

**International Competition Network**

**Cartels Working Group**

**Subgroup 1 – General Framework**

**INTERACTION OF PUBLIC AND  
PRIVATE ENFORCEMENT  
IN CARTEL CASES**

Report to the ICN annual conference, Moscow, May 2007

## INTRODUCTION

Apart from competition authorities private market participants also play an important role in the general system of cartel law enforcement. They fulfil a valuable function by way of complaints or as third parties in competition proceedings. Also by means of civil lawsuits private persons can seek redress for their own cartel-based injuries. In recent discussions the private enforcement of cartel law has gained increasing significance. For example there have been a number of substantial changes in the last few years in many national legal systems to improve the situation of private plaintiffs<sup>1</sup>. Parallel to this, the European Commission has published a Green Paper on issues of damage entitlement under cartel law with the aim of strengthening private enforcement in Europe.<sup>2</sup>

Private cartel law enforcement is not only a topic for lawyers and civil courts but for all parties involved in the application of competition law. Private enforcement cannot be treated as an isolated issue because it is an integral part of the system as a whole and has to be seen in its interaction with public cartel law enforcement. The aim of this report is to shed light on the different facets of this topic, in particular with a view to what effects private cartel law enforcement has on public competition law enforcement practice. It will explore the interaction between the public and private enforcement of competition rules by examining the basic role of private enforcement of competition rules, the extent to which private enforcement currently exists, and its role in deterring cartel conduct. A special focus is laid on the impacts of private enforcement on leniency programmes.

For this study three questionnaires were prepared: one addressed to the competition agencies, one addressed to NGAs as in their daily work lawyers are often more concerned with private enforcement matters than the competition agencies and a third addressed to companies.

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<sup>1</sup> One example is Germany where the 2005 amendment of the competition act led to a significant improvement in the sector of damage claims by private parties in follow-on claims for competition infringements.

<sup>2</sup> Available at [http://www.europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp.html](http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html).

Competition agencies of 9 jurisdictions participated in this project: Australia, Brazil, Canada, Germany, Hungary<sup>3</sup>, Japan, Mexico, South Africa and the United States of America. The questionnaire was not sent to European competition agencies as their private enforcement regime was covered and described in the “Study on the condition of claims for damages in case of infringement of EC competition rules” as commissioned by the European Commission in preparation of the Green Paper which covers the 25 Member States of the European Union: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republik, Slovenia, Spain, Sweden and United Kingdom. The study provides an overview of the current state of affairs as regards damages actions based on an infringement of competition law in Europe. The findings of the study are incorporated in the report. This means that for the purpose of the report a total of 32 jurisdictions were surveyed.

NGAs from 11 jurisdictions participated in the project: Brazil, Canada, Finland, France, Germany, Hungary, Japan, New Zealand, South Africa, United Kingdom and United States, whereas it has to be taken into account that of each jurisdiction often more than one NGA answered and 18 answers in total have been received. Furthermore, companies and trade associations from ten jurisdictions answered the questionnaire. Here it also has to be taken into account that of each jurisdiction often more than one company answered and 23 answers in total were received. The responding companies were from the following jurisdictions: Australia, Brazil, Canada, European Union, Finland, Germany, Netherlands, Portugal, United Kingdom and United States. Of the companies surveyed five companies had been claimants in private damage claims, three had been defendants, and four had been both a party claiming damages against a cartel and a party being sued for (allegedly) participating in a cartel. Eleven companies had no experience at all in the private enforcement of cartel cases. The limited number of NGAs and companies replying, and their varying experiences with antitrust issues, means that their views should not be considered as

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<sup>3</sup> Even though Hungary and Germany were covered by the Ashurst study the Hungarian competition authority offered to provide us with an update as there have been some significant changes in the Hungarian competition law with regard to private enforcement after the completion of the Ashurst study, and we also incorporated the changes due to the 2005 amendment of the German competition act in the report.

representative and are reported here as examples of NGA and companies viewpoints only.

In a first section, this report will give an overview of the existing legal systems providing for the private enforcement of competition rules in the 32 jurisdictions surveyed. Section 2 will then briefly explore the basic role of private enforcement in the different jurisdictions under review. Finally, the last section will explore the interaction between public and private enforcement in more detail.

While there are various cases in which the private enforcement of competition law plays a potential role, the scope of this study focuses on cases in which private plaintiffs file actions for damages which they have incurred as a result of anti-competitive cartel agreements. Other cases involving the infringement of competition law as a result of the abuse of a dominant position were not dealt with, as this working group concentrates on cartels.

The ICN project on the interaction between public and private enforcement was led by the German Bundeskartellamt. Credits go to Sandra Weisweiler, who drafted the report, and also to Dr. Felix Engelsing. Without the time-consuming contributions of all the countries involved in this project this report would have never been possible to publish. Therefore, many thanks to all the competition agencies, NGAs and companies who participated.

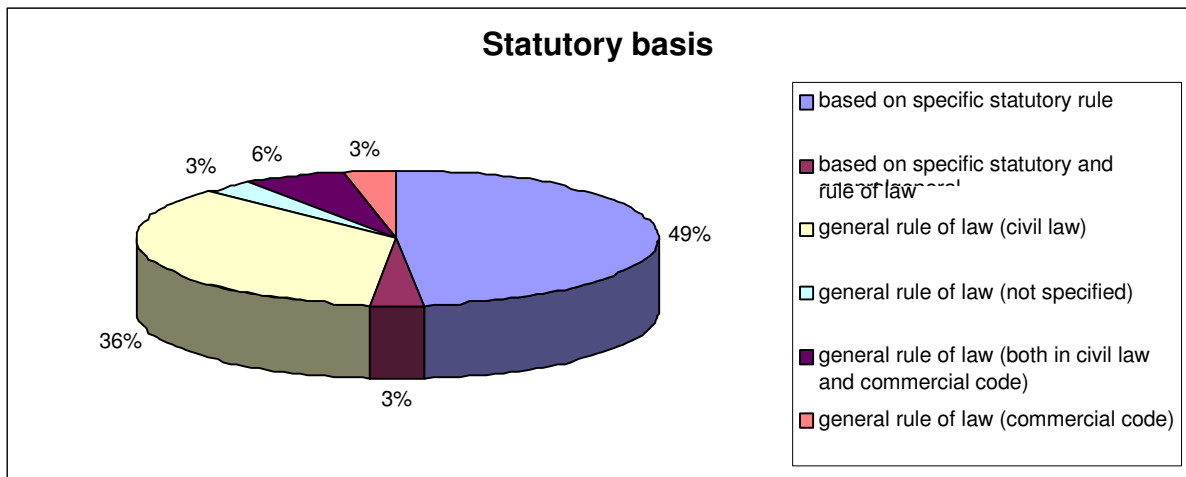
**PART I: PRIVATE ENFORCEMENT – OVERVIEW OF EXISTING LEGAL  
SYSTEMS**

This first section gives an overview of the existing legal systems providing for the private enforcement of competition rules, analyzing in particular preconditions for damage claims, grounds of justification, damages and the procedural framework of actions for damages in competition matters.

**A. ACTIONS FOR DAMAGES – LEGAL BASIS**

**I. Statutory Basis**

In a first step it was analysed whether explicit statutory bases for action for damages exist in competition law in the jurisdictions and what are the preconditions for claims for damages. Regarding the statutory bases for actions for damages in competition matters, almost half of the competition laws surveyed provide for an explicit statutory rule, while a plaintiff in the other jurisdictions may base his claims on general provisions of the national civil code or – in few cases – on provisions of the commercial code. However, even in those jurisdictions providing for a specific statutory basis, the conditions of liability are by and large regulated by the general provisions of tort and contract law. Therefore, in a number of these jurisdictions, the specific provisions do not deviate in any material manner from the general rules for damages. Nevertheless, the majority of these provisions facilitate the enforcement of private damage claims. Some provide for special procedural rules including the shifting of the burden of proof for the element of fault, the easement of evidentiary requirements for causation, or the extension of liability covering pure financial losses and even including exemplary damages. Others contain particular rules for the calculation or the estimation of (economic) damages. Although in turn, in 4 of the jurisdictions surveyed a decision of a competition authority or a competition court establishing the infringement is required as a pre-condition before allowing damage claims, which could be seen as a restraint for private claims.



