The Private Competition Enforcement Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

The Private Competition Enforcement Review

The Private Competition Enforcement Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The Private Competition Enforcement Review - Edition 7
(published in August 2014 – editor Ilene Knable Gotts).

For further information please email
Nick.Barette@lbresearch.com

The Private Competition Enforcement Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Rawson

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-18-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADDLESHAW GODDARD LLP

ARAQUEREYNA

ASHURST LLP

CHIOMENTI STUDIO LEGALE

CONSUMERS EMPOWERMENT ORGANISATION OF NIGERIA (CEON)

DANAILOV, DRENSKI, NEDELCHEV AND CO/LEX LOCUS LAW OFFICES

DLA PIPER UK LLP

ENSAFRICA

EPSTEIN, KNOLLER, CHOMSKY, OSNAT, GILAT, TENENBOIM & CO LAW OFFICES

GLOVER & TEMPLE (LEGAL & HUMAN DEVELOPMENT CONSULTANTS)

HANSBERRY COMPETITION

HAUSFELD & CO LLP

HOUTHOFF BURUMA

IWATA GODO LAW OFFICES

JUN HE LAW OFFICES

KASTELL ADVOKATBYRÅ AB

MAGALHÃES E DIAS ADVOCACIA

MARTÍNEZ LAGE, ALLENDESALAZAR & BROKELMANN

MOTIEKA & AUDZEVIČIUS

NORTON ROSE FULBRIGHT LLP

POPOVICI NIȚU & ASOCIAȚII

PRAGER DREIFUSS AG

SCWP SCHINDHELM

SRS ADVOGADOS

STIKEMAN ELLIOTT LLP

TRILEGAL

TURUNÇ

WACHTELL, LIPTON, ROSEN & KATZ

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. Last year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past few years, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea). Moreover, we appear to be at a critical turning point in the EU: on 17 April 2014, the European Parliament voted to adopt the proposed directive on rules governing private actions for damages for infringements of competition law. Once approved by the European Council – possibly as early as the summer or autumn of 2014 – EU Member States will be required to implement the directive into national law within two years of its promulgation. As mentioned above, even prior to the entry of the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action or class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions such as Hungary seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged is gross negligence or wilful conduct. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-

action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so

strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
August 2014

Chapter 25

SWITZERLAND

Bernhard C Lauterburg and Philipp E Zurkinden[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Civil antitrust litigation remains limited in Switzerland. Since the enactment of the Act on Cartels and Other Restraints of Competition (the ACart) in 1995, only roughly 50 cases are known to have been brought before the civil courts.[2] The bulk in the enforcement of antitrust and competition law largely rests upon the competition authorities. The reasons for this lack of private competition law enforcement are manifold.

First, it seems more appealing for an aggrieved party to file a complaint with the competition authorities, rather than bearing the burden of proof in a civil proceeding. Unlike claimants in private enforcement proceedings who regularly face evidentiary difficulties, the competition authorities may compel the production of evidence. However, if (e.g., for discovery reasons) the claimant opts to file a complaint with the competition authorities, the claimant should be aware that his or her civil claim may become time-barred (see Section X, *infra*), an issue that shall be resolved with the current revision of the ACart. Also, an aggrieved party filing a complaint with the competition authority normally is not subject to costs, unlike in a civil proceeding. Moreover, upstream market participants may regularly pass on an overcharge incurred as a result of a cartel or other infringement of antitrust law to downstream market participants and therefore sustain no damage in the legal sense.[3]

1 Bernhard C Lauterburg is a counsel and Philipp E Zurkinden is a partner and head of the competition team at Prager Dreifuss AG.

2 See Recht und Politik des Wettbewerbs (RPW; 'Law and Policy of Competition' [LPC]), Systematisches Verzeichnis aller RPW ab 1997.

