a personal and decisive part in the design, organisation, and implementation

of anti-competitive practices. This article has only been rarely applied, and when it was applied, it was generally applied against individuals who participated in cartels between companies in the context of a public procurement. Second, articles L. 442-2, L. 442-5, and L. 443-2 of the Commercial Code respectively penalise selling at a loss, imposing a minimum resale price, and artificially increasing or decreasing prices of goods or services, particularly in the context of distance auctions. In addition, article 432-14 of the Criminal Code condemns favouritism, namely, violating freedom of access and equality for candidates with regard to tenders for public service.

The conditions relating to the introduction of group actions can be found in articles L. 423-1 to L. 423-26 of the Consumer Code.

### Relevant courts

Decree No. 2005-1756 dated 30 December 2005 sets out 16 courts that are specialised in competition matters: there are eight commercial courts and eight civil courts located in Marseilles, Bordeaux, Lille, Lyons, Nancy, Paris, Rennes (all in metropolitan France), and Fort-de-France (which is in Martinique, one of the French overseas territories). The listed commercial courts have jurisdiction over litigation between commercial parties, while the listed civil courts have jurisdiction over cases between private litigants. However, both types of courts are competent to declare anti-competitive contracts null and void and to award damages resulting from a violation of competition law.

Concerning group actions, however, all civil courts are competent and not solely the eight civil courts specialised in competition matters (article L. 211-15 of the Code of Judicial Organisation).

When a case brought before a court encompasses two different claims, only one of which is based on a violation of competition law, the case will be dealt with by two different courts. In fact, the competition-related claim will be heard by the competent specialised court, while the other claim (including claims based on unfair competition or contract law) will stay within the jurisdiction of the court before which the claim was originally brought.

With specific regards to criminal offences, the competent courts are the criminal courts, and for cases involving a public entity, the competent courts are the administrative courts.

Rulings from these courts can be appealed, as will be explained in detail in question 18.

### 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 for any type of antitrust infringement because claimants only have to satisfy the general conditions that are imposed to bring a civil claim (such as standing, interest in the case, urgency or imminent damage for interim measures, etc). With respect to the specific condition relating to proving interest in the case, such interest must be personal, existing, real, and legitimate.

Consequently, competitors, direct purchasers, indirect purchasers, and contracting parties can bring private antitrust actions if they satisfy the aforementioned conditions. Under very strict conditions, it is also possible for certain authorised consumer associations to bring actions and claim compensation under tort law for damage to the collective interest they represent, which is caused by the violation of French competition rules (see question 9).

Private actions are not only available for cartel infringements but also for:

- abuses of a dominant position (see, for example, the ruling of the Commercial Court of Paris of 31 January 2012);
- unilateral anti-competitive practices (such as boycotts, resale price maintenance, or tying practices);
- non-compete clauses;
- any other anti-competitive contractual provisions (see, for example, the ruling of the Court of Appeal of Paris of 1 February 1995, that declared null and void an anti-competitive contractual clause);
- bid rigging (see, for example, the decision of the Conseil d'État, which is the French Supreme Court for administrative matters, of 19 December 2007, involving the SNCF, the French railway company, as plaintiff);
- criminal offences relating to competition law (such as selling at a loss); and
- any horizontal or vertical restraints.

Initially, the majority of private claims were brought in the context of vertical relationships (especially claims relating to the termination of distribution agreements; see, for example, the ruling of the Court of Appeal of Paris of 22 October 1997 concerning discrimination in the application of sales conditions). Today, however, it seems that parties tend to seek damages in the context of horizontal restraints (namely cartels) or abuses of a dominant position.

Parties may bring actions even without a finding of infringement by the FCA (group actions, however, are necessarily follow-on). However, since, when initiating a private antitrust action, parties must prove a fault (meaning a competitive infringement), in practice, a finding of infringement by the FCA may considerably assist them in proving such fault (see question 15).

### 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?

With regard to subject-matter jurisdiction, the competent courts are the 16 courts specialised in competition matters, as previously mentioned in question 3. They have exclusive jurisdiction over private antitrust litigation cases. As a reminder, all civil courts have jurisdiction concerning group actions.

