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GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors

Nicholas Heaton and Benjamin Holt

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Contents

| | | |
|---|--|---|
| 1 | Introduction..... | 1 |
| | <i>Nicholas Heaton and Benjamin Holt</i> | |

Part I: Key Issues and Overviews

| | | |
|---|---|----|
| 2 | Competition Cases, Territoriality and Jurisdiction..... | 5 |
| | <i>Sir Marcus Smith</i> | |
| 3 | Territorial Considerations: the US Perspective..... | 10 |
| | <i>James L McGinnis and Bevin M B Newman</i> | |
| 4 | Territorial Considerations: the EU Perspective | 29 |
| | <i>Camilla Sanger and Olga Ladrowska</i> | |
| 5 | Collective or Class Actions and Claims Aggregation in the United States | 39 |
| | <i>Eva W Cole and Sean D Meenan</i> | |
| 6 | Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective..... | 50 |
| | <i>Till Schreiber and Martin Seegers</i> | |
| 7 | Collective or Class Actions and Claims Aggregation in the EU: the Defendant's Perspective..... | 62 |
| | <i>Francesca Richmond</i> | |
| 8 | Collective or Class Actions and Claims Aggregation in Germany | 70 |
| | <i>Borbála Dux-Wenzel, Anne Wegner and Florian Schulz</i> | |

Contents

| | | |
|----|--|-----|
| 9 | Collective or Class Actions and Claims Aggregation in the Netherlands..... | 79 |
| | <i>C E Schillemans, E M M Besselink, E M R H Vancraybex</i> | |
| 10 | Collective or Class Actions and Claims Aggregation in Spain..... | 88 |
| | <i>Paul Hitchings</i> | |
| 11 | Collective or Class Actions and Claims Aggregation in the United Kingdom..... | 94 |
| | <i>Kim Dietzel, Stephen Wisking, James White, Andrew North and Ruth Allen</i> | |
| 12 | The Role of US State Antitrust Enforcement..... | 112 |
| | <i>Juan A Arteaga and Jordan Ludwig</i> | |
| 13 | Causation and Remoteness: the US Perspective | 133 |
| | <i>Colin Kass and David Munkittrick</i> | |
| 14 | Causation and Remoteness: the EU Perspective..... | 141 |
| | <i>Helmut Brokelmann and Paloma Martínez-Lage</i> | |
| 15 | Proving the Fix: Damages..... | 148 |
| | <i>Michelle M Burtis and Keler Marku</i> | |
| 16 | Picking up the Tab: Funding and Costs from the Claimant's Perspective..... | 161 |
| | <i>Tilman Makatsch, Markus Hutschneider and Robert Bäuerle</i> | |
| 17 | US Monopolisation Cases | 172 |
| | <i>Barbara Sicalides and Lindsay D Breedlove</i> | |
| 18 | Brazil Overview | 191 |
| | <i>Cristianne Saccab Zarzur, Marcos Pajolla Garrido and Carolina Destailleur G B Bueno</i> | |
| 19 | Canada Overview..... | 200 |
| | <i>Antonio Di Domenico, Vera Toppings and Zohaib Maladwala</i> | |
| 20 | China Overview..... | 212 |
| | <i>Jet Deng and Ken Dai</i> | |

Contents

| | | |
|---|--|-----|
| 21 | Japan Overview..... | 220 |
| | <i>Madoka Shimada, Kazumaro Kobayashi, and Atsushi Kono</i> | |
| 22 | Mexico Overview | 230 |
| | <i>Omar Guerrero Rodríguez, Martin Michaus-Fernandez and Ana Paula Zorrilla Prieto de San Martin</i> | |
| Part II: Comparison Across Jurisdictions | | |
| 23 | Austria Q&A | 239 |
| | <i>Guenter Bauer and Robert Wagner</i> | |
| 24 | China Q&A..... | 256 |
| | <i>Jet Deng and Ken Dai</i> | |
| 25 | England and Wales Q&A..... | 274 |
| | <i>Nicholas Heaton and Paul Chaplin</i> | |
| 26 | France Q&A | 312 |
| | <i>Julie Catala Marty</i> | |
| 27 | Germany Q&A..... | 326 |
| | <i>Kim Lars Mehrbrey, Lisa Hofmeister and Sophia Jaeger</i> | |
| 28 | Israel Q&A..... | 343 |
| | <i>Talya Solomon and Iris Achmon</i> | |
| 29 | Mexico Q&A | 357 |
| | <i>Omar Guerrero Rodríguez, Martin Michaus-Fernandez and Ana Paula Zorrilla Prieto de San Martin</i> | |
| 30 | Netherlands Q&A | 372 |
| | <i>Klaas Bisschop and Sanne Bouwers</i> | |
| 31 | Portugal Q&A..... | 389 |
| | <i>Gonçalo Machado Borges</i> | |