3 In this respect, see the explanatory notes of the Federal Council of 30 June 2010 on the legislative proposal, p. 32.

Finally, according to the current majority view among Swiss legal scholars, consumers do not have standing under the ACart. Thus, an entire group of persons that may be potentially harmed by an unlawful restraint of competition is precluded from seeking damages pursuant to the rules set forth in the ACart.[4]

Since the last report, only one civil antitrust case has come to our attention. On 23 August 2013, the Supreme Court of the Canton of Zug rejected a motion by a former Renault car dealer against a Renault primary partner to be admitted to Renault's aftersales market. An earlier sales and service agreement was validly terminated and the former car dealer argued that the legislative framework in Switzerland would entitle it to admission to the Renault selective aftersales market and that its rejection amounted to an abuse of dominance. Pursuant to the Competition Commission's guidelines on the Motor Vehicle Notice, all motor vehicle suppliers must organise their aftersales market (i.e., repair market) in a selective distribution system based solely on qualitative criteria. Hence, all independent repairers satisfying these criteria must be admitted to the supplier's repair market.[5] In the instant case, the plaintiff failed to show that it satisfied the admission criteria. Moreover, given that (1) the plaintiff did not satisfy the selective criteria at the time the previous and terminated contract was in effect; and (2) the new contract would now require full compliance with these criteria, the refusal to admit the car dealer to the distributors did not constitute abuse. Given this outcome, the court did not have to examine whether the respondent had a dominant market position.[6]

Civil antitrust litigation may increase after the envisaged amendments to the ACart become effective; however, to date it is unclear whether the government's proposal (see Section XV, *infra*) will be adopted by Parliament. The government's proposal was submitted to Parliament on 22 February 2012. The Council of States discussed the government's proposal and adopted it with no changes on 21 March 2013 as far as it concerned private enforcement (changes were made with respect to the substantive antitrust provisions). The National Council rejected consideration of the proposal and referred it back to the Council of States for reconsideration.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Unlawful restraints of competition may be prosecuted under both civil and administrative law. While every person may file an administrative complaint with the competition authorities, only persons who are impeded from entering or competing in a market by an unlawful restraint of competition may seek civil remedies such as damages and injunctions. Thus, according to a majority view, consumers who may be affected by an unlawful restraint of competition are not entitled to seek damages in civil courts based on the ACart, and therefore may only initiate an investigation by the authorities, while

4 Id., pp. 25–26, 32–33.

5 Guidlines on the Motorvehicle Notice, p. 2.

6 Decision of the Supreme Court of the Canton of Zug of 23 August 2013, RPW 2013/3 p. 455 et seq.

competitors and market entrants may opt for both civil and administrative enforcement of antitrust regulation.

The competition authorities have significant discretion regarding whether to open an investigation. The *ratio legis* for the ACart was primarily the protection of the principle of competition. Only on a secondary level does the ACart serve to protect individual interests. Accordingly, if public interests do not outweigh the private interests of the complainant, the competition authorities are unlikely to initiate formal proceedings and will refer the claimant to the civil courts.

Domestic antitrust claims before civil courts in Switzerland are governed by Articles 12 to 17 of the ACart (Articles 14, 16 and 17 of the ACart were repealed with effect from 1 January 2011 by the Civil Procedure Code (CPC)). Article 12 ACart sets forth the remedies that are available to a claimant, these being the elimination of the hindrance, or requiring defendants to desist from it, damages and satisfaction or the surrender of unlawfully earned profits. Article 13 ACart governs the enforcement of cease-and-desist orders and Article 15 ACart stipulates an obligation for the civil courts to refer questions on the lawfulness of a restraint of competition to the Competition Commission.[7] If the context of the antitrust litigation is international, the applicable substantive law is determined by Article 137(1) of the Act on Private International Law (PILA), which provides that the applicable law shall be the law of the country in which the restraint of competition has a direct effect on the claimant.

In domestic antitrust cases, the venue for a civil proceeding is governed by the CPC, according to which the case shall be heard by the competent court at the place of business of the claimant or the respondent. The claim may also be brought at the place where the restraint of competition occurred or took effect (Article 36 CPC).[8] In international cases, the venue is determined by Articles 2 and 5 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention), or by Article 129 PILA if the Convention is not applicable. Both the Lugano Convention and PILA provide for the same venues as the CPC, except for the place of business of the claimant, which is not available in international contexts.