With regard to territorial jurisdiction, civil actions based on antitrust claims must be brought before the specialised court of the judicial district of place of residence or place of business of the defendant. The plaintiff may choose between different courts if there are several defendants.

Depending on the type of action, however, there may be instances where other courts also have jurisdiction. Indeed:

- tort actions (such as an action brought by a victim against an undertaking that abused its dominant position) can also be brought before the court that is located where the anti-competitive practice occurred (meaning where the damage was caused) or where the damage was suffered;
- contractual actions (such as an action brought by a distributor against its supplier to invalidate a contractual clause allegedly violating competition law) can be brought before the court where the products were delivered (or the services provided) or where the main obligation of the contract was performed;
- administrative actions (meaning actions involving a public entity, which happens often in bid-rigging cases) must be brought before the administrative court located where the public contract was performed; and
- criminal actions (meaning cases where the violation of competition law is a criminal offence, such as selling at a loss) can be brought before the criminal court where the infringement occurred or where the defendant lived.

Additionally, it is generally possible for parties to insert a jurisdiction or arbitration clause in their contract to agree on the competent forum (bearing in mind that, once an arbitral award is rendered, parties can no longer seek tort damages for the very same infringement before a court).

Finally, once a claim is brought before a French court that considers that it has jurisdiction to hear the case, the case cannot be brought before any other court, and the first court therefore has exclusive jurisdiction.

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

Yes, private actions can be brought against both individuals and corporations.

With respect to individuals, as discussed in question 3, they risk criminal penalties under article L. 420-6 of the Commercial Code if they played a personal and decisive role in the design, organisation, or implementation of the anti-competitive practice in question. In such a case, the plaintiff can request damages against the individuals by joining the defendant to the criminal proceedings as a civil party.

However, the vast majority of private litigation cases involve corporations.

In any case, French courts have jurisdiction over foreign individuals and corporations if the anti-competitive practice took place in France or if the damage was suffered in France.

---

**Private action procedure**


---

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

Although third-party funding is uncommon in France, it is possible to receive such funding, but under very strict conditions. The third party must be validly and legally empowered to provide funding to the client. A frequent example of this situation arises in France when insurance companies offer litigation insurance and thereby agree to fund their clients' litigation expenses.

Furthermore, professional bar rules applicable to lawyers in France prohibit contingency fees, except where they merely add on to general fees, meaning where the fees are only partially contingent upon the result of the decision. Additionally, contingency fees can only be requested if the lawyer had requested them in advance and in writing. According to the French National Bar Council, a contingency fee that is merely supplementary to a fixed fee and that represents 10 per cent of the damages is considered reasonable. However, this is only a recommendation so contingency fees may exceed this limit, subject to compliance with the aforementioned rules.

**8 Are jury trials available?**

In France, jury trials are only available in criminal matters, but the criminal judge will alone decide on civil matters within such cases, not the jury.

**9 What pretrial discovery procedures are available?**

In France, there are no discovery and disclosure procedures. In particular, there is no pretrial discovery procedure similar to those that exist in common law countries.

However, prior to any lawsuit on the merits, parties can request that the court order investigatory measures in view of upcoming procedures (article 145 of the Civil Procedure Code). The goal of these measures is to reveal crucial facts or to preserve or establish key evidence. For instance, claimants may request access to the defendant's technical, accounting, or commercial data to rely upon in future proceedings.

According to article 9 of the Civil Procedure Code, the claimant has the burden of proof, and the defendant has no disclosure obligation other than the parties' general obligation to disclose documents they rely on to assert their arguments. Therefore, it is the claimant that must provide factual evidence of the alleged anti-competitive activity. However, article 10 enables the judge to order any measure of inquiry necessary for him or her to decide the case, and article 11 enables parties to demand that the judge order the opposing party (or third party) to disclose documents that are necessary to prove the alleged facts. The parties can try to resist these orders for legitimate reasons, such as by claiming that (i) the documents in question constitute business secrets protected by confidentiality rules; (ii) they are covered by the attorney-client privilege; or (iii) they cannot submit them because of force majeure. The judges will assess such arguments on a case-by-case basis (see questions 11 and 13).