**Graphic 1:** Existence of legal bases within the jurisdictions surveyed

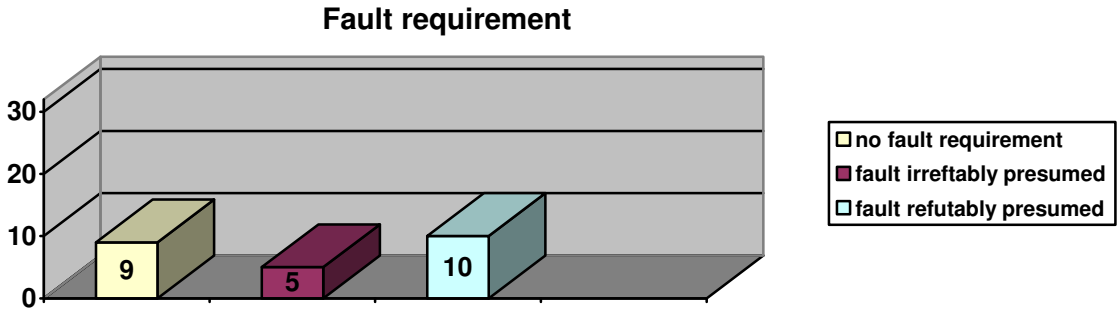
## II. Preconditions for claims and legal consequences of an action for damages

### 1. Fault requirement

Regarding the fault requirement, a distinction has to be made between the requirement of fault and that of illegality, i.e. the infringement of competition rules. According to the results of the survey, in nine of the 32 jurisdictions surveyed the proof of illegality alone will suffice. Thus, as one of the national reports illustrated, in the case of hard-core restrictions the plaintiff will only have to show that the defendant knowingly joined the conspiracy. However, the majority of the competition laws surveyed requires illegality and fault on part of the defendant with both intent and negligence being sufficient. This must generally be established in relation to the violation of competition law, while two countries require the fault to be proven in relation to the effects of the infringement. Still, the burden of proof is alleviated as most of these competition regimes stipulating a fault requirement provide for a refutable (shifting of the burden of proof to the defendant) or irrefutable presumption of fault. Only in five countries will the plaintiff have to prove fault on behalf of the defendant in order to obtain the restitution sought.

An interesting observation is that even for those jurisdictions not requiring an element of fault, its existence might still be relevant regarding the quantum of damages awarded. This is also true for those jurisdictions providing for a “graduated

compensation” scheme, according to which the level of damages is linked to the degree of fault of the tortfeasor.

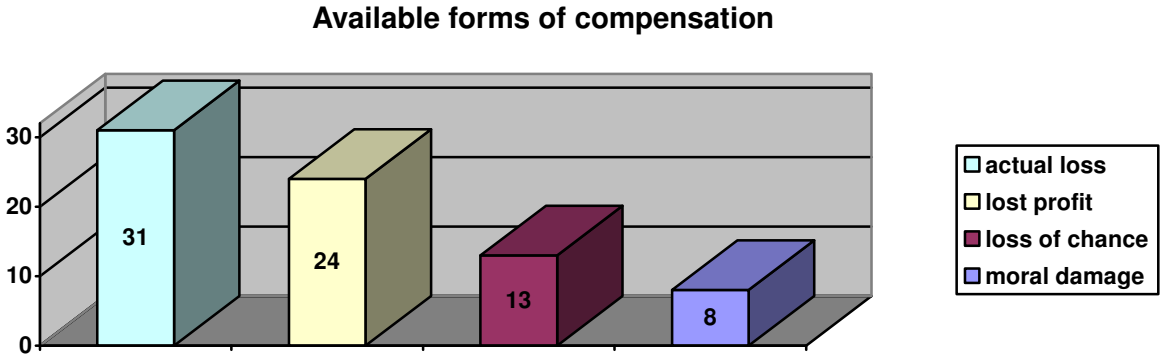


**Graphic 2:** Fault requirement

**2. Available forms of compensation**

The survey has shown that damages are principally awarded on a restitution basis, i.e. the victim must be restored to the situation he would have been in had the tort not taken place. Some of the jurisdictions regard this principle of restitution as the main form of remedy, so that monetary compensation is only awarded if full restitution is impossible or excessively difficult. In some other jurisdictions, the plaintiff has to specifically request restitution, while in turn a few other jurisdictions only provide for monetary compensation.

Nonetheless, monetary compensation is available in all jurisdictions, covering at least actual losses and loss of profits. However, not all jurisdictions also compensate for a loss of chance or moral damages<sup>4</sup>, as is shown in the graphic below.



**Graphic 3:** Available forms of compensation

<sup>4</sup> Moral damages are a form of compensation decreed by a court in instances where the defendant suffers:physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury.

### **3. Other forms of civil law liability**

In addition to monetary compensation, the great majority of jurisdictions surveyed also provide for other types of liability such as the disqualification and/or various forms of personal liability of directors, officers and board members<sup>5</sup> of the defendant undertaking. With regard to the disqualification of directors the legal basis is only very rarely the competition Act and more often than not the commercial/companies Act or criminal law. If disqualification is not envisaged under competition law, the breach of competition law is often not expressly mentioned in the relevant provisions but usually qualifies as a reason for disqualification in terms of a violation and negligence of duties as a director. However, in one jurisdiction competition law infringements per se do not justify for disqualification and can only be taken into account among other factors. In most cases disqualification is limited in time but can even last up to 15 years in one jurisdiction.

In almost all jurisdictions surveyed, directors can be held personally liable for the damages the company incurred through competition law infringements as a result of a violation of their duties. A violation of their duties is usually given if they harmed the company by participating in a cartel agreement. Such damage claims against directors can be brought either by the company, shareholders (in the name of the company) and/or in some jurisdictions also by third parties and creditors. Furthermore, the personal liability of directors can lie in the joint and several liability for the damage payment awarded to the plaintiff and/or for the payment of fines imposed by the competition authority. One jurisdiction also referred to the possibility of spin-offs or sale of the defendant company's assets in order to eliminate the anticompetitive effects as another form of civil liability.

### **4. Availability of punitive or exemplary damages**

Only one of the 32 competition law regimes surveyed provides for a mandatory trebling of the damages sustained by the plaintiff for most violations of the antitrust laws. Just four other jurisdictions provide for discretionary punitive or exemplary damages recognising them as a deterrent to wrongful conduct. In order to award these damages, the defendant must have consciously and deliberately violated the competition rules or must have acted particularly repulsively and/or repeatedly.

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<sup>5</sup> In the following simply referred to as directors.



However, in these four jurisdictions these damages are in practice only rarely awarded and even if this is the case, they were often viewed as modest.

On the other hand, the great majority of the countries surveyed does not provide for multiple damages and believes that the idea of exemplary or punitive damages conflicts with the restitutionary and compensatory nature of damage claims. It was expressed that awarding multiple damages would lead to an impermissible unjust enrichment of the plaintiff and is even considered by one jurisdiction to violate the “*ordre public*”. The consequence is shown by practice: a court of this jurisdiction decided that the competent authorities can deny the service of a foreign writ claiming punitive damages as it qualifies as a violation of its national *ordre public*.

In two other jurisdictions the defendant may be ordered to publish the decision establishing an infringement of the competition rules or an admission to that effect in the press. In yet another country the defendant may even be ordered to make a donation to a charitable organisation. As neither of these remedies compensates for the plaintiff’s damages, they might also be considered as a form of “exemplary damage.”

### **III. Grounds of Justification**

#### **1. Grounds of justification in general**

Regarding grounds of justification, as far as the European market is concerned, a competition infringement can be justified if the anticompetitive practices contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Most EU Member States provide a national equivalent. But even some jurisdictions from outside the European Union claimed that undertakings can enjoy exemption if the public benefit of the anticompetitive practice outweighs the anticompetitive detriment.<sup>6</sup> This form of justification can be called justification on the basis of competition law.

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<sup>6</sup> Although in one of these jurisdictions this does not apply to hard core cartels.