The CPC requires each canton to designate a court that shall act as the sole cantonal authority to hear claims with respect to antitrust law in its territory (Article 5(1)(b) CPC). In those cantons that have established a commercial court, notably the cantons of Aargau, Berne, Saint Gall and Zurich, civil antitrust disputes must be brought before the respective commercial courts. The judgments of the commercial courts may be appealed against to the Federal Supreme Court. A party seeking to initiate civil antitrust proceedings must file a detailed statement of claim with the competent court, which will then serve process on the respondent and set a deadline for filing a statement of defence. If the court considers it necessary, it may order the parties to file a reply and a rejoinder respectively, particularly if a party raises new facts. Frequently, courts encourage the

7 Note that, if the necessity of a restraint of competition that is as such unlawful is claimed for reasons of compelling public interest, the matter shall be referred to the Federal Council (Article 15(2) ACart).

8 Sutter-Somm/Hedinger in: Kommentar zur Schweizerischen Zivilprozessordnung (Sutter-Somm et al., eds.), Article 36 N 12.

parties to hold settlement talks under their guidance, and in this context may give an indication on their preliminary view of the case and the legal assessment.

The recognition and enforcement of foreign judgments is subject to the Lugano Convention and the PILA. Serving process in foreign proceedings is subject to the applicable domestic rules, the 1954 Convention on Civil Procedure and the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, to which Switzerland is a contracting party.

A civil antitrust proceeding based on the ACart is subject to the same substantive rules as an administrative proceeding conducted by the competition authorities. Although the substantive rules set forth in the ACart must be interpreted and applied by both the competition authorities and the civil courts in the same fashion, diverging interpretations may arise as the decision of one authority in principle does not have a binding effect on another authority.[9] However, if the legality of a restraint on competition is questioned during the course of a civil procedure, the civil court must refer the matter to the Competition Commission and obtain an expert report. Thus, in practice, the primacy of interpreting the ACart lies with the Competition Commission, and on appeal the administrative law sections of the federal court system, as the courts normally respect such expert opinion.

The ACart is silent on the applicable statute of limitations. Rather, as the ACart refers to the rules set forth in the Code of Obligations (CO) with respect to claims for damages and the forfeiture of unlawfully earned profits, the applicable statute of limitations is governed by the CO. Both for damage claims and the forfeiture of illicit profits, the statute of limitations is one year from the time the harmed person becomes aware of the damage and has knowledge of the tortfeasor, and becomes time-barred after 10 years from the date of the action causing the damage. However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, the latter also applies to the civil law claim. Note that the opening of a formal investigation by the competition authorities does not hinder the statute of limitations for a civil action to run (see Section X, *infra*).

III EXTRATERRITORIALITY

The ACart applies to practices that have an effect in Switzerland, irrespective of their origin. Accordingly, the competition authorities may investigate conduct that occurred in foreign countries and that has an effect in Switzerland.

The decision as to whether Swiss or foreign antitrust law must be applied by the court in a civil proceeding is subject to the relevant statutes on private international law, such as the PILA in Switzerland. In a Euro-international context, at least, the application of Article 5 of the Lugano Convention, which provides for jurisdiction at the place where the harmful event occurred or may occur, and Article 137 PILA, may result in the application of Swiss competition law before a Swiss court even if the tortfeasors are domiciled abroad. Also, Swiss competition law may apply in proceedings before foreign courts where the law of that country refers to Swiss competition law.

9 Jacobs/Giger in: Basler Kommentar – Kartellgesetz, Vor Article 12-17 N 21 et seq.

IV STANDING

Private enforcement of competition law is limited to persons who are hindered by an unlawful restraint of competition from entering or competing in a market. As already explained above, the majority of legal opinion concludes therefrom that this precludes consumers from seeking damages in cartel cases based on the provisions set forth in the ACart. Thus, only undertakings affected by a hindrance of competition have standing in civil court to seek the cessation of or the abstention from the hindrance as well as damages.

However, a minority view proposes that consumers may seek redress against members of a cartel or entities abusing their market dominance through an ordinary tort claim and directly invoke the relevant provisions in the ACart as remedial statute.[10]

V THE PROCESS OF DISCOVERY

US-style discovery is not available in Switzerland and parties must rely primarily on the evidence available to them when filing the lawsuit. However, parties to a court proceeding as well as third parties are under a duty to assist the court to establish the facts of the matter at issue once the trial has commenced, if ordered to do so by the court.[11] A party seeking documentary evidence may request the court to issue an order against the opposing party or a third party to produce certain documents. The requesting party must describe and identify the evidence sought in sufficient detail and demonstrate that it is relevant to establish the case. Alternatively, the requesting party may demonstrate that it is unreasonable or impossible for it to identify the sought evidence. Mere general statements as to the nature of the evidence sought and its possible relevance to the case are not sufficient to obtain a disclosure order.[12] Evidence can also be obtained by way of provisional measures before the filing of a lawsuit. This requires the requesting party to demonstrate credibly that there is a realistic and imminent threat that the evidence sought will be destroyed and that it is likely to prevail on the merits of the case.[13]