Furthermore, based on article 144 of the Civil Procedure Code, the court may order preparatory inquiries at the parties' request if they are deemed necessary to resolve the dispute, and the court may amend, at any time, the scope, nature, and number of these inquiries (such as personal verifications, appointment of an expert, etc). Moreover, it is common practice in France for a judge to appoint an expert, in particular in competition cases where judges do not necessarily have the required skills to comprehend and decide on technical issues, such as the definition of the relevant market. In the event that the court appoints an expert, such expert can request that any party provide him or her with any document relevant to the inquiry. If a party is not cooperative, the court can impose periodic penalties.

Additionally, parties can request that the court order the disclosure of a document withheld by the opposing party (articles 138 et seq of the Civil Procedure Code). In this case, the requesting party must identify the document withheld by the opposing party, and the court can accept or refuse such request. In other words, this procedure does not allow for so-called 'fishing expeditions'.

Finally, parties can also request that the court order the FCA and the French Directorate General for Competition, Consumer Affairs, and Repression of Fraud (DGCCRF), which is the administrative service dealing with antitrust matters and antitrust investigations within the Ministry of Economy, to submit investigation reports or statements. This is usually allowed, which has considerably facilitated proving the anti-competitive infringements (see question 13).

**10 What evidence is admissible?**

On the one hand, in commercial cases, any evidence is admissible under the principle of freedom of evidence in commercial matters (article L. 110-3 of the Commercial Code).

On the other hand, in civil cases, while no specific type of proof is required to demonstrate facts, written evidence must be submitted to prove the existence of any contract which value exceeds €1,500 (under article 1341 of the FCC). Furthermore, what is called 'perfect' evidence (such as documentary evidence, decisive oaths, and judicial admissions) is binding on the judge; whereas 'imperfect' (meaning non-decisive) evidence (such as oral evidence, presumptions, and extrajudicial admission) is not binding on the judge. Consequently, the judge will discretionarily assess the weight of 'imperfect' evidence that was submitted and may rely on it in cases where it needs to complete other types of evidence.

**11 What evidence is protected by legal privilege?**

All documents and information linked to the lawyer's activity (whether in relation to litigation or not) are privileged (under article 66-5 of the Law of 31 December 1971). Therefore, the scope of the privilege is very broad and covers (i) consultations and exchanges between a lawyer registered with a French bar and his or her client, as well as between lawyers; and (ii) handwritten notes taken during client-lawyer meetings. Consequently, even documents relating to the negotiation of a deal are privileged.

Legal privilege is recognised by every French court, French police, and French administrative bodies such as the FCA (this is true in spite of the FCA's known and criticised practice seizing, during dawn raids, the entire content of mailboxes, including communications that are covered by legal privilege).

As of today, legal privilege only benefits independent lawyers registered with a bar. Consequently, in-house counsel do not benefit from the privilege since they are not registered as independent lawyers under French bar rules. However, there is an ongoing and growing debate regarding whether such privilege should extend to and cover in-house counsel in a manner similar to the protection afforded in the United States.

Finally, as explained in question 9, trade secrets may be privileged on a case-by-case basis, in which case the judge will determine whether there is a legitimate reason not to provide the piece of evidence in question.

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

Yes. The criminal judge may decide upon civil claims arising from a criminal case. Previously, courts applied the principle according to which a civil court dealing with the same matter as a criminal court must stay the proceedings until the criminal court's ruling. However, since the recent amendment to article 4 of the Criminal Procedure Code, this principle only applies when the purpose of the civil suit is to compensate the victim of the criminal offence for the damage directly suffered. This means that in all other cases, the civil court now has full discretion to decide whether or not to stay the proceedings when a case pending before a criminal court is likely to affect the potential outcome of the case pending before the civil court. Consequently, a party seeking to stay civil proceedings must now prove the existence of the criminal procedure, as well as its interest in suspending the civil proceedings (parties usually do this by invoking due process).

**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?**

First, the evidence in criminal proceedings is confidential because of the confidential nature of the procedure. Consequently, plaintiffs cannot rely on such evidence until the criminal procedure is closed. Once closed, the criminal ruling is likely to influence the civil court's ruling (bearing in mind that the civil court is not bound by the criminal court's ruling).

Second, leniency applicants are not protected from civil law consequences relating to their competitive infringement, as specified in the FCA's general guidelines on leniency, dated 2 March 2009 (section 47).