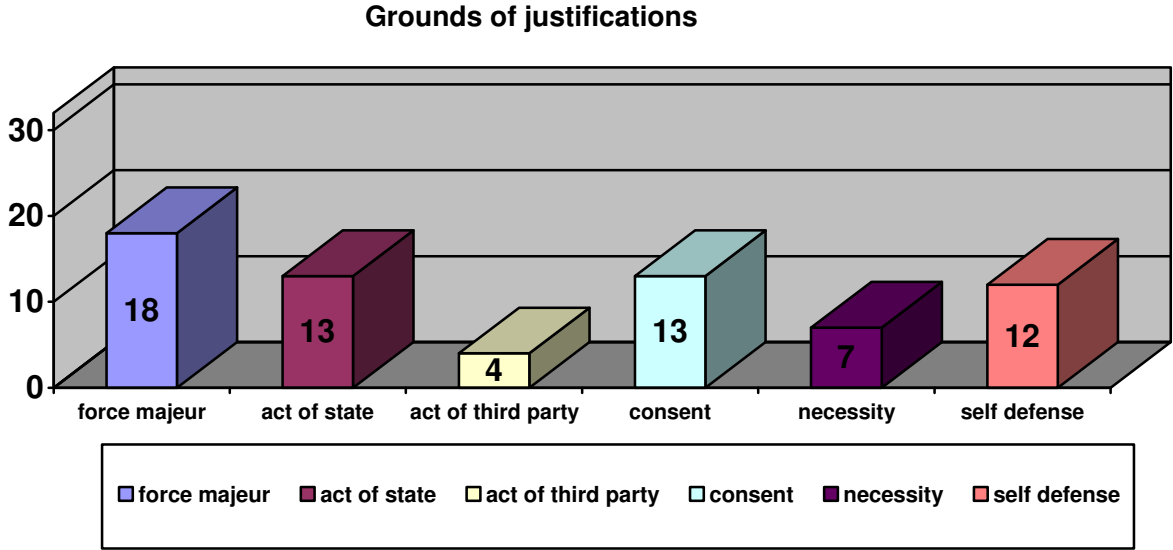
Furthermore, the jurisdictions reported other more general grounds of justification. For example, “*force majeure*” justification, i.e. an event which is unpredictable, irresistible and independent of the tortfeasor’s will. Similarly, the fact that the defendant acted in a state of emergency or out of necessity, i.e. to prevent danger to himself, another person, or to property, is also accepted as a defence of anti-competitive behaviour. This applies also to cases of self-defence, in which the anti-competitive conduct is in response to an anti-competitive or exploitative conduct on the part of another party.

In a number of jurisdictions, the acts of the defendant are also justified where a state authority compelled the anti-competitive conduct, e.g. by passing specific compulsory legislation. In general, however, the mere facilitation or promotion of such conduct will not suffice. In one jurisdiction, the sovereign’s act is qualified as a form of “*force majeure*”. Also the intervention of a third party or the victim is viewed as possibly exempting the defendant from liability, whereby this aspect is also taken into account when establishing the required causal link between the defendant’s behaviour and the damage sustained (see below under B. III. 7.).

Some competition law regimes likewise acknowledge the consent of the victim to the anti-competitive conduct of the defendant as a ground of justification. However, as one national report pointed out, a consent to the defendant’s anticompetitive conduct would normally constitute an infringement of competition law in itself, so that consent usually does not qualify as justification for the defendant. Consequently, those countries accepting consent as a defence generally require that the consent itself does not infringe statutory prohibitions or public policy. Furthermore, this concept ordinarily does not prevent the application of national rules regarding contributory negligence (see below under III. 3) which are acknowledged by the vast majority of the jurisdictions surveyed.

In a few reports it was also discussed whether insurmountable error on behalf of the defendant could justify the infringement. However, they agreed that this would be restricted to situations where there is no clear guidance in the case law on the illegality of a certain behaviour and that everybody is obliged to inform himself about legal provisions applying to him.

For the most part, the different competition law regimes accept various grounds of justification. Admittedly, their application appears highly theoretical, with only one national report providing an example of the protection of legitimate interests in the form of a boycott against a dominant firm. Only two jurisdictions claimed not to acknowledge any grounds of justification. In two other jurisdictions justification does not apply to hard core cartel conduct as hard core cartels are deemed per se unlawful. Finally, five jurisdictions stated that all or part of the grounds of justification explained above do not serve as a justification but can be used by the defendant to show lack of fault.



**Graphic 4:** Grounds of Justification<sup>7</sup>

**2. Passing on defence and indirect purchaser standing**

The passing-on defence constitutes a defence raised by the defendant, claiming that the plaintiff has been able to pass the damage wholly or partly on to his customers by raising prices correspondingly, and that he has therefore not suffered any damage himself. The passing-on defence is closely connected with the question of whether indirect purchasers have an entitlement to claim for damages. Denying the passing-on defence to the defendant and granting at the same time the indirect purchaser an entitlement to claim for damages may involve the risk of exposing the defendant to cumulated claims for damages. However, if both, i.e. the passing-on defence and the

<sup>7</sup> For reason of simplification in this graphic it was not differentiated whether it is qualified as a ground of justification or as lack of fault.

indirect purchaser claim are denied, the result may be that the direct purchaser as the plaintiff is enriched whereas the indirect purchaser, who has actually suffered the damage, comes away empty-handed. Even if the passing-on defence is permitted and the indirect purchaser is granted an entitlement to claim in return, it is often difficult for the indirect purchaser to prove his damage. Because the damage suffered by the indirect purchaser, in particular the end consumer, is often merely a minor damage there might also not be a strong enough incentive to file a lawsuit. As a consequence the efficiency of private cartel law enforcement could suffer.

The vast majority of the jurisdictions surveyed neither addressed the admissibility of the passing on defence nor indirect purchaser issues in a statutory provision or in the case law. However, the general principles of compensation (*compensatio lucri cum damno*) and prohibition of the unjust enrichment of the plaintiff in damage actions are likely to require the courts of these countries to contemplate this defence when assessing damages. It lies with the defendant, though, to prove that the damage has been passed on by the plaintiff as no presumption exists that increased prices have been passed on. In one jurisdiction it is even explicitly stated in the competition law that a damage shall not be excluded on account of the mere fact of a resale; clarifying that it is left to the defendant to show that the higher prices have been passed on. In this context two of the national reporters stressed that even accepting the passing-on defence would not necessarily bar all claims from those direct purchasers as they may also have sustained a damage due to the loss of customers. Another agency pointed out that claiming the passing-on defence in a civil proceeding would imply the confession of the alleged infringement.

According to the general principles, in the vast majority of jurisdictions it is also deduced from the restitutive-compensatory function of damage awards that this will normally require that indirect purchaser claims are admitted. Interestingly, this also applies to those jurisdictions requiring a “direct causation” test, as the passing-on could in fact be regarded as a normal consequence of the principal’s conduct. As there is no general presumption that higher prices have been passed on to indirect purchasers, the burden of proof will lie on the plaintiff. In the opinion of most of the countries surveyed, indirect purchasers will therefore face serious difficulties in showing a causal link between the infringement and the damage sustained.

Therefore, one national reporter suggested that the problem of proof for the indirect purchaser could be substantially alleviated if the direct purchaser was under the obligation to prove that the damage award would not unjustly enrich him by identifying all customers to whom he has passed on his potential loss caused by the infringer and to notify these indirect purchasers so that their claims against the direct purchaser may be joined to the direct purchaser's claim.

Only three jurisdictions claimed the passing on defence as being inadmissible. As a consequence in two of these jurisdictions indirect purchasers also have no standing. Although it is noteworthy that in one of these jurisdictions the passing on defence is not strictly excluded but admissible in the very limited circumstances, where the purchaser has pre-existing, fixed-quantity, cost-plus contracts with its customers – a threshold viewed by the courts as practically insurmountable. In this jurisdiction there is also the particularity that indirect purchaser claims are not allowed under federal law but under many state laws. Therefore, the defendant can face damage actions by its direct purchaser without the possibility to claim the passing on defence and also by an indirect purchaser under state law. In order to solve the conflict it was reported by the agency of this jurisdiction that the later acting court could use a mechanism of setoff to prevent excess damage awards.

### **3. Contributory negligence**

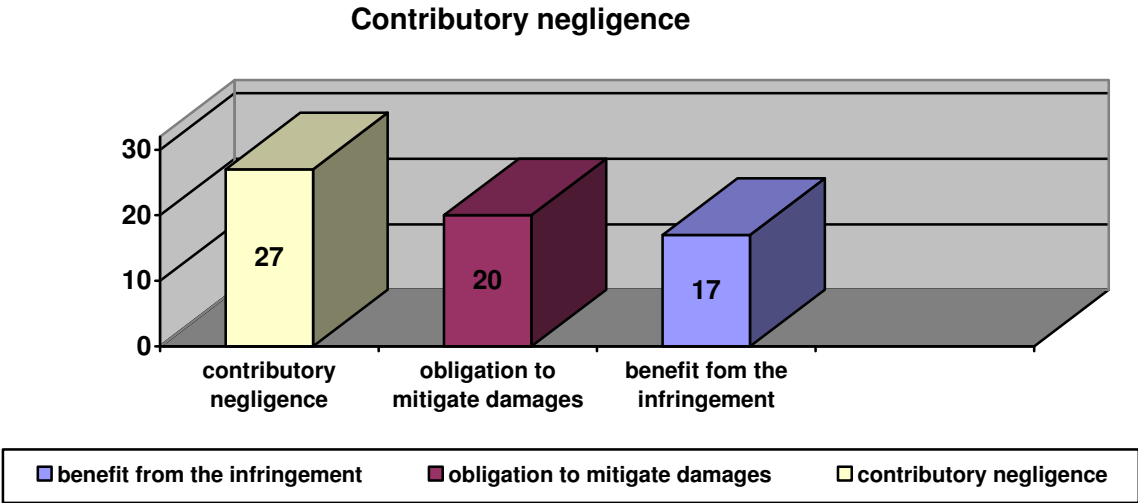
According to the general principles of civil law almost all jurisdictions provide for a reduction of damages where the plaintiff has contributed to the infringement, leading to a reduction of the damage award in proportion to the contributory negligence. This even applies to those countries not requiring an element of fault in order to establish liability. However, the result of the survey suggests that for the majority of the countries, the plaintiff's participation in a cartel will usually not reduce the defendant's liability to nil or even function as a defence. In this respect, the judgment of the ECJ in "Courage v. Crehan" clarified for the EU that a plaintiff may still obtain compensation from the other party of an agreement for the damage caused by the infringement of competition laws if the other party bore significant responsibility for this.