Contents

| | | |
|----|---|-----|
| 32 | Romania Q&A..... | 406 |
| | <i>Paul George Buta, Manuela Lupeanu and Diana Gruiescu</i> | |
| 33 | Spain Q&A | 419 |
| | <i>Paul Hitchings</i> | |
| 34 | Sweden Q&A | 434 |
| | <i>Andrew Bullion, Mikael Treijner, Johan Karlsson and Trine Osen Bergqvist</i> | |
| 35 | United States Q&A..... | 451 |
| | <i>Benjamin Holt</i> | |
| | About the Authors | 465 |
| | Contributors' Contact Details | 487 |

PART II
COMPARISON
ACROSS
JURISDICTIONS

United States Q&A

Benjamin Holt¹

Effect of public proceedings

1 What is your country's primary competition authority?

At the federal level, the Antitrust Division of the United States Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC) share responsibility for enforcing the anti-trust laws. In addition, state attorneys general enforce state antitrust laws within their respective states.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The Antitrust Division, the FTC and the state attorneys general all have investigatory power. The Antitrust Division and many state attorneys general can also bring criminal proceedings or file civil actions based on competition violations. Absent a compelling federal interest, the Antitrust Division typically does not prosecute anticompetitive conduct if a state has already prosecuted that same conduct.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Private antitrust claims can, and often do, proceed parallel to criminal investigations and proceedings; however, the Speedy Trial Act and criminal discovery rules generally dictate that any criminal trial occurs before related civil actions are tried. Private litigants can benefit from waiting to pursue their claims until after the criminal proceeding because a finding of criminal liability is typically very helpful in corresponding private suits.

¹ Benjamin Holt is a partner at Hogan Lovells.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

In a criminal investigation or proceeding, investigators can seek a discovery stay in civil matters sharing common questions of fact or law. The judge presiding over the civil proceeding has discretion as to whether to grant the stay.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

The Clayton Act provides that final judgments entered against a defendant in a civil or criminal antitrust proceeding brought by the government may be used in a later private suit arising out of the same facts as prima facie evidence against the defendant. The Clayton Act also gives collateral estoppel effect to judgments in prior actions brought by the Antitrust Division in federal court but not to findings made by the FTC in administrative proceedings. Under the doctrine of collateral estoppel, a judgment as to matters actually litigated in an earlier suit is binding in a subsequent suit against the same party involving a different cause of action.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

Yes. Although leniency applicants can still be sued in private litigation, they are not subject to joint and several liability or triple damages if the court presiding over the private action determines that the applicant has satisfied its cooperation obligations. This means that a private damages recovery from a leniency applicant is limited to the actual damages resulting from the anticompetitive conduct. Despite this beneficial treatment, an applicant's criminal plea or conviction following a government action may be used as prima facie evidence of the violation in a subsequent private action.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

The files of a competition authority are often deemed protected by various exceptions to the discovery rules and, thus, are not accessible in private lawsuits. Similarly, there is no general right to access the materials used in a grand jury proceeding. However, Rule 6(e) of the Federal Rules of Criminal Procedure provides that grand jury minutes and transcripts from a criminal antitrust proceeding may be disclosed in a separate judicial proceeding pursuant to court order if a litigant demonstrates a 'particularized need' for the materials, such as a need to impeach a witness or refresh recollection. See *Illinois v. Abbott & Assocs, Inc*, 460 U.S. 557, 567 (1983) (collecting cases that set forth the standard of 'particularized need'). Courts differ in whether they permit disclosure in a private suit of documents submitted to the grand jury.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

The Antitrust Division does not disclose the identity of leniency applicants nor does it disclose materials or statements created or made in connection with a leniency application, unless required to do so by court order in connection with litigation.