The law provides for certain means to facilitate the claimant's burden of proof, for example through an 'action by stages', in which the claimant first establishes the case and only at a later stage specifies the amount of damages. Also, where the exact amount of damages cannot be quantified, the claimant can request the court to estimate the amount at its discretion.[14]

Evidence obtained in an administrative proceeding carried out by the competition authorities may be used in a civil proceeding without limitation.[15] Note, however, that documents relating to a leniency application with the competition authorities may not

10 See, e.g., Spitz in: Das Kartellrecht und seine Zukunft nach der Revision des Kartellgesetzes 2003, SZW 2005, pp. 120–121; Brunner, Konsumentenkartellrecht, AJP/PJA 8/96, p. 941.

11 Article 160 CPC.

12 Schmid in: Basler Kommentar – Schweizerische Zivilprozessordnung, Article 160 N 23.

13 Article 158 CPC in connection with Article 261 CPC.

14 Article 42(2) of the CO.

15 Jacobs/Giger in: Basler Kommentar – Kartellgesetz, Vor Article 12-17 N 28.

be copied or otherwise reproduced or duplicated. Access to those documents is restricted to the premises of the competition authorities and the documents may only be manually transcribed.

If the taking of evidence compromises legitimate interests of a party or a third party, for example with respect to business secrets, the court can take the necessary measures to preserve the concerned interests, such as excluding the public from the proceedings or limiting access to certain documents.[16]

VI USE OF EXPERTS

If the court decides that expert knowledge is necessary, it can appoint an expert. Court-appointed experts act on behalf of the court and are therefore subject to the same rules on independence and impartiality as the court. If the lawfulness of a restraint of competition is questioned in the course of the civil proceeding, the court must obtain an expert report from the Competition Commission.[17] The court is not legally bound by the Competition Commission's expert opinion or the opinion of a court-appointed expert and may depart from their findings;[18] however, it must give reasons for doing so.[19] Expert opinions provided by party-appointed experts are considered by the court as party statements, and for this reason have no additional evidentiary weight.[20]

VII CLASS ACTIONS

A typical class action, as known, for example, in US law, is not available under Swiss law. Claims must be brought by individual claimants. However, several claimants may bring a collective suit against the same defendant provided that the claims of each individual claimant are based on similar facts or a similar legal basis.[21] Moreover, civil procedure permits the court to join similar lawsuits.[22]

Note that the Swiss parliament only recently referred a motion to the federal government to revise the current system of collective redress and to introduce class actions. Whether and in what form the motion will be adopted into law remains to be seen. A legislative proposal has yet to be prepared. At this time, also in view of the uncertainties in relation to the currently debated revision of the ACart (see Section XV,

16 Article 156 CPC.

17 Article 15(1) ACart.

18 Borer in: Wettbewerbsrecht I – Kommentar (3rd ed.), Article 15 N 11; Reymond in: Commentaire Romand – Droit de la Concurrence (Tercier/Bovet eds.), Article 15 ACart N 98.

19 Guyan in: Basler Kommentar – Schweizerische Zivilprozessordnung, Article 157 N 6, with further references.

20 Botschaft zur Schweizerischen Zivilprozessordnung, BBl 2006, p. 7325; Decision of the Federal Supreme Court (DTF) 132 III 87 (4P.145/2005) of 21 September 2005.

21 Article 71(1) CPC.

22 Article 125(c) CPC.

infra), no prediction can be made as to whether Switzerland may eventually permit civil antitrust class actions.

VIII CALCULATING DAMAGES

A claimant may petition for the elimination of or abstention from the hindrance of competition, and either damages and satisfaction in accordance with the CO or the remittance of unlawfully earned profits in accordance with the provisions on agency without authority set forth in the CO.