The great majority of the law regimes surveyed also require the plaintiff to mitigate potential losses, which will lead to a reduction of damages if he failed to do so. While the defendant regularly bears the burden of proof that the plaintiff has allegedly not

complied with his duty, this obligation does not put an unreasonable burden on the injured party as he is only under the obligation to take appropriate measures to restrict the damage if that would be the behaviour of a reasonable and careful person.

Similarly, in most jurisdictions, the damages awarded to the plaintiff may be reduced if he has benefited from the infringement. For the purpose of this report, “benefit” refers to any advantage, financial or otherwise which the plaintiff gained as a result of the competition law violation. While this is left in one country to the discretion of the court, this principle is based on the premise that the plaintiff should not be unjustly enriched, meaning that only the net damage should be compensated.

Despite the overriding concept of restitution, it is interesting to note that four national reporters observed that their courts are in exceptional circumstances entitled to reduce the damage award, if full compensation would otherwise produce unacceptable or severe results to either the benefit of the plaintiff or the detriment of the defendant (see also below IV. 6.). The results of the survey are summarized in the following graphic:



**Graphic 5:** Contributory negligence

**IV. Damages**

Damage calculation and estimation is of crucial importance for private plaintiffs and raises questions such as: What economic or other models are used by the courts to calculate damages? Are damages awarded for injuries suffered on the national

territory only or over a wider area? Are ex ante (time of injury) or ex post (time of trial) estimates used? As confirmed by the answers given by the NGAs these questions arise in practice in particular in follow-on claims where the competition law infringement has already been established by the decision of the competition authority or criminal court, as the case may be.

## **1. Economic models to calculate damages**

In practice, it is the economic calculation of damages caused by a competition law violation that is particularly difficult. There are two aspects under which a damage on the demand side can be defined. Firstly, purchasers have to buy the respective product at the monopoly price, which is higher than the competitive price, and consequently suffer a monetary damage. Secondly, due to reduced output quantities the product quantities available to purchasers are lower than under normal competitive conditions. This can result in additional damages for purchasers. However, the calculation of these damages in individual cases very much depends on the individual situation of the affected party and is therefore not discussed in this statement. Instead the report will focus on the monetary damage, i.e. the “overcharge percentage” the plaintiff had to pay due to the infringement.

A tenable calculation of the hypothetical market price often raises similar difficulties as the administrative calculation of additional profits or abusive pricing proceedings. There are three methods by which the hypothetical market price can be established. The **comparative market approach** bases the calculation of the hypothetical market price on the situation in a comparable market, the **cost-based approach** analyses actual production costs and adds an “appropriate” profit margin and the **simulation approach** determines the hypothetical result directly on the market affected.

### ***The comparative market approach***

This approach is based on the comparative market concept. It comprises two steps: First it has to be verified that the market used as the comparative market is indeed adequate to determine the hypothetical market price. In a second step price developments in the comparative market can then be compared to prices in the market affected by the cartel. The open market price is calculated on the basis of the comparative market, not the affected market. For this reason it is decisive that the affected market and the comparative market are indeed comparable to one another.

For a market to be comparable, be it in terms of product or geography or from a temporal perspective, two fundamental conditions must be fulfilled. Firstly, the structures of the two markets have to be (to a large extent) comparable, and secondly there has to be effective competition on the comparative market so that the price in the comparative market can be regarded as an open market price. Consequently the verification of these two assumptions is central to the comparative market approach. This requires the development of appropriate tests. However, there is no need to develop an extensive market model because it suffices to compare structural features. Sometimes, in order to prove that there is effective competition in the comparative market, a more detailed examination of market structures in the comparative market is required. If for example the comparative market analysis is based on a “before-and-after” approach (i.e. the same product market is examined before the formation and after the liquidation of the cartel) it has to be ensured that the market’s efficiency has not been disrupted by other anti-competitive activities. The before-and-after approach therefore requires an adequate reference period to verify effective competition, e.g. by means of a time series analysis. The advantage of the comparative market approach lies in its greater manageability because it requires less data and, in particular, does not require the development of a complex market model. However, the fact that additional proceeds are calculated indirectly on a different market rather than directly on the actually affected market can be considered a disadvantage.

### ***The cost-based approach***

According to this approach the hypothetical market price can be established by adding to the average production costs of the product in question a hypothetical profit margin considered to be appropriate under competitive conditions. The disadvantage of this approach is that it is impossible to define what is an appropriate profit margin because this is precisely what competition is supposed to determine. In particular it disregards the fact that in the past cartel agreements have also occurred in situations where the competitive price was in danger of becoming a below-cost price.

### ***The simulation approach***

The simulation approach determines the cartel-induced damages by comparing the affected market with the – hypothetical – situation in the same market if the cartel did not exist. There are two possibilities to calculate the damages: either the market



structure is represented by statistical interrelations of relevant variables or by means of an independent economic model. The first method requires corresponding regression analyses to determine the significance of individual parameters; an elaborated market model is not applied. The second method, on the other hand, is based on a market model which would have to be specified according to market parameters. Since the affected markets usually have oligopolistic market structures the unilateral effects caused by these structures need to be taken into consideration when establishing the hypothetical market price. In the case of oligopolistic market structures it would therefore not be appropriate to simply presume that the open market price corresponds to the equilibrium price because such an assumption would completely ignore any unilateral effects. Where the market model approach is chosen the relevant variables therefore need to be described by a correspondingly specified (oligopolistic) market model which is based on econometric methods. Thus it is possible to adequately reproduce the prevailing market structures in the affected market and to estimate the open market price on their basis. The advantage of the simulation approach lies in the fact that the calculation of the open market price is directly based on the affected market. This excludes the possibility of interferences resulting from comparisons with other markets. However, this approach also has its drawbacks because choosing on which model to base the calculation always requires a balancing between proximity to reality and practicability. In other words the closer the model represents the reality the more complex it becomes, to the point of mathematical impracticability. In addition it has to be noted that there have to be corresponding data bases for all explanatory variables used in the model. Furthermore, it should not be underestimated that econometric methods are always based on statistic procedures which in turn can be flawed with structural misconceptions.

## **2. Economic models to calculate damages used by the courts in the jurisdiction surveyed**

Unanimously, all competition law regimes will compare the plaintiff's actual position following the harmful event with the hypothetical position which would have existed had the harmful event not occurred in order to establish the quantum of the damage. This "differential analysis" is a direct consequence of the restitutionary nature of damages.

The national reports indicate that, while the courts have wide discretion in calculating damages in competition law cases, they rely either exclusively on evidence submitted by the parties or require an expert witness. (see below under B. III. 5.). Consequently, the quantification of damages is either done on a case-by-case analysis or a constant methodology has not yet developed because of a lack of case-law in this area. Therefore, only very few national reporters and agencies could specify the economic models and calculation methods applied when determining the quantum of damages.

### **3. Maximum limits to damages**

Because of the restitutionary nature of damage claims, none of the jurisdictions surveyed recognises a maximum limit to damages as the victim must be compensated for the full extent of the damage. Nevertheless one national report pointed to the inherent limitation that the damage accrued must have been foreseeable for the defendant, which in practice is construed very narrowly.

Noteworthy in this respect is that despite the concept of full restitution, four jurisdictions provide for the discretionary power of the judge to limit the amount of damages, if full compensation produced unacceptable or severe results.

### **4. ex ante/ex post estimates**

While the *ex-ante* approach considers the amount of the damage at the time of the infringement and then takes into account inflation and interest for the period until the date of the judgment, the *ex-post* approach compensates the loss with a lump sum at the time of the judgment. Both approaches, therefore, aim at awarding full compensation to the victim. Nevertheless, the two might yield different results when considering intervening events. Yet, such events are taken into account to some degree by all jurisdictions surveyed. Generally excluded are only those without any relation to the infringement or to the damage.

The survey showed that 12 jurisdictions apply an *ex-post* assessment and nine jurisdictions prefer the *ex-ante* approach. In the other countries surveyed, the plaintiff may thus use either method of quantification or the different concepts are not recognised in the respective national law at all.