9 Is information submitted in a cartel settlement protected from disclosure?

Information submitted as part of a federal criminal investigation is protected from disclosure under Rule 6(e) of the Federal Rules of Criminal Procedure, which limits the disclosure of grand-jury materials, and the exemptions to the Freedom of Information Act (FOIA). The FOIA exemptions prevent disclosure of certain types of documents, including those that are trade secrets, confidential commercial information, work product created in anticipation of litigation, files whose disclosure would constitute an unwarranted invasion of personal privacy, and law enforcement records or information whose disclosure could cause an invasion of personal privacy or the disclosure of a confidential source.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The FOIA provides a process whereby private individuals, including parties to a private antitrust suit, may request disclosure of federal agency records, including those of the FTC and the Antitrust Division. The FOIA, however, exempts from disclosure certain types of documents, including those listed in response to question 9. In addition, Section 6(f) of the FTC Act protects from disclosure trade secrets as well as confidential, privileged or financial information submitted to the FTC.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

Section 4 of the Clayton Act (15 U.S.C. § 15(a)) provides a private cause of action for suits brought pursuant to ‘the antitrust laws’, which includes Sections 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2), Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 2 of the Robinson Patman Act (15 U.S.C. § 13). Broadly speaking, Section 1 of the Sherman Act prohibits agreements in restraint of trade, including price-fixing agreements, group boycotts, market allocation, bid-rigging and tying. Section 2 of the Sherman Act prohibits unlawful monopolisation. Section 7 of the Clayton Act prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly. The Robinson Patman Act prohibits price discrimination in the sale of products to similarly situated buyers. Many states’ antitrust laws also provide for private rights of action.

12 What forms of monetary relief may private claimants seek?

Under Section 4 of the Clayton Act (15 U.S.C. § 15(a)), claimants can obtain treble damages, or three times the amount of damages sustained owing to the plaintiff’s antitrust violation, plus costs of suit, reasonable attorney’s fees and post-judgment interest.

13 What forms of non-monetary relief may private claimants seek?

Under Section 16 of the Clayton Act (15 U.S.C. § 26), private claimants may obtain injunctive relief to prevent or terminate unlawful conduct or, in rare cases, divestiture.

14 Who has standing to bring claims?

A plaintiff has standing to seek damages if (1) there is an actual case or controversy, the resolution of which directly impacts the plaintiff; (2) the plaintiff is not too removed from the violation; and (3) the plaintiff can demonstrate that it suffered an 'antitrust injury' to have standing in federal court. Antitrust injury is 'injury of the type the antitrust laws were intended to prevent'. *Atlantic Richfield Co v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). Plaintiffs who purchased products or services indirectly from the defendants are not permitted to bring antitrust damages claims under federal law but can do so under many state laws.

15 In what forums can private antitrust claims be brought in your country?

Private antitrust claims may be brought in state or federal courts.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

Generally speaking, a claimant has the choice of filing a claim in any forum that has jurisdiction over the antitrust claim and the defendant. Antitrust claims that allege a violation of any federal antitrust law may be filed in any federal district court where either: the defendant resides; substantial parts of the events arose; or the defendant can be served (if there is no other appropriate forum). A defendant must live in or have sufficient minimum contact with the state in which the federal district court sits for that court to have jurisdiction over the defendant. Laws vary by state, but most state courts have jurisdiction to adjudicate the federal antitrust claims if the federal court in that state would also have jurisdiction. Through a process called 'removal', a defendant can transfer a case initially filed in state court to a federal court if the case otherwise meets the federal jurisdiction requirements.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Claims can be brought in federal courts based on foreign law, subject to comity concerns and subject-matter jurisdiction. To determine what substantive law applies, federal courts apply the choice of law provisions of the state in which they sit. Federal Rule of Civil Procedure 44.1 governs determinations of foreign law. It states: 'A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.'