Article L. 463-6 of the Commercial Code prohibits the FCA from disclosing information covered by the investigative secrecy. The information contained in the FCA's file (that is linked to leniency applications) remains confidential until the final decision is issued. Moreover, the FCA does

not, on its own initiative, disclose documents to private claimants that are obtained in its investigations. Therefore, leniency applicants benefit from a certain level of protection.

Moreover, the adoption of a law on 20 November 2012 limits the transmission of documents pertaining to leniency applicants from the FCA to French courts. Indeed, it provides that the FCA may produce any documents to the courts as regards anticompetitive practices at stake in the proceedings before the court, with the exception of documents elaborated in the context of or obtained through the leniency programme (article L. 462-3 of the Commercial Code). The adoption of this law seems to show that there is more willingness in France to protect leniency applicants than to help private litigants in their damages actions.

However, concerning documents other than those pertaining to leniency applications, certain procedures enable civil courts to gain access to the FCA's file once the FCA issues its decision. In particular, article 138 of the Civil Procedure Code provides that a judge can order the production of documents if a party wishes to rely on (i) an official document; (ii) an agreement to which it was not a party; or (iii) any document held by a third party. On the basis of the aforementioned article 11 of the Civil Procedure Code, the FCA may deny such disclosure if it has legitimate reasons for doing so (such as the need to ensure the efficiency of leniency procedures). On 8 November 2011, the Commercial Court of Paris ruled that the production of documents from the FCA's file was not considered a disclosure of information protected by the investigative secrecy when the parties to the proceedings already have knowledge of the documents. Moreover, recently, the Court of Appeal of Paris ruled in a similar matter that the FCA could not be ordered to divulge documents contained in its file and related to a settlement procedure, but that a party to the procedure was free to produce such documents provided that they were necessary in order for him or her to defend itself (ruling of 20 November 2013).

It remains to be seen whether the Court of Cassation will confirm such interpretations.

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

According to articles 378 to 380-1 of the Civil Procedure Code, both parties can ask for a stay of proceedings but the judge has full discretion whether to grant it or not. Pursuant to general principles of French procedural law, the request must be made before any arguments on the merits of the case are made (article 74 of the Civil Procedure Code).

The judge can grant a stay of proceedings based upon due process, which is typically the case when the judge seeks to avoid two incompatible or even contradictory rulings being successively rendered. In this sense, it may make sense for the judge to grant a stay of proceedings in case of a follow-on private action when the relevant decision by the FCA is being challenged.

Furthermore, a court can stay proceedings until the FCA renders an opinion in accordance with article L. 462-3 of the Commercial Code. However, this opinion is not binding on the court.

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

The standard of proof is set forth by article 1382 of the FCC, which sets out the following conditions for proving tort liability under French law: claimants, either direct or indirect purchasers, must prove a fault, a damage, and a causal link between the fault and the damage. Generally speaking, the judge has wide discretionary powers to adjudge the evidence set forth by the parties.

Concerning the proof of a fault, the judge must be reasonably convinced of the related competitive infringement. Infringement decisions by the FCA do not strictly bind the judge except in the context of group actions (article L. 423-17 of the Consumer Code). However, a review of the existing case law pertaining to private actions shows that, in practice, French courts do consider that an FCA decision sanctioning a competitive infringement almost necessarily implies the existence of a fault. Consequently, the FCA's finding of a competition law infringement usually constitutes valid proof of a fault. Moreover, pursuant to article 16 of Regulation 1/2003, French courts are bound by decisions taken by the Commission, the General Court and the Court of Justice of the EU. This explains why claimants usually bring private actions only when an infringement decision has been rendered by a competition authority. As an example, in *Eco System* the Commercial Court of Paris ruled that it was bound by an infringement

decision made by EU institutions and that their finding of a competition law infringement constituted a fault within the meaning of article 1382 of the FCC (ruling of 22 October 1996). Very recently, the Court of Appeal of Paris confirmed being bound by a prior EU infringement decision in *JCB v Central Parts* (ruling of 26 June 2013).