The rules for calculating damages are set forth in the CO.[23] Civil courts can award damages in the amount of the actual loss incurred by the claimant and caused by the tortfeasor, including both property loss and lost profits. According to long-standing jurisprudence of the Federal Supreme Court, damages are defined as the (hypothetical) difference between the value of the assets of the injured person taking into account the restraint of competition and the value of the assets of the injured person under the assumption that no restraint of competition had occurred. Where the exact value of the loss or damage cannot be quantified, the court shall, at the request of the claimant, estimate the value at its discretion in light of the normal course of events and, if so warranted by the particular circumstances of the case, steps taken by the injured party to achieve exceptional gains.[24] Punitive damages are not available in Switzerland, even if the court must apply foreign antitrust law. Article 137(2) PILA provides that if a claim for damages is based on foreign antitrust law, no award may be rendered by a Swiss court in excess of what would be available under Swiss law. The claimant bears the burden of proof and must therefore demonstrate that the incurred damage is a result of an unlawful restraint of competition attributable to the tortfeasor and that the tortfeasor's conduct was culpable. Negligence by the tortfeasor is sufficient for this purpose.

The court determines the form and extent of the compensation provided for the loss or damage incurred, with due regard to the circumstances and the degree of culpability.[25] The undertaking harmed by an unlawful restraint of competition is under a duty to reduce the damage it incurs to the extent possible and reasonable; the cost of such measures must, however, be borne by the undertaking causing the damage by participating in an unlawful restraint of competition. Accordingly, the court may reduce the amount of damages claimed where the harmed undertaking gave rise to or compounded the loss or damage or otherwise exacerbated the position of the party liable for it.[26] The court may further reduce the damages award where the loss or damage was caused neither wilfully nor by gross negligence, which will rarely be the case in antitrust matters, or where the damages award would leave the liable party in financial hardship.[27] The statutory interest rate in Switzerland on monetary claims is 5 per cent per annum

23 Article 41 et seq. CO.

24 Article 42(2) CO.

25 Article 43(1) CO.

26 Article 44(1) CO.

27 Article 44(2) CO.

on the amount of the damages awarded.[28] Interest will only be awarded if the claimant specifically claims interest, as otherwise the award of interest is considered *ultra petita*.

Alternatively, the claimant can move the court to order the remittance of unlawfully earned profits by the tortfeasor.[29] As with a claim for damages, the claimant must demonstrate the tortfeasor's earned profits that are attributable to the unlawful restraint of competition, and that the tortfeasor acted with malice.

Costs of a proceeding are normally borne by the losing party.[30] If none of the parties prevails in full, costs are borne by both parties in accordance with the outcome of the proceeding.[31] In certain special cases, the court may award costs at its own discretion.[32] Both the court and attorney fees are subject to statutory tariffs set by the cantons and depend largely on the amount in dispute (such as in the cantons of Berne and Zurich).[33] The courts enjoy considerable discretion in determining attorney fee awards and may take into account such factors as the complexity and the duration of the proceeding. Prospective claimants should therefore be aware that they are unlikely to recover all costs they incur in a civil court proceeding.

IX PASS-ON DEFENCES

Under Swiss law, an injured party may only claim actual damages and a claim for damages must not result in an unjust enrichment of the injured party. Thus, if the injured party (mostly distributors and retailers) passed on the overcharge in part or in full to downstream market participants (mostly consumers), such behaviour will be taken into account by the courts when calculating the damages.[34] The tortfeasor bears the burden of proof that the injured party passed on the overcharge to a third party.

X FOLLOW-ON LITIGATION

Antitrust proceedings before the competition authorities and the civil courts are inherently distinct and concern different objectives. The competition authorities are not competent to award damages to parties affected by the restraint of competition, and damages may only be sought in civil court proceedings. Therefore, civil antitrust cases tend to be follow-on proceedings after the competition authorities have ruled on a matter (e.g., declared a certain practice unlawful).

Prospective claimants should, however, be aware that the opening of formal proceedings by the competition authorities against the tortfeasor does not toll the

28 Article 73(1) CO.

29 Article 419 CO et seq., rules on agency without authority.

30 Article 106(1) CPC.

31 Article 106(2) CPC.

32 Article 107 CPC.

33 Article 96 CPC.

34 In this respect, see the explanatory notes of the Federal Council of 30 June 2010 on the legislative proposal, p. 32.

statute of limitations for a civil action. Unless the tortfeasor does not cease or change the concerned business practice upon the opening of an investigation by the competition authorities, the injured party should file a civil action within a year of the investigation becoming public and move the court to stay proceedings until the competition authorities have rendered a decision in the matter.