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

To file a claim in a federal district court, a plaintiff must pay a US\$400 filing fee and set forth in short and plain statements sufficient facts to support the plausibility of the claim alleged. A plaintiff must serve the pleading on the defendant personally (or through a process server) either to the defendant's home or residence, to the defendant's agent, or by registered mail with return receipt requested. Corporations may be served by delivery to authorised agents, officers or directors.

19 What is the limitation period for private antitrust claims?

The statute of limitations for federal private antitrust claims is four years from the date the cause of action accrued, which is defined as the date the plaintiff suffered injury. Individual states may have statutes of limitations that differ from the federal rule (e.g., Wisconsin allows six years; Georgia allows two years).

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The statute of limitations period is considered procedural law. If the statute of limitations expires before a plaintiff files a case and no basis for suspension of the period exists, the claim will be dismissed with prejudice.

21 When does the limitation period start to run?

The statute of limitations begins to run on the date that the cause of action accrues. The cause of action typically accrues on the date that the plaintiff suffered antitrust injury.

22 What, if anything, can suspend the running of the limitation period?

The statute of limitations may be 'tolled' or suspended in the event of any of the following situations: a pending government investigation or class action derived from the same facts as the plaintiff's case; fraudulent concealment; duress; or estoppel. A statute of limitations period may also be modified by contract between the parties.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

The pleadings must provide short and plain statements sufficient to make the claim alleged plausible and to put the defendant on notice of the challenged conduct.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Interim relief is available in the form of a temporary restraining order or preliminary injunction. To obtain either form of preliminary relief, a plaintiff must establish that irreparable harm is likely unless injunctive relief is granted. A plaintiff typically must also show that it is likely to succeed on the merits, that equitable considerations weigh in favour of injunctive relief and that injunctive relief is in the public interest.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

Before answering the pleading, a defendant may file a motion to dismiss challenging the claim for lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, failure to state a claim, failure to join a necessary party, or *forum non conveniens*. Alternatively, a defendant can answer the pleading. If the defendant answers the pleading, it can also simultaneously allege against the plaintiff counterclaims arising from the same transaction or occurrence. Once the complaint has been answered and discovery has commenced, a defendant can file a motion for summary judgment to obtain dismissal of the case. Summary judgment may be granted if there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law.

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

Discovery is fairly broad in US antitrust cases and may include production of documents, depositions, interrogatories and requests for admissions. Discovery must be of non-privileged matters that are relevant to any party's claim or defence and proportional to the needs of the case, and is usually limited to a period of time before the earliest date of alleged wrongdoing to a date after the alleged wrongdoing ended. The number of depositions, interrogatories, and admissions are limited by the Federal Rules of Civil Procedure and state procedures (although such limitations are sometimes altered by agreement or court order).

Discovery of non-parties is also allowed; however, courts regularly narrow the scope of discovery when it is sought from non-parties.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

Confidential information, if not otherwise subject to a specific privilege preventing disclosure, must be produced in response to appropriate discovery requests. Parties may protect such information from public disclosure through the use of protective orders that are either stipulated to by the parties or ordered by the court when the need for confidentiality of the information is shown 'for good cause'. Evidence introduced at trial is generally subject to the public's right of access to the courtroom and will not be blocked absent a compelling need.

28 What protection, if any, do your courts grant attorney-client communications or attorney materials? Are any other forms of privilege recognised?

Courts protect confidential communications between clients and attorneys related to the scope of the attorney's representation so long as the communication was not made in furtherance of an on-going or future criminal or fraudulent act. Further, any materials prepared in anticipation of litigation are protected from discovery under the Work-Product Doctrine. Federal and state courts recognise various other privileges, including a doctor-patient privilege, a marital privilege and a religious adviser-advisee privilege.

Trial

29 Describe the trial process.

Following pretrial proceedings (e.g., briefing, discovery, motions), a trial is divided into three primary parts. First, both plaintiffs and defendants make opening statements where they outline what they plan to prove at trial. Next comes the case-in-chief, where both fact and expert testimony is provided, and documentary evidence is introduced. Generally, substantive evidence may only be introduced during this second phase. The party bearing the burden of proof presents its evidence first, followed by the other party. Once all the evidence is presented, both sides have an opportunity to present closing arguments, which summarise the facts presented and apply them to the law applicable to the case.