Furthermore, the harm must be direct and certain. Indeed, damages exclusively aim at compensating for the entire injury directly suffered by the plaintiff. Under French law, plaintiffs can be compensated for pecuniary losses (loss of profit or lost earnings) and also, although more rarely, for non-pecuniary losses such as damage to the plaintiff's reputation (see question 27). It is often difficult for claimants to provide the court with a precise calculation of damages. This explains why claimants regularly use external experts to assist them in assessing damages, which also helps them to convince the courts of the accuracy of the damages calculation. It must be noted that there is no such thing as punitive damages under French law (see question 29).

The causal link between the fault and the damage must be direct. Quite often, parties are not compensated for damage allegedly suffered because courts consider that they did not sufficiently prove this causal link, namely, that the antitrust injury incurred resulted entirely from the anti-competitive conduct.

The burden of proof rests on the plaintiff, but the defendant is free to produce any evidence or document that will make it more difficult for the plaintiff to prove a fault, a damage, or a causal link. The judge has considerable discretion when appraising the evidence. The burden of proof concerning the passing-on defence will be explained in detail in question 35.

The judge, therefore, has significant discretion when assessing and deciding on the nature of the evidence and, if necessary, the judge can order inquiry measures to decide on the case.

In addition to the (recurrent) appointment of an independent expert, the judge can also request the FCA's opinion concerning both the factual and the legal aspects of alleged anti-competitive practices. However, this opinion is not binding on the courts.

Moreover, prior to the court's inquiry, the competition administration (Ministry of Economy) may have already conducted an inquiry of the facts, either at its own initiative or pursuant to a request by the plaintiff or a third party. In such case, the court can request a copy of the competition administration's findings.

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

Group actions have only recently been introduced in France and, accordingly, it is not yet possible to determine a typical timetable (see question 19).

It is somewhat difficult to provide a typical timetable for civil proceedings since this depends not only on the complexity of the case and on the availability of evidence but also on which specialised court is ruling on the case. In our experience, it is common for first instance proceedings before one of the 16 aforementioned specialised courts to last two to three years. In the event of an appeal, cases before the Court of Appeal of Paris, which has exclusive jurisdiction, last approximately 12 months. Finally, appeals before the Court of Cassation generally last between 12 and 18 months (however, these appeals are quite rare because they are limited to the appeal on points of law and not of fact; see question 19). Recently, however, proceedings seem to have been expedited, and this trend should and is likely to continue.

While it is not possible to accelerate the procedure, parties can request interim measures since general rules governing such measures cover competition cases (including articles 771, 808 et seq and 873 et seq of the Civil Procedure Code; see question 28). In particular, the president of the court can order the payment of interim damages if the claim is not seriously challenged (under article 771 of the French Civil Procedure Code).

#### **17 What are the relevant limitation periods?**

Antitrust claims based on tort liability must be brought within five years following the 'manifestation of the damage' (this is based on article 2224 of the FCC).

The date of the manifestation of the damage is the date on which the holder of the right to bring a claim becomes aware or should have become aware of the facts enabling him or her to exercise such a right. If he or she was not aware of the anti-competitive activity, a decision to fine made by the Commission or the FCA would set the starting date.

This legal limitation period can be amended by the parties (from at least one year to a maximum of 10 years), as well as the rules governing its temporary suspension or interruption. The opening of a proceeding before a competition authority (whether it is the FCA, a national competition authority of another member state or the European Commission) interrupts the limitation period until a definitive decision has been taken by this authority or, in the event of an appeal, by the jurisdiction concerned (article L. 462-7 of the Commercial Code).

As regards group actions, the time limit of five years starts from a definitive decision taken by the European Commission, national competition authorities or national courts (article L. 423-18 of the French Consumer Code). A decision is 'definitive' if all appeals relating to the facts have been exhausted at the time the group action is filed (article L. 423-17 of the Consumer Code). If an ongoing appeal is limited to the fine or the procedure, the appealed decision is still considered as definitive under this meaning.

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

Appeals against first instance decisions, meaning rulings rendered by commercial and civil courts, must be brought before the Court of Appeal of Paris (which has exclusive jurisdiction) within one month following the date on which the ruling was served on the parties. Rulings rendered by criminal courts must be appealed within 10 days of the decision being rendered, before the court of appeal which has territorial jurisdiction. Lastly, appeals against rulings made by administrative courts must be filed with the administrative court of appeal which has territorial jurisdiction, within two months following the date on which the ruling was served on the parties.