XI PRIVILEGES

Parties to a proceeding and third parties may refuse to testify only under limited statutory grounds. Parties may only refuse to testify or disclose documentary evidence on limited grounds. In particular, a party may not refuse to testify or disclose documentary evidence to avoid civil or criminal liability. Refusal is only justified if a closely related natural person would be exposed to civil and criminal liability or if the testifying person would breach professional confidentiality. If a party fails to disclose documents that it is not legally entitled to withhold, the court will take this into consideration in its deliberation of the matter and often render an adverse finding upon that party regarding the content of the concerned document.

Swiss law generally recognises attorney–client privilege.

As stated above, the parties are under a duty to assist the court to establish the facts of the matter at issue. However, the law expressly protects correspondence of external counsel, irrespective of its location. Thus, a party may refuse to disclose communication from and to its external counsel when the correspondence relates to matters typically undertaken by the external counsel. Legal privilege does not extend to in-house counsel.

Controversy exists regarding the extent to which companies with a registered office in Switzerland or Swiss subsidiaries of foreign companies may be subject to pretrial discovery in foreign proceedings. Surrendering evidence located in Switzerland to foreign authorities or parties may constitute a violation of Article 271 (prohibited acts for a foreign state) and Article 273 (economic intelligence service) of the Swiss Criminal Code or other special statutory provisions (e.g., banking regulation, data protection regulation).

Governmental authorities, in particular the competition authorities, are bound by the rules on official secrecy. The authorities may use the information obtained in the performance of their duties only for the purpose for which it was obtained or for the purpose of the investigation. However, as already noted, during an administrative proceeding the parties may request access to the files and use the information obtained in this manner in a civil proceeding.

In this context, reference should also be made to the envisaged agreement between Switzerland and the EU enabling the competition authorities of both parties to cooperate in the enforcement of their competition laws.[35] Although the agreement stands on the premise that information exchanged among the competition authorities must

35 For more information, see the Dispatch of the Federal Council, available at: www.news.admin.ch/message/index.html?lang=de&msg-id=48936 (only in German, French and Italian); Press release of the Commission of 17 May 2013, IP/13/444, available at: http://europa.eu/rapid/press-release_IP-13-444_en.htm.

be treated confidentially and must only be used for purposes of enforcing competition laws, disclosure of information is permitted in certain cases. Pursuant to Article 9 of the agreement, information may be disclosed for enforcement of competition rules through the courts, to undertakings subject to an investigation if the information concerned is used against them, in appeals proceedings or based on the right to access documents under the relevant procedural laws. Hence, it my be possible for civil plaintiffs to obtain access to documents (except those submitted under the relevant leniency programmes) submitted to an authority in an administrative proceeding.

XII SETTLEMENT PROCEDURES

The parties may at any time during court proceedings try to negotiate a settlement of their own volition and without the knowledge of the court, or the court may encourage the parties to settle the dispute and facilitate a settlement among the parties (Article 124(3) CPC). The court may schedule a special hearing or submit to the parties a written proposal for a settlement. The settlement can cover all claims or only a part of the claims.

A court-sanctioned settlement has the same legal effect as a judgment rendered by the court. Monetary claims set forth in the court settlement can be enforced through ordinary debt enforcement proceedings pursuant to the Act on Debt Enforcement and Bankruptcy. Judgments for specific performance can be enforced in a summary proceeding pursuant to the rules set forth in the CPC.

An out-of-court settlement is merely a contract between two or more private parties, and as such does not have legal force unless the settlement is formally notified to the court.

During settlement discussions, parties frequently circulate proposals that they do not want to use in (subsequent) court proceedings. Courts generally respect such understandings, provided that the intention of the parties that the proposals do not prejudice their position in court proceedings is clearly and unambiguously expressed in their correspondence.

Note that an administrative proceeding before the competition authorities may also be settled amicably (Article 29 ACart). Such a settlement does not in principle release the tortfeasor from being sanctioned: however, it may result in a reduction of the sanction.