30 How is evidence given or admitted at trial?

Evidence may be presented in either party's case-in-chief through witness testimony and documents. The admission of all types of evidence is governed by the Federal Rules of Evidence at the federal level, and by states' rules of evidence, common law rules of evidence or both at the state level.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Experts are regularly used in private antitrust litigation. The most common types of experts in antitrust cases are economists who testify about various issues, such as market definition and the extent of antitrust injury. Individual parties have discretion to select their expert witnesses, although experts presenting evidence at trial are subject to qualification and methodology requirements laid out in the Federal Rules of Evidence, and case law and disclosure requirements under the Federal Rules of Civil Procedure. Judges may also appoint experts.

32 What must private claimants prove to obtain a final judgment in their favour?

To prevail, private claimants must prove that: the defendant violated the antitrust laws; the plaintiff suffered economic injury (see question 36 for information on quantification of injury); the defendant's violation of the antitrust laws caused plaintiff's injury; and the defendant's violation was a material and substantial cause of the plaintiff's injury. Plaintiffs must prove these facts through a preponderance of the evidence, meaning that it is more likely than not that the facts are true. In addition, plaintiffs meet the 'antitrust injury' requirement by showing that the injury was 'of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful'.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

Two of the more commonly used defences unique to private antitrust litigation are the *Noerr-Pennington* defence and state action immunity. Generally, the defendant bears the burden of proving these defences.

The *Noerr-Pennington* defence exempts from liability actions aimed at influencing the passage or enforcement of laws by legislative, regulatory and judicial bodies even if the governmental action sought would have anticompetitive effects. This doctrine does not protect 'sham' petitioning.

State action immunity exempts state and municipal authorities from the federal antitrust laws, as well as non-state actors if state or municipal authorities actively supervise the non-state actor's activity or actively supervise a clearly articulated policy to displace competition.

The passing-on defence, or the avoidance of antitrust liability through proof that a plaintiff passed on any antitrust injury to a third party, is not available at the federal level, although some states do recognise it.

34 How long do private antitrust cases usually last (not counting appeals)?

From the filing of a complaint to the rendering of a verdict, private antitrust cases take an average of two to five years. Cases involving class actions or particularly complex issues can take an even greater period of time.

35 Who is the decision-maker at trial?

The decision-maker at trial is either a judge or jury of between six and 12 individuals. Either party to a damages claim has a constitutional right to request a jury in most circumstances.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

The evidentiary burden to quantify damage is less stringent than the burden to show that damage occurred. Plaintiffs merely must quantify damages with a 'just and reasonable' estimate that is based on relevant data. Damages may not be awarded, however, based merely on 'speculation or guesswork'.

37 How are damages calculated?

Damages are calculated as the difference between (1) the plaintiff's financial position 'but for' the antitrust violation and (2) the plaintiff's actual financial position as a result of the antitrust violation. For instance, in price-fixing cases damages are calculated as the difference between the price a buyer did pay and the price it would have paid without the violation. With limited exceptions, the actual amount of damages is tripled, or trebled, to calculate total recovery. Damages also are subject to mandatory post-judgment interest awards and the provision of pre-judgment interest dating back to service of the complaint if the defendant acted in bad faith to delay the proceedings.

38 Does your country recognise joint and several liabilities for private antitrust claims?

Yes, defendants may be held jointly and severally liable for antitrust violations when their concerted actions caused harm to the plaintiff.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Defendants may not seek contribution from co-defendants or third parties, although judgment-sharing agreements are generally permissible. Indemnification from other parties may be possible, but only for defendants who are ‘innocent actors’.