Appeal decisions can be challenged before either the Court of Cassation or the Conseil d'État, depending on the type of case, within two months following the date on which the appeal decision was served on the parties. It is worth mentioning, however, that these courts only decide on issues of law (as opposed to questions of fact).

### **Collective actions**

#### **19 Are collective proceedings available in respect of antitrust claims?**

Certain authorised associations can bring actions in the representation of a collective interest, if the collective interest is separate from the individual interests of each of their members (article L. 421-1 of the Consumer Code). The collective interest is assessed according to the corporate purpose of the association (for example, in a ruling rendered by the Court of Appeal of Agen on 4 May 2004, a consumer association called UFC Que choisir was awarded €5,000 for injury to its collective interest). Consumer associations can also bring actions on behalf of individual interests if they obtain mandates from individual consumers to represent them (articles L. 422-1 et seq of the Consumer Code).

Moreover, a law introducing collective actions in French law was promulgated on 18 March 2014. Under such law, consumers may file claims through consumer groups that are represented by government-approved associations (as of today, there are 16 government-approved associations). Such associations may introduce damages actions before civil courts for the individual harm suffered by consumers placed in a similar or identical situation, the common cause of which is the breach of competition law by the same professional(s). It should be noted that consumer groups are prohibited from advertising their course of action to consumers.

Concerning the procedure, the judge issues one single decision in which he rules on the following aspects: (i) in a first stage, once the judge rules that the action is admissible, he decides on the principle of the professional's responsibility; and (ii) in a second stage, he defines the group of consumers in relation to whom the professional is liable, defines the criteria for joining the group and determines the type of harm that may be repaired along with the amount of damages to be awarded (article L. 423-3 of the Consumer Code).

Individual consumers may then join the group within a certain timeframe, as specified in the decision, in order for their loss to be repaired (article L. 423-5 of the Consumer Code). The French group action is thus not an 'opt-out' procedure but rather a specific and unique 'opt-in' procedure.

The law also provides for a simplified procedure when the court is aware of the identity and the number of victims, and when victims have suffered damages of the same amount. Under such system, after having

ruled on the liability of the professional, the court may impose on them the obligation to directly and individually compensate the victims within a specified timeframe and according to terms decided by the court. Prior to any compensation, however, victims who have been informed individually by the court must accept the compensation within the terms of the court's decision (article L. 423-10 of the Consumer Code).

#### **20 Are collective proceedings mandated by legislation?**

Collective proceedings are regulated by articles L. 423-1 to L. 423-26 of the Consumer Code.

Associations may introduce group actions on the basis of these provisions. Similar to other damages actions, group actions follow the general French rules governing civil liability and associations must invoke both the provisions of the FCC and the relevant antitrust provisions (see question 2).

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

There is no equivalent in France of the US-style opt-out class action procedure and, accordingly, there is no similar certification process. Moreover, in any case, only a limited number of authorised consumer associations may introduce collective actions (see question 19).

#### **22 Have courts certified collective proceedings in antitrust matters?**

Not applicable (see question 21).

#### **23 Can plaintiffs opt out or opt in?**

The French collective action provides for a classic opt-in procedure. Indeed, in its ruling, the judge defines the group of consumers in relation to whom the professional is liable and defines the criteria for joining the group (article L. 423-3 of the Consumer Code).

#### **24 Do collective settlements require judicial authorisation?**

Associations who have introduced a group action may take part in mediation under general civil procedure principles. Any agreement negotiated on behalf of the group requires judicial authorisation. The judge verifies the impact on those whose rights are affected, and then enforces it (articles L. 423-15 and L. 423-16 of the Consumer Code).

#### **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?**

Not applicable.

#### **26 Has a plaintiffs' collective-proceeding bar developed?**

The law was promulgated on 18 March 2014 and, as a result, no plaintiff's collective-proceeding bar has developed yet.

### **Remedies**

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

Parties are compensated with damages, which are assessed on a case-by-case basis taking into account the harm actually suffered by the party. Such harm may be (i) pecuniary (such as the overcharge suffered because of the difference between the price actually paid and the price that should have been paid had no anti-competitive practices been implemented, as well as the loss of opportunity to make future profits and lost earnings); (ii) non-pecuniary (such as damage to the plaintiff's reputation), see question 15. However, non-pecuniary harm is usually more difficult to prove and to quantify. Group actions, however, may only seek to obtain damages for pecuniary losses resulting from material damage suffered by consumers (article L. 423-1 of the French Consumer Code).