## **5. Damage assessment: profits gained / injuries suffered**

Other than in damage claims for infringement of intellectual property rights, where a number of countries allow the plaintiff to claim the infringer's profits instead of their actual loss, in competition matters the damage is almost unanimously assessed on the basis of injuries suffered by the plaintiff. Only in two countries the method of calculating the damage depends either on the plaintiff's claim or is calculated in the manner considered most appropriate by the judge including the assessment on the basis of profits gained.

However, in some jurisdictions, the profit gained by the defendant can act as an indicator for the level of damage suffered by the plaintiff. The competition law provisions of one jurisdiction expressly allow the judge to take into account that part of the infringer's profit gained as a result of the anti-competitive conduct when calculating the damage suffered by the plaintiff. This regulation was only recently introduced in order to facilitate the enforcement of damage claims, especially in cases where the assessment of a hypothetical market price as a basis for the calculation of damages is difficult.

## **6. Imposition of fines and the calculation of damages**

The restitutionary nature of damage claims was generally deemed at odds with taking fine payments into account: While the fine serves the public aim of deterring anti-competitive behaviour, damages are awarded with the primary aim of compensating the victim of such behaviour. This position was also supported by one country in which the respective fines are set by the courts. Four jurisdictions pointed out that the courts could in principle reduce the amount of damages if full compensation would be grossly unfair and not reasonably acceptable for any other reason. In this respect all kinds of circumstances are taken into account: the nature of the liability, the relationships between the persons and their economic situation. It might therefore be possible that the court will also take into account fines imposed on the defendant. Nevertheless, in none of these jurisdictions exists yet any case law relating to this issue. One jurisdiction also interpreted the EU-lenieny programme to imply that national courts take such decisions into account.

Interestingly, two reports alluded to the different situation where potential damage claims are taken into account by the NCA when setting the fine for a competition law infringement. When fines are set after previous damage payments, this fact is considered by one agency when confiscating profits or imposing fines which include the confiscation of profits. Another agency will lower its fines in order to not impair the defendant's ability to make restitutions to victims.

## **7. Territorial reach**

Once the jurisdiction of a national court has been established, most competition law regimes – with the exception of five jurisdictions – will award damages also for injuries suffered outside their national territory. In one jurisdiction, this applies even without an explicit provision granting the courts a power to that effect, but they will still take such injury into account when assessing the damages to be awarded. The same result is reached in one country where damages are only awarded for injuries suffered within the relevant geographic market, which can extend beyond the national borders.

In general, the necessary nexus to establish said jurisdiction over the claim is that the national competition law has been breached. This is generally the case when the alleged anti-competitive behaviour also has had effects on the national market.

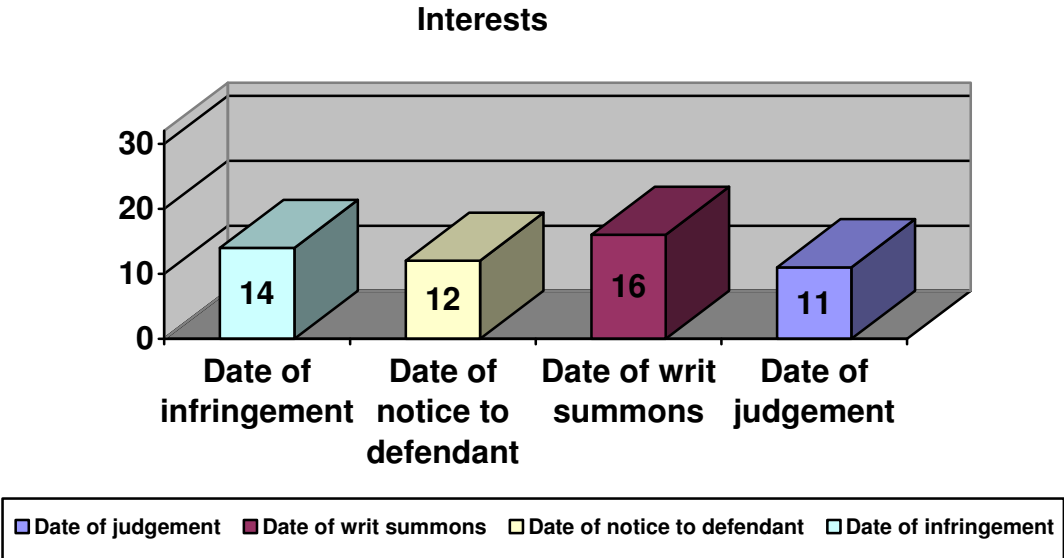
## **8. Interest**

According to general rules in civil proceedings interest is granted after judgement. In the context of private enforcement the question arises in particular whether pre-judgment interest is granted as a deviation from these rules, as pre-judgment interest can result in a significant increase in the level of the awarded damages.

The study revealed that there are generally four different phases of a cartel prosecution associated with the accrual of interest.: The first concerns preliminary events such as the date of the infringement or the date of injury. The next phase includes for example a demand for payment or the notice to stop the breach, which is followed by the commencement of the trial through the filing of the claim or the writ of summons, constituting the third phase, and finally, the last phase, the date of the judgment. In one jurisdiction, where the decision of the competition authority is a

prerequisite to a private damage claim, interest accrues as of the date of that decision. It should also be kept in mind that a court may simply award a lump sum compensating for any interest accrued from the date the action arose.

The different approaches chosen by the respective countries are stated in the following graphic. Hereby it is noteworthy that the different jurisdictions often do not choose only one possible approach, but several and leave it for the court to decide.



**Graphic 6:** Interests

**B. PROCEDURAL ENFORCEMENT OF ACTIONS FOR DAMAGES**

In most jurisdictions the enforcement of claims for damages caused by a cartel is largely subject to the general provisions on civil cartel law proceedings. However, the details with regard to form and content are significantly different in the individual jurisdictions.

**I. Specialised courts**

The survey has shown that only in two countries specialised courts for private damage claims in competition matters exist while in most jurisdictions these claims are brought before the regular civil courts. However, the fact that competition law

matters require specialised knowledge has led some countries to assign such cases either to regional courts instead of lower ranking district courts, or to one or a limited number of courts which have exclusive jurisdiction to hear civil disputes concerning violations of competition rules.

## **II. Standing**

### **1. Limitations on standing**

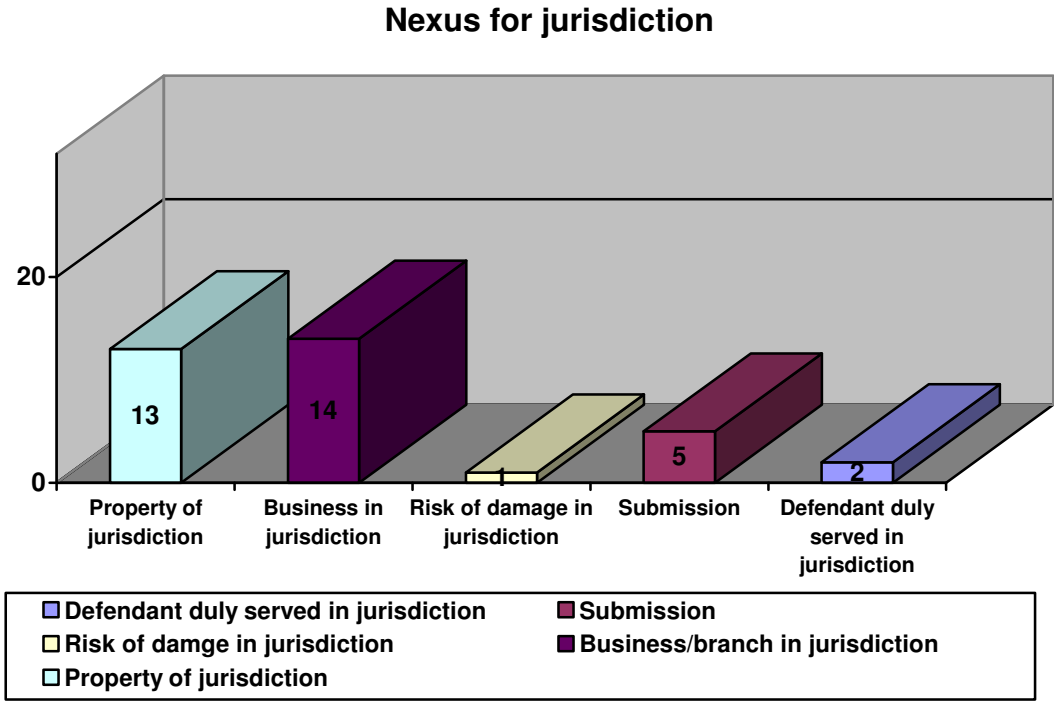
Unanimously, in all jurisdictions under review any natural or legal person of full capacity has standing to sue or be sued in the courts of the state of his domicile, with a few countries even extending this – in limited circumstances – to entities without legal personality. However, this is regularly limited to those plaintiffs who can claim a genuine grievance. Even though the different legal regimes stipulate varying degrees of this requirement, it is often referred to as a personal, direct and actual interest of the plaintiff that has allegedly been infringed. Sometimes it is also circumscribed by the notion that the plaintiff must assert the violation of a rule of law that is aimed at protecting the plaintiff against the alleged harm. It is noteworthy that one of the jurisdictions has thus far required for a plaintiff to have standing in a private damage action that a contractual relationship with the defendant existed. Meanwhile, this provision is currently under review.