40 Can prevailing parties recover attorneys’ and court fees and other costs? How are costs calculated?

In the United States, prevailing parties may recover costs (e.g., court fees, transcript fees, printing and copying fees, witness fees), but each party generally pays its own attorney’s fees regardless of case outcome. Under Section 4 of the Clayton Act, however, prevailing plaintiffs in private antitrust damages actions may recover reasonable attorney’s fees and costs. Similarly, a ‘substantially prevailing’ plaintiff suing for injunctive relief under Section 16 of the Clayton Act may recover a reward for reasonable attorney’s fees. Prevailing defendants are typically not entitled to recover attorney’s fees.

41 Are there circumstances where a party’s liability to pay costs or ability to recover costs may be limited?

Courts have the ability to limit the recovery of costs under certain circumstances, such as when the prevailing party’s costs are unreasonably large, where the prevailing party should be penalised for unnecessarily prolonging the trial or injecting unmeritorious issues, where the prevailing party’s recovery is so insignificant that the judgment amounts to a victory for the opposing party, and cases that are ‘close and difficult’.

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Attorneys may act for claimants on a conditional fee basis. Contingency fees are generally negotiated before representation begins and are determined as a percentage of plaintiff’s recovery.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Both litigation funding and the sale of claims to third parties are generally allowed in the United States. While some individual states restrict third-party litigation funding under certain common law doctrines, the current trend is towards allowing such third-party funding.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Companies may insure themselves against the risk of private antitrust claims. We are not aware of insurance companies providing after-the-event insurance in the United States.

Appeal

45 Is there a right to appeal or is permission required?

Unsuccessful plaintiffs and defendants in private federal antitrust suits have the right to appeal a final decision of a federal district court.

46 Who hears appeals? Is further appeal possible?

For most competition cases, appeals from a federal district court are heard by the court of appeals in the circuit in which the district court is located. Further appeal to the United States Supreme Court – the country’s highest court – is allowed, but the Supreme Court has discretion as to whether it will hear such an appeal.

State cases are appealed to the state appellate court in the state where the case was heard. Many states have two layers of appellate courts like the federal system. A decision by the highest court in a state can be appealed to the United States Supreme Court.

47 What are the grounds for appeal against a decision of a private enforcement action?

In a private action, either side may appeal an unfavourable decision on the grounds of legal error that prejudiced the losing party. Appellate courts do not re-weigh the evidence; rather, they examine whether the trier of fact correctly applied the law to the facts as it (the trier of fact) found them.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Yes, class actions are common in the US, and antitrust claims are regularly brought as putative class actions. Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for class actions, including antitrust class actions. Under the Class Action Fairness Act, federal courts can hear class lawsuits that arise under state laws. Many states also permit the filing of class-action lawsuits.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

A consumer or trade association may bring claims in a representational capacity on behalf of members under certain circumstances. An association may sue in a representational capacity only if the association’s members would have standing in their own right; the interest the association is seeking to protect is germane to the association’s purpose; and the nature of the claim and the relief sought do not require the participation of the individual members.

50 What is the standard for establishing a class or group?

Rule 23(a) of the Federal Rules of Civil Procedure requires the class representative to establish (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Numerosity ensures that the size of the putative class is such that joining all members is impractical making class action

a useful way to bring claims. Commonality requires that the class members have at least one question of law or fact in common. Typicality means that the claims or defences of the class representative are typical of those of the other class members. Finally, the adequacy requirement ensures that the class representative is capable of fairly and adequately protecting the interests of the class.

51 Are there any other threshold criteria that have to be met?

In addition to establishing the prerequisites specified in question 50, a class representative also must satisfy one of three criteria set forth in Rule 23(b) of the Federal Rules of Civil Procedure: trying individual actions would expose the defendant to the risk of inconsistent and incompatible judgments or would dispose of or harm the interests of non-parties; the defendant's conduct is such that injunctive or declaratory relief on behalf of the whole class is appropriate; or questions of law or fact common to the class predominate over questions affecting individual members. Most antitrust class actions are certified based on the third circumstance.