It is worth noting that courts do not take into account the fine imposed by the FCA to assess the compensation to be awarded (see question 31).

### Update and trends

The current hot topic in France is the very recent promulgation of a law introducing collective actions in French law, notably for damages suffered as a result of a competition law violation.

The mechanism of the collective actions will be specified by an implementing decree to be taken by the Conseil d'État, which is the French supreme court for administrative matters. Such decree is expected to be published in the coming months.

It remains to be seen what impact this law will have on private antitrust litigation in France. The introduction of collective actions in combination with the private enforcement directive recently adopted by the European Parliament could create an impulse in private damages actions in France.

Thirty months after the promulgation of the law, in other words in September 2016, the French government will draft a report on the enforcement of group actions that will consider whether to extend its scope to cover health and the environment. Moreover, two bills were submitted to the French National Assembly on 14 January 2014, aiming at widening the scope of potential collective redress in France in order to include health, the environment and discrimination.

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

In application of articles 808 et seq and 873 et seq of the French Civil Procedure Code, plaintiffs can file a claim with the president of a civil court or of a commercial court to request an interim order.

Such interim measures are available to parties when two conditions are met. First, urgency must be established. Second, there must be no serious challenge to the claim or interim measures must be justified by the nature of the dispute (article 808 of the Civil Procedure Code; see question 16). Alternatively, interim measures are available to parties who prove that they are necessary to avoid imminent damage (see articles 809 et seq of the Civil Procedure Code). For example, this could be the case where a party is requesting an injunction requiring the defendant to sell a specific product to the plaintiff, in the situation where the seller has abused its dominant position by refusing to sell the product at issue.

Plaintiffs can also request the publication of the ruling.

### 29 Are punitive or exemplary damages available?

No, neither exemplary nor punitive damages are granted in France. By virtue of the non bis in idem principle in France, parties cannot be condemned twice for the same conduct. The role of competition authorities is to punish the infringing party, not to award damages to victims, and the courts' sole objective is to compensate the entire injury suffered by the plaintiff by granting damages.

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

According to the FCC (article 1153-1), a legal interest rate automatically applies to damages granted by a judicial decision. Such interest rate is determined each year by decree (for example, it was 0.04 per cent in 2014). Except for express provisions to the contrary in the decision, the interest is applicable starting on the date of the decision. It is subsequently increased by five points if damages are not paid within two months following the decision.

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

Fines imposed by competition authorities are not taken into account because damages awarded by courts and fines imposed by the FCA do not pursue the same goals (as previously mentioned in question 29). Nevertheless, the calculation of fines by the FCA may provide the judge with useful guidance for the calculation of damages suffered within the framework of private actions.

Article L. 464-2 of the French Commercial Code provides that the FCA shall take into account, when fixing the amount of the fine, the 'damage to the economy' caused by the anti-competitive practice. This requires an in-depth analysis and calculation.

In line with the Commission's policy, and pursuant to the FCA's recent publication in May 2011 of a notice on the method relating to the setting of

financial penalties, the FCA is expected to provide more and more detail in its decisions as regards the calculation of the fine. This is likely to be of great assistance to both the plaintiff in the drafting of its claim and the courts in the issuance of their final decision.

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

The general principle is that the unsuccessful party bears the legal costs (under article 696 of the Civil Procedure Code). Legal costs are listed in article 695 of the Civil Procedure Code: they include, among other things, fees for translation of documents, witnesses, experts, and translators, but they do not include lawyers' fees. In any case, the judge can always order another party to bear these costs (under article 696 of the Civil Procedure Code). However, this only happens exceptionally and if it does, the judge's rationale needs to be specific.

Finally, concerning other fees not covered by article 695, the judge can order the unsuccessful party to pay a certain amount to cover certain supplementary fees such as lawyers' fees, on the basis of article 700 of the Civil Procedure Code. In practice, this amount, which is freely determined by the judge by taking into account fairness and the financial situation of the parties, is almost always granted but is insufficient to fully cover these fees.