XIII ARBITRATION

Civil antitrust matters may be brought before an arbitral tribunal.[36] Arbitral proceedings with a tribunal having its seat in Switzerland are governed by Part III of the CPC unless the provisions in the PILA apply. Domestic arbitration is normally governed by the CPC while international arbitration is governed by the PILA. In international arbitration, the arbitral tribunal shall decide the matter according to the law chosen by the parties, or in the absence of a choice-of-law clause, according to the law with which the matter is

36 DTF 132 III 389 (4P.278/2005) of 8 March 2006.

most closely connected.[37] In Swiss legal doctrine there is, however, widespread agreement that substantive competition law – Swiss or foreign – must be taken into account by an arbitral tribunal having its seat in Switzerland, irrespective of the parties' choice of law.[38] However, a misapplication of competition law by the arbitral tribunal does not result in the award being overturned by the Federal Supreme Court. Only if the arbitral tribunal fails to consider issues of competition law notwithstanding their obvious existence or an application by one of the parties would the Federal Supreme Court quash the award. On the other hand, an arbitral award that clearly violates European competition law may be unenforceable in Switzerland.[39]

In many jurisdictions, arbitration has been recognised as a valuable tool in post-merger disputes regarding, for example, divestments that have been ordered for merger clearance, or with respect to interim measures. In a recent decision on interim measures, an arbitration clause was inserted in an amicable settlement between the Swatch Group and the Swiss competition authorities.[40] In late 2009, the Swatch Group announced that it would cease to supply to customers outside the Swatch Group certain components used to manufacture movements. As a subsidiary of the Swatch Group presumably had a dominant position in the market for certain of these components, the competition authorities decided to investigate whether Swatch's conduct constituted an unlawful refusal to deal under Article 7(2)(a) ACart. Pursuant to an order, Swatch must continue to supply competitors with the concerned components for the duration of the investigation. It further consented to submit any dispute arising out of its obligations under this order in relation to its customers to an arbitral tribunal established pursuant to the Swiss Rules of International Arbitration and the supplemental rules on the application of the Swiss Rules of International Arbitration in domestic arbitration.

XIV INDEMNIFICATION AND CONTRIBUTION

As stated earlier, claims for damages and forfeiture of unlawfully earned profits are subject to the rules of the CO. The CO states that in cases where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party (Article 50(1) CO). Therefore, the injured party may bring suit against multiple parties if they have jointly engaged in the same restraint of competition. It is within the discretion of the court to determine whether and to what extent multiple tortfeasors have a right of recourse against each other.

37 Article 187(1) PILA.

38 Id., DTF 132 III 389; see also Weber-Stecher in: Basler Kommentar – Kartellgesetz, Nach Article 12-17 N 30 et seq.; Heinemann, Die Privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage (2008), at pp. 102–103.

39 DTF 118 II 193 of 18 April 1992.

40 Decision of the Swiss Competition Commission of 6 June 2011.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As mentioned above, the government sent its proposal to amend the ACart to Parliament on 22 February 2012. The Parliament is currently debating the legislative proposal, however, the outcome is unclear. The parliamentary chambers are at this time not in agreement whether to consider the proposal at all (for reasons unrelated to the revision of the current system of civil antitrust enforcement).

With regard to private enforcement of competition law, the envisaged broadening of legal standing for claimants and the new rules governing the statute of limitations are certainly steps in the right direction and close an objectionable accountability gap.

Whether the overall situation for litigants will actually improve if the revised provisions are passed remains to be seen. Despite the envisaged prohibition of certain types of agreements and the fact that it shall no longer be necessary to examine whether certain types of agreements significantly restrict competition, the civil courts shall remain under a duty to refer a matter to the competition authorities, namely for the purpose of obtaining an expert report on a respondent's defence of economic efficiency of the agreement at issue (Article 15 ACart). Since investigations by the competition authorities may take several years, for civil litigants to approach a civil court without having – at least simultaneously – brought the matter before the competition authorities is likely to remain an exception.[41]