With regard to non-national plaintiffs, a few countries require them to provide security for the accruing court fees if the defendant so requests and – regularly – if a similar security is required in the reciprocal situation. However, as one national report pointed out, this requirement does not amount to a limitation of standing of foreign plaintiffs in practice.

Moreover the issue of standing also raises the question of the territorial jurisdiction of the legal regimes surveyed. In the majority of countries, courts will have jurisdiction where the defendant is domiciled or has his seat. For claims arising among nationals of the Member States of the European Union, including those parties domiciled therein, this issue is governed by Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. As actions for damages in competition law are considered tort cases, they may also be

filed in courts of that Member State where the damage occurred or the infringement leading to the damage took place (Art. 5 No. 3). Furthermore, under Art. 6 (1) of Regulation 44/2001 a person domiciled in a Member State may also be sued where he is one of a number of co-defendants, in the courts of the place where any one of them is domiciled.

In relation to other jurisdictions the survey showed that there is a variety of potential nexus for a state to claim territorial jurisdiction over a particular damage action. In this context it has to be taken into account that the effects doctrine is widely applied in competition law. Under this doctrine a state has jurisdiction as far as the alleged conduct has an effect in this state. The various other “points of contact” are summarized in the graphic below:



**Graphic 7:** Nexus for jurisdiction

**2. Possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation**

The possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation is of note in the context of private enforcement in competition matters with regard to indirect purchasers, as the extent of their damage will often not suffice to initiate a claim of their own.

Regarding the possibility of pursuing actions for damage collectively, this study revealed that collective action in competition cases, is conceptualised for injunctions and cease-and-desist orders in many jurisdictions. Furthermore, it could be ascertained from the national reports that these forms of collective enforcement were particularly utilised in matters of unfair competition more than competition law.

While one agency reported that no form of collective action has so far been introduced in its procedural laws, other national reports referred to various forms of collective enforcement of competition law. Due to the different labelling used, the definitions for collective claims provided therein shall also be used in the course of this survey:

In this respect, **public interest litigation** refers to litigation by a representative organisation, that is not done on behalf of any identified individuals but for the benefit of the public at large. While one country basically provides for such a form of collective enforcement the respective statute explicitly excludes claims for damages. Only one jurisdiction reported a right of certain organisations to claim the profits gained from intentional infringement of competition law, where the profit has been obtained at the expense of a large number of customers, and provided these profits have not yet been claimed by the competition authority. The award will then be made to the state and the suing organisation is reimbursed by the NCA for the litigation costs that do not exceed the economic benefit obtained through the litigation.

In five jurisdictions **class actions** can be filed in which one party, or a group of parties, may sue as representatives of a larger class of unidentified individuals. While two countries provide for an “opt-in” system, in which each victim has to choose to be considered as a member of the class, two other countries provide for an “opt-out” system, according to which only those class members who opt out of the proceedings are not bound by the judgment in the case. The award is then made to the members of the class as a whole. In the fifth country, courts may appoint one or more persons to sue and/or defend on behalf of numerous persons having the same interest, if the latter provided powers of attorney and empowered their representatives to sue on their behalf. In yet another country, there exists a special form of consumer “class action” for the limited cases of competition law infringements



through standard contractual terms. While in first proceedings a consumer association initiates court proceedings to establish the infringement, the victims will have to file their claim individually for the determination of the quantum of the damage.

Another form of collective claims are **representative actions** in which a single claim is brought for example by an association on behalf of a group of identified individuals with the award being made to the individual members. Such proceedings are available in five of the reporting countries.

Most countries recognise in some form the possibility of **joining** individual actions, either allowing for several plaintiffs to pursue their individual claims in one action or allowing the judge hearing the case to join separate cases if a connecting link exists between them. Such links may be the same defendant or that the damage resulted from the same infringement. However, the judgment is rendered and the damage awarded to each plaintiff individually. In this regard three jurisdictions also permit the **assignment** of claims by which potential plaintiffs may assign their rights to an unconnected third party who will then litigate in its own name for its own account.

Finally, a few countries provide for actions by public officials for damages actions on behalf of specific persons (***parens patriae* litigation**). For example, in three countries the public prosecutor may, in the case of criminal proceedings either bring an action on behalf of the state resulting in a damage award to the victim if the latter becomes a civil party to that proceeding, or inform the persons affected to allow them to present a compensation request.

### **3. Alternative Dispute Resolution**

The vast majority of jurisdictions recognize the possibility of out-of-court or pre-trial settlement of damage claims as an alternative dispute resolution. Alternative means of dispute resolution may also include arbitration and mediation procedures. While in the course of an arbitration the dispute is determined by one or more independent third parties rather than by a court, mediation establishes a method of solving a civil dispute without the need for conventional litigation through a structured form of conciliation. Mediation differs from arbitration in so far as it does not impose a

solution. If the parties cannot reach a solution, they may still proceed with their claim and commence litigation.

Except for three jurisdictions all countries acknowledge the existence of arbitration as an alternative means of dispute resolution including in competition law matters. Most countries see in their judicial control over arbitral awards a sufficient method for policing competition law. As the success of arbitration in damage claims for competition law infringements is virtually impossible for competition authorities to assess given the results remain outside the public domain, the NGAs and the companies were asked about its success.

Both the NGAs and companies agree in their assessment that settlements are an important and effective mechanism as they allow creative solutions which can be built in to the existing commercial relationship between the parties and help to avoid negative publicity for the company. Six NGAs reported that settlements already play a very important role in the resolution of private claims with over 90 % of these cases being settled out of court. The remaining NGAs declared that they are not aware of any cases being settled in their jurisdiction, although four expressed the opinion that settlements might play a significant role in the future of private competition litigation, as contested competition cases often require in-depth economic studies and expert opinions. Also the majority of the companies surveyed had no specific experience with settlements in competition-related cases. However, most of them also clearly see the potential of settlements in private damage claims. One company even referred to it as the ultimate way to go.

Nevertheless, many companies expressed their view that legal systems should be designed so as to avoid litigation abuses by plaintiffs, such as black mail forcing companies to settle. The companies argued that this is not because they are guilty, but the ever so unlikely worst-case exposure is astronomic. In cases of simultaneously pursuing public enforcement via the competition authority and private action one company expressed its concern that a competition authority may pressure the accused company into a private settlement, without itself having reached the stage of a statement of objections, i.e. without having assessed the case in sufficient detail.

Regarding mediation, only one jurisdiction reported the court in the first instance is obliged to mediate to try to reach a settlement. While it is not available in six countries, most national reporters made no reference to its availability. In those countries where mediation is available, the procedure has either so far not been successful, has never or only rarely been used or there is no statistical data available as such proceedings are confidential.

### **III. Rules of Evidence**

#### **1. Burden of proof**

It is generally accepted by all countries that the burden of proving the infringement, the existence of the damage claimed and the causal link between the two rests in principle on the plaintiff. However, most countries provide for some alleviation of that burden either through presumptions, the concept of prima-facie-evidence with a lowering of the evidential threshold or the reversal of the burden of proof. Eight national reporters explicitly pointed to the fact that in their legal regimes there is no need of proof if the required facts are of public knowledge. A large number of countries accept a lowering of the evidential threshold under the prima-facie-concept. Accordingly, it is sufficient for the plaintiff to show that a certain fact within the sphere of the defendant is likely to have discharged his burden of proof, which then falls onto the defendant to disprove. A reversal of the burden of proof is available in many countries under varying conditions:

Regarding the element of fault, out of the 22 countries requiring this as a constituent element for the damage claim, the plaintiff only bears the burden of proof for it in five countries. In those countries where fault is refutably presumed, the defendant would have to show that he acted neither intentionally nor negligently. Furthermore, facts contained in (public) deeds or public documents are often considered to either constitute full evidence of the fact or to be refutably presumed. Finally, the refusal to produce pieces of evidence if so ordered by the court hearing the case may also result in a reversal of the burden of proof.