52 How are damages assessed in these types of actions?

The court hearing the class action is tasked with developing a procedure for distribution of damages. Courts sometimes appoint a 'special master' who can examine witnesses and evidence and who is often specially trained in matters of accounting or auditing. Distribution schemes also may be determined jointly by the court and the parties during the pretrial conference. At the pretrial conference, the parties may stipulate to various facts that would enable fair distribution in the event the defendant is found liable.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

Rule 23(e) sets forth the procedures for settling class actions. The Rule requires that notice of the settlement be given to all class members who would be bound by the settlement. The parties must provide notice in clear, concise, and easily understood language. The parties must file a statement identifying any agreements made with counsel in conjunction with the settlement proposal, and class members must be given an opportunity to object to any settlement that requires court approval. The court then must hold a hearing regarding the proposed settlement. If the court determines that the proposal is fair, reasonable, and adequate, it can approve the settlement. The Class Action Fairness Act (CAFA) sets forth several prohibitions regarding class-action settlements. For example, CAFA levies restrictions on awards of attorneys' fees in coupon settlements, where the value of the settlement is determined based on the number of coupons redeemed. CAFA also prohibits distribution that discriminates based on the class members' geographic locations, thereby preventing larger awards to members solely because of where they live.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Although there is no specific mechanism for collective settlements outside the class-action process, collective settlements are sometimes reached pursuant to arbitration. Arbitration often occurs in lieu of a class action when a potential defendant's contracts make arbitration mandatory. Alternatively, parties can agree to engage in arbitration voluntarily. Decisions of an arbitrator are binding unless the parties agree otherwise. To enforce an arbitration decision, the winning party must resort to the courts.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The FTC does not impose redress schemes, but, upon reaching a settlement with a defendant, the FTC typically returns some of the money that it collects to consumers harmed by the anticompetitive conduct. Some state attorneys general suing on behalf of their citizens also return portions of settlement funds and damages awards to injured consumers in their respective states.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes, private antitrust disputes may be subject to arbitration.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Yes, courts will generally enforce an arbitration clause in a contract as well as a class arbitration waiver. That said, courts do not always enforce such clauses, especially where the clause is in a contract of adhesion or a contract that is not sufficiently related to the alleged violation. Moreover, courts are unlikely to compel arbitration where there is no contractual basis for it.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Most federal district courts have ADR programmes that are available to litigants and are managed by formal court rules. These programmes vary by court, but typically include referrals to mediation or arbitration, and less frequently include early neutral evaluation, 'settlement week' and 'case valuation' programmes. Some courts automatically refer particular types of cases to mediation or ADR. Other courts require the parties to certify that they have considered and discussed mediation and settlement options as part of early case management procedures.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

Unlike in parts of Europe, there have been no significant attempts by policy-makers to increase knowledge of private antitrust suits in the United States in part because private antitrust suits are already common and the laws are fairly well-known. However, both the DOJ Antitrust Division and the FTC hold workshops and release policy statements on their interpretation of antitrust laws and conduct in certain industries. Such guidance is often taken into consideration by the parties to lawsuits as well as by the courts. One example of recent agency guidance is the joint FTC/DOJ 'Antitrust Guidance for Human Resources Professionals', which was released in October 2016.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

Not applicable.

Appendix 1

About the Authors

Benjamin Holt Hogan Lovells

Benjamin Holt is a partner in Hogan Lovells' antitrust litigation practice in Washington, DC. Ben has significant experience defending class actions following governmental investigations and coordinating litigation and investigations across borders. He has also handled numerous stand-alone antitrust lawsuits and investigations covering a range of competition issues from mergers to price-fixing, and everything in between.

Ben has litigated antitrust cases on both sides of the 'v' and has represented clients in matters before the US Federal Trade Commission, the US Department of Justice, and various state attorneys general. Ben brings this experience to his counselling practice in which he regularly advises clients on antitrust and competition issues arising from business deals and disputes as well as compliance with federal and state antitrust laws. He has experience in a wide range of industries, but has focused most of his work on financial services, automotive, and healthcare.

Ben has published a variety of articles on antitrust and antitrust litigation topics and regularly presents to clients and others on developments in the field and relevant antitrust topics, such as antitrust compliance for trade associations and strategies to defend antitrust class actions. In addition to this publication, he is the co-author of *Antitrust Compliance*, published by Bloomberg BNA as part of the Corporate Practice series. Ben also serves as an adjunct professor at Georgetown University Law Center, teaching a seminar on antitrust practice and writing.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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