Under the proposal, the short one-year limitation period would be interrupted for the duration of the competition authorities' administrative investigation. This would prevent a potential civil antitrust claim from becoming time-barred during the investigation and accordingly enable litigants to exercise their rights effectively against potential tortfeasors. In particular, the new rules on the calculation of the limitation period facilitate follow-on civil litigation based on the competition authorities' findings and permit aggrieved parties to pursue a strategy of sequenced proceedings without running the risk that claims for potential damage claims become time-barred. From a litigant's point of view, sequenced proceedings may also bring certain financial advantages: Unlike in civil antitrust proceedings, a party who files a complaint with the competition authorities is normally not subject to any costs. The competition authorities investigate by virtue of their office and may compel the production of evidence. Accordingly, potential litigants may be inclined to first file a complaint with the competition authorities and are no longer required to file suit with the civil courts immediately. The new possibility of follow-on litigation would be likely to make private enforcement of competition law more attractive. What has long been reality in other jurisdictions, such as the United

41 The competition authorities enjoy significant discretion on whether or not to open an investigation. It normally suffices that the competition authorities are *prima facie* satisfied that a restriction of competition may exist. This is the case, for example, when the competition authorities become aware of meetings between undertakings during which price-sensitive information may have been exchanged.

States,[42] shall be introduced and improved in Switzerland as well. Proposals to improve civil antitrust litigation are also underway in the EU.[43]

The government's proposal is not limited to improving private enforcement of competition law; certain types of horizontal and vertical agreements shall be directly prohibited (euphemistically called 'partial prohibition of restrictive practices').[44] While this should lead to less onerous burdens of proof for litigants, the outright prohibition of certain restrictive practices is likely to have international repercussions, since global companies employing cooperation agreements and distribution systems in several countries are subject to the competition laws of a multitude of different and differing jurisdictions. In Switzerland in particular, the government's proposal constitutes a step backwards given the largely harmonised legal framework that has to date been achieved across Europe (including Switzerland) in relation to the aforementioned agreements. Despite government assertions to the contrary, this paradigm shift will lead, at least factually, to Switzerland's departure from international standards. In addition, the Council of State has introduced a new provision aiming at minimising price differentiation by international companies supplying goods into Switzerland, which directly targets intra-group agreements. These proposals are hotly debated and may – eventually – prevail over the government's legislative proposal.

In the context of this legislative proposal noteworthy is the envisaged cooperation agreement between the European Commission and the Swiss Competition Commission, which would provide for an extensive information exchange among the two authorities. At present, it not clear to what extent information that may be provided by the Swiss authorities to the European Commission will remain under seal pursuant to the EU Damages Directive. Although statements have been made that potentially contradicting provisions in the cooperation agreement and the Directive were taken into consideration by both authorities, it remains to be seen to what extent confidential information submitted to the Swiss authorities will remain under seal also with the European Commission.

---

42 For example, private antitrust claims under the Clayton Act of 1914, 15 USC Section 15(a), which reads as follows in relevant parts: '[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.'

43 On 11 June 2013, the Commission adopted a proposal for a Directive on antitrust damages actions for breaches of EU competition law. On 17 April 2014, the European Parliament adopted a text for the Directive which was agreed between the European Parliament and the Council during the ordinary legislative procedure. The agreed text of the Directive has been sent to the EU Council of Ministers for final approval (http://ec.europa.eu/competition/antitrust/actionsdamages/index.html).

44 Under the current Article 5(3) and (4) ACart, the presumption that effective competition is eliminated is rebuttable. According to the government's proposal, certain agreements (those now in Article 5(3) and (4) ACart) would be considered unlawful, subject to justification on grounds of economic efficiency.

Appendix 1

ABOUT THE AUTHORS

BERNHARD C LAUTERBURG

Prager Dreifuss AG

Bernhard C Lauterburg, LLM, is a counsel with Prager Dreifuss' team for competition and regulatory matters. Along with competition law, he focuses on international trade regulation, including investment treaty law and arbitration and WTO law.

PHILIPP E ZURKINDEN

Prager Dreifuss AG

Prof Dr Philipp E Zurkinden is a partner and head of the competition team at Prager Dreifuss and lectures Swiss and European competition law at the University and the European Institute of Basel.

PRAGER DREIFUSS AG

Schweizerhof-Passage 7
3001 Berne
Switzerland
Tel: +41 31 327 54 54
Fax: +41 31 327 54 99
bernhard.lauterburg@prager-dreifuss.com
philipp.zurkinden@prager-dreifuss.com
www.prager-dreifuss.com