**2. Standard of proof**

While most of the national reporters stressed the principle of free evaluation of evidence by the judge hearing the case, a party will only discharge its burden of proof if the evidence presented meets the required standard of proof. In a number of jurisdictions the parties are required to win a conviction of the judge without any further specification as to how this is to be achieved, given that often just simply doesn't exist a specific legal provision with regard to the required standard of proof. In some jurisdictions the standard of proof is also decided on a case-by-case analysis. The standard of proof required in the other countries may, however, be depicted on the following scale requiring only a balance of probabilities up to certainty, whereas it as be taken into account that the terminology used by the different jurisdictions may slightly differ:

Country	Standard of proof
Australia, Canada, Cyprus, Ireland, Malta, Slovak Republic, South Africa, U.K, U.S. ("preponderance of evidence")	Probability, Balance of probabilities
Denmark, Japan	High degree of probability
Germany, Lithuania, Sweden, Slovak Republic	No reasonable or serious doubt
Austria, Czech Republic, Greece	Beyond reasonable doubt
Slovenia, Latvia ("almost certainty")	Certainty

**Table 1:** Standard of proof

**3. Admissible forms of evidence**

In order to meet the required standard of proof, in eight of the surveyed jurisdictions, the party bearing the burden of proof is restricted to an exhaustive list of forms of admissible evidence. However, in most countries the party is not limited regarding the form in which the evidence is presented. Three national reporters mentioned that some forms of evidence are attributed greater evidential value than others. The study also revealed that the jurisdictions are of two minds as to whether or not to allow evidence that was illegally gathered (e.g. recording of third parties conversations without the required court order).

With special regard to witnesses, the great majority of countries provide that certain categories of witnesses may refuse testimony, or are even under the duty not to testify, if the testimony would either violate professional secrecy or if a close relationship to one of the parties exists. Many countries also acknowledge a right to refuse testimony if the witness risks incriminating himself. The survey also showed that in general the countries take two different approaches to the testimony of parties, as seven countries do not allow the parties to be called as a witness. However, even in these countries – given certain circumstances – the parties are permitted to submit written and/or oral statements to the court.

#### **4. Availability of pre-trial discovery**

Even though only seven countries have a pre-trial discovery with an eighth country reviewing its introduction, most of the other countries will admit evidence obtained through such proceedings in third countries. Pre-trial discovery is understood to mean the compulsory (pre-trial) disclosure of all documents relevant to a case. The parties are either required to disclose all documents in their possession or control which are material to the proceedings, or each party may request any relevant document from the other. However, in one country the latter procedure is limited to documents "necessary for disposing fairly of the matter or for saving costs".

Generally, the requirements to obtain discovery from non-parties are stricter than from the opponent, and documents covered by legal privilege cannot be sought. This procedure may also be used in order to identify potential respondents or to find out whether sufficient evidence can be produced in order to support the main proceedings. In those countries which do not provide for a discovery-procedure, only the judge is in a position to demand the production of a document either at the request of one of the parties or *ex officio*. Here, the party is generally required to identify the document requested. It is commonly accepted that the production of certain evidence can be refused if it falls under professional secrecy. This does not apply equally to business secrets, as in one country this does not qualify as a ground for refusal, or is only accepted in limited circumstances in another country. Yet another country stressed that with regard to business secrets its courts cannot guarantee the confidentiality of the evidence submitted as there is no "*in camera review*".

There are generally two penalties for failure to disclose the requested evidence: Many countries provide for financial penalties, in particular if a non-party does not comply with the request. In case a party is not fulfilling its duty, in a number of jurisdictions the judge may even draw conclusions from the failure to produce those documents or even strike out the claim or the defence. Finally, it is noteworthy that some jurisdictions explicitly provide for particular procedures to secure evidence, if the (potential) plaintiff has reason to believe that the evidence will be lost.

## **5. Admissibility of expert witnesses**

Expert evidence on points that require specific knowledge or technical expertise is admissible in all jurisdictions although in a number of jurisdictions expert evidence on national law is not admissible. With the exception of four countries the expert is appointed either by the court or by the parties. However, a report emanating from an expert appointed by a party may carry less evidential value as it is considered to be somewhat biased. Even with the expert's opinion, the judge remains generally free in his evaluation and is not bound by the expert's findings.

## **6. Specific rules for evidence of damage**

While generally the existence and extent of damages has to be proven by the plaintiff in the same way as other elements of the damages claim, this burden is likewise alleviated in different countries under various aspects:

In one country the NCA can be requested to render an opinion with respect to the quantum of damages sustained by an infringement of competition law. In another country, the judge may lower the standard of proof required if gross violations of competition rules have been established, or if the profit of the defendant can be used as a measure of damages.

If proof regarding the extent of the actual loss cannot be adduced or rather can only be provided with difficulty, many courts may estimate the injury either at a reasonable amount or on the basis of their "free conviction". When claiming loss of profits, the burden of proof is alleviated in three jurisdictions as these hypothetical profits need only be "probable" or "likely", while in contrast in one country the plaintiff has to show that he would have earned these profits with a "probability nearing certainty".

Ultimately, twelve jurisdictions provide for partial judgments that only establish liability without ascertaining the quantum of damages. This may be undertaken in later proceedings when, for example, the problems in presenting the necessary evidence have been solved.

## **7. Level of causation**

The plaintiff's damage must have generally occurred "but for" the defendant's behaviour. This is often coupled with a second test of "sufficient causation": While nine jurisdictions require a direct causal link between the infringement committed and the damage sustained, other countries resort to notions of adequacy, remoteness or foreseeability in order to rule out causation under peculiar and improbable circumstances.

However, once the infringement is proven, four jurisdictions also lower the requirements to prove causation, or even shift the burden of proof if the defendant acted grossly negligent or where the damage appears to be a normal consequence of the unlawful conduct.

## **IV. Legal Costs**

### **1. Bearer of the legal costs**

With the exception of four countries, where each party pays its own costs irrespective of the outcome of the proceedings, usually the losing party bears the costs. However, in four countries this does not include the lawyers' fees, which may in one case be included at the judges' discretion. If both parties win and lose to a degree, the costs are regularly shared in relation to the claim's success.

Interestingly, one country in which usually each party bears its own costs, provides for a special rule on costs with respect to private damage actions in competition matters: If the plaintiff prevails his lawyer's fees have to be reimbursed under antitrust law. The defendant, however, bears his own lawyer's fees even if he prevails.

## **2. Permissibility of contingency fees**

Contingency fees allow the plaintiff to eliminate the cost risk linked to lawyers' fees. If contingency fees are agreed upon with the attorney, he receives a certain percentage of the compensation payment granted or of the amount allowed by the court as compensation. If the action is lost, the attorney comes away empty-handed.

Contingency fees are permissible in 16 countries, although in three of them they are rarely used. The other half of the jurisdictions reviewed prohibit such a fee arrangement. Nevertheless it is possible in most of these countries that the attorney may agree with his client on a bonus or an uplift if he wins the case. Together with a low fixed fee, this could, however, have practically the same effect.



## **PART II: BASIC ROLE OF PRIVATE ENFORCEMENT**

Private antitrust enforcement is on the one hand a form of individual law enforcement and on the other it complements public cartel prosecution. In the overall system of cartel prosecution, private antitrust enforcement therefore fulfils various functions.

In individual law enforcement, private antitrust enforcement mainly fulfils a **compensatory function**: The plaintiff resorts to private antitrust enforcement to assert his rights as an individual accorded to him by the legal system. He is able to defend these before the civil courts on his own initiative and according to his own priorities and fight for compensation for the damage he has incurred.

In public law enforcement private antitrust enforcement can complement the competition authorities activities in several respects. One of these is the **deterrent function**: Effective private enforcement in combination with public enforcement can help to raise the deterrent effect of antitrust enforcement for companies and so prevent cartel agreements.

Private antitrust enforcement can also fulfil a certain **relief function**. The competition authorities have to concentrate their relatively limited resources on cases which are of general significance for competition. Some of these can be of secondary importance for the competition authority whereas they might be so significant for an individual company that it would be willing to take the case even as far as the supreme court.

In this way civil law proceedings can not only make a valuable **contribution to the general enforcement of antitrust law** but also fulfil an **indicator function** if the competition authority, in cooperation with the civil courts, acquires knowledge of the frequency of competition problems in certain areas and therefore sees a reason to conduct investigations. In this respect the knowledge gained about private antitrust proceedings can help to define focal areas of general antitrust enforcement.

Seen in a broader perspective private antitrust enforcement can ultimately help to **strengthen the competition principle or competition culture**. Successful civil

lawsuits are conducive to law enforcement and can show market participants, including consumers, that competition rules have to be observed and violations can be stopped on their own initiative.

To evaluate the function of private enforcement in modern-day competition practice in the different jurisdictions, the competition agencies NGAs and companies were asked in the ICN project whether private enforcement is predominantly a supplement to public enforcement or part and parcel of an effective combating of cartels. As this question was not addressed in the Ashurst Study, only 13 of 32 jurisdictions provided an answer: Australia, Brazil, Canada, Finland, France, Germany, Hungary, Japan, Mexico, New Zealand, South Africa, United Kingdom and United States.

Except for two jurisdictions, all claimed that there is limited private enforcement practice in their jurisdictions. In their jurisdictions, private enforcement therefore has only a very limited supplementary function in the interaction between public and private enforcement, if at all. At the same time most of them expect private enforcement to become more and more important in the years to come. Recent changes in competition law in some jurisdictions and an increasing awareness of the issue in the business community will encourage private parties to bring actions for damages resulting from anticompetitive infringements. A few also stated that for the time being private enforcement plays only a minor role in cartel cases in their jurisdictions, but is already becoming more important in the application of unilateral conduct rules.

As mentioned above, in two jurisdictions it was said that private enforcement is considered to be part and parcel of an effective cartel prosecution policy. Here, private enforcement is seen as an important consideration for cartel participants and operates in tandem with public enforcement to deter and combat cartel activity and to compensate victims for loss or damages suffered as a result of cartel activity. One NGA also reported that in some instances private enforcement may serve the function of developing information and evidence of use to public enforcers. These descriptions of the interaction between public and private enforcement show and confirm the different possible functions of effective private enforcement as explained above.

A final interesting observation is that the answers given by the competition agencies by NGAs and by companies of the same jurisdiction in this regard were far and away the same.

### **PART III: INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT**

Private enforcement should not be regarded as an isolated aspect in the antitrust enforcement system but has to be viewed in its interaction with public enforcement. Private and public enforcement can complement one another in many different ways. However, it cannot be ruled out that they might contradict one another in individual cases. One particular aspect which has to be considered here is that the discussion about private enforcement is not so much about the current legal situation as the issue of what role private enforcement should play in future in relation to public enforcement. In this regard, it cannot be excluded that the current debate on the development of private enforcement, particularly in Europe, has had an influence on some of the respondents' answers.

#### **I. Relationship of the proceedings of the competition authority and of the court**

As regards the relationship between the proceedings of the competition authority and those of the court it was asked if a decision of the competition authority establishing the infringement is a precondition for a private claim, and if the competition authority or the court is under duty to stop its proceedings if the same cartel activity is the subject of an investigation by the other. This question was only raised in the ICN questionnaire and not in the Ashurst study. Nevertheless, by answering other questions of the Ashurst study some jurisdictions also illustrated the relationship between the public and private proceedings. Therefore, in total 13 jurisdictions provided an answer to this question: Australia, Belgium, Brazil, Canada, Cyprus, Hungary, Japan, Malta, Mexico, Poland, Spain, South Africa and the United States of America.

Of these jurisdictions four envisage that a decision of a competition authority or a competition court establishing the infringement is pre-conditional for allowing damage claims. In all these jurisdictions the civil courts consequentially have a duty to stop the proceedings and refer the case to the national competition authority. In another jurisdiction the decision of the competition authority is no longer a precondition for a private damage claim, but if there are simultaneous proceedings the civil court has to

stop its proceedings until the decision of the competition authority becomes definitive (i.e. until the expiry of the time limit for filing an action in the court against the decision or in cases where an action is filed against that decision up to the date on which the decision of the review court becomes final). In yet another jurisdiction, the civil court before which the case is pending has in certain circumstances the obligation to submit a request for preliminary ruling not to a competition authority or competition court, but to the Court of Appeal, which will render a binding decision for that case. In two other jurisdictions the situation is not clear as the wording of the relevant provision gives leeway for different interpretations and there is no established practice. However, none of the jurisdictions surveyed have established a duty for the competition authority to stop its proceedings if the examined cartel activity is also the subject of a private claim.

## **II. Interaction between public and private enforcement in practice**

To further examine the interaction between public and private enforcement in practice the NGAs were asked if they advise a client to contact firstly the competition authority, take private legal action, or both enforcement mechanisms, when a client approached them claiming to be a victim of an alleged infringement of competition law before a competition authority started its investigations. Also the companies were asked what would likely be their first reaction if they suspected that they were a victim of a cartel agreement but they were not aware of any competition authority investigation of the conduct

This question did not of course apply to those jurisdictions where a decision of the competition authority establishing the infringement is a precondition for a private claim as in these jurisdictions the first advice to clients will be to contact the competition authority. Out of the 18 NGAs who answered the questionnaire, this concerned two NGAs from two different jurisdictions.

The large majority of NGAs advises their clients to first of all contact the competition authority. They claim that the principal difficulty in cases where there has been no public enforcement decision lies in the challenge for a private plaintiff to develop evidence against cartel members. To overcome these difficulties, it corresponds best

to the clients interests to report all the relevant facts to the competition authority, which has significant compulsory investigatory powers. Above all, the decision of a competition authority can often be used as evidence in a follow-on damage claim. One NGA also pointed out the public attention resulting in many cases from a public proceeding which might be desired by a client.

Moreover, the few NGAs reporting that they advise their clients to pursue both private and public enforcement mechanisms simultaneously also referred to the greater investigatory powers of the competition authority, which provide private plaintiffs with an advantage of conducting their own investigation. This way the fruits of an enforcement authority's investigation can assist a plaintiff seeking damages in proving its case. On the other hand, one NGA further explained that such parallel action may have benefits for the plaintiff in terms of limitation periods depending on the outcome of the public proceeding.

The large majority of companies claimed that they would first contact the competition authority as they see cartel enforcement as a task for the competition authorities. The competition authorities would pursue the public interest in the enforcement of the principles of competition and they were better equipped and qualified than national courts. Some companies' statements were more reserved, saying that the decision is made on a case-by-case basis, but that it is very likely that they would first contact the competition authority given that the competition authorities have the most efficient means to investigate a cartel conduct. Only two companies claimed their first step would be to take private legal action. One company would pursue both paths simultaneously. Another company would first of all seek a detailed reaction from the relevant business partner confronted with such a suspicion before taking any other subsequent steps.

The survey showed that only very rarely is private legal action taken or advised as a first step and only under certain circumstances, e.g. it is advised by NGAs when the client's main goal was to obtain economic compensation and/or the concerned conduct has a limited impact on the market and is therefore less likely to attract the interest of the competition authorities.

### **III. Rules of evidence in the interaction between public and private enforcement**

As indicated before, the issue of evidence plays a central role in private law proceedings. This raises the question as to what extent competition authorities can be obliged to support parties in the tendering of evidence, and what evidential value prior decisions of competition authorities have.

#### **1. Access to court/ National Competition Authority (NCA) documents by courts or NCAs**

Private plaintiffs are – as one national report explained – often confronted with difficulties to gain access to court documents or those held by the NCA as these files will likely be covered by rules of secrecy. Nevertheless competition authorities may in the vast majority of jurisdictions reviewed be requested by the courts to give evidence, although they usually cannot be ordered to do so. However, in three jurisdictions, the NCA may also be obliged to provide the required administrative assistance, or – as in one country – the documents can be subpoenaed. Yet in three other countries, the employees or even the director of the NCA may be summoned as a witness or subpoenaed. Furthermore, evidence can – as a general rule – also be requested from foreign competition authorities but its production cannot be ordered.

#### **2. Evidential value of decisions by NCAs, courts (national, foreign)**

Even though the concept of "*stare decisis*"<sup>8</sup> is only known to a limited number of jurisdictions, all jurisdictions apply the doctrine of "*res judicata*" according to which a prior judgment between the same parties under the same factual background is binding. However, regarding the evidential value of decisions by the NCAs, the different legal regimes pursue diverse approaches.

In nine countries such decisions only have regular evidential value, i.e. the court is neither bound by them nor deprived of making its individual assessment of the facts. In one country, the document containing the NCA's decision even only constitutes evidence of the fact that this decision was rendered and not, however, of the facts

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<sup>8</sup> According to this principle precedent decisions have to be followed by the courts.

relied on. Nonetheless, the survey showed that the great majority of jurisdictions attributes to these decisions of national competition agencies an important or even compelling evidential value. In some jurisdictions, such a decision constitutes “*prima-facie*” evidence of the infringement effectively relieving the plaintiff of the burden of proof. In seven countries, the decisions rendered by the NCA even have a binding effect.

Some jurisdictions even attribute to decisions by foreign competition authorities some evidential value. These may either be assessed freely or carry a persuasive evidential value. Since a recent amendment in one country surveyed, these decisions are even attributed a binding effect as regards the anti-competitive behavior that took place within the territory of the NCA rendering the decision.

In a number of countries the national competition authorities may also be asked for non-binding opinions on national