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

Infringing parties that cause damage are jointly and severally liable. Consequently, a victim can claim damages from any of them. This is a general principle of French civil liability rules.

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

As explained above, because of defendants' joint and several liability, they may be obliged to pay damages in full to the victims. They can subsequently file an action for contribution against the other defendants who did not participate in the initial payment.

The court must determine each party's share of liability and, accordingly, the amount of damages that they must each pay to the victim.

### 35 Is the 'passing on' defence allowed?

As previously mentioned, antitrust actions are based on article 1382 of the FCC according to which parties must prove a fault, damage, and a causal link between the fault and the damage. Plaintiffs will receive damages depending on the harm actually suffered. Consequently, the amount of damages will be reduced if a victim passed on a part of the price increase resulting from the anti-competitive activity.

Therefore, the passing-on defence is available and its consequence will be the reduction of damages for victims. However, there are only few examples of the use of the passing-on defence in France.

French courts have had the opportunity to deal with the application of the passing-on defence and to specify whether the burden of proof lies on the plaintiff or on the defendant.

In two follow-on actions following the Commission's decision in *Vitamins*, the landmark cartel case, the burden of proof was placed on the plaintiff to prove why it could not have passed on the price increase onto consumers. First, a plaintiff requested that the Commercial Court of Nanterre award damages in the context of the *Vitamins* cartel case and with regards to the passing-on defence, the court did not require proof from the defendant. Instead, the court based its decision on the Commission's decision and on a press release that stated, in general terms, that price increases were likely to be passed on to consumers. Ultimately, the court held that the cartel was implemented worldwide and consequently, every competitor of the plaintiff was subject to the same conditions. Therefore, the plaintiff had the possibility of passing on the increase and the choice not to do so was part of the plaintiff's pricing policy. In view of this, the court concluded that the plaintiff had not established the causal link between the fault and the damage (ruling rendered on 11 May 2006). Thereafter, in a similar case in 2007, the Commercial Court of Paris ruled that the plaintiffs could have passed on their price increase and rejected the parties' argument that a price increase would have led to a loss in market share (ruling rendered on 26 January 2007).

Recently, in the context of two follow-on actions subsequent to the Commission's decision in the *Lysine* cartel case (decision rendered on 7 June 2000), the Court of Cassation ruled that the claimants had not suffered any harm because they had passed the price increase on to consumers. Consequently, in both cases, the Court of Cassation affirmed that the burden of proving the absence of passing-on lies on the claimant, as part of the proof of the damage suffered (rulings rendered on 15 June 2010 and 15 May 2012). In the first case, the Court of Appeal of Paris recently ruled that the claimant had suffered from higher prices due to the anticompetitive behaviour, and thus awarded it damages in the amount of €1.66 million (ruling rendered on 27 February 2014). The second case is currently pending appeal before the Court of Appeal of Paris.

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

Based on the three necessary requirements to obtain compensation for a tort (under article 1382 of the FCC), defendants can only prove the absence of a fault, a damage, or a causal link between the fault and the damage. Since these are cumulative requirements, the proof of the mere absence of one of the three is sufficient to successfully dismiss a claim.

**37 Is alternative dispute resolution available?**

Alternative dispute resolution (including judicial and out-of-court mediation) is available and seems to be relatively successful. In fact, it is likely that there have been many settlements in the field of private antitrust litigation, which could explain the relatively small number of decisions issued in the context of private actions in France.

## McDermott Will & Emery

Jacques Buhart  
Lionel Lesur  
Louise Aberg

[jbuhart@mwe.com](mailto:jbuhart@mwe.com)  
[llesur@mwe.com](mailto:llesur@mwe.com)  
[laberg@mwe.com](mailto:laberg@mwe.com)

23, rue de l'Université  
75007 Paris  
France

Tel: +33 1 81 69 15 00  
Fax: +33 1 81 69 15 15  
[www.mwe.com](http://www.mwe.com)

## Getting the Deal Through

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

Also available digitally



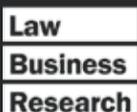
# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



# iPad app

Available on iTunes



Private Antitrust  
Litigation  
ISSN 1742-2280



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Partner of the  
ABA Section of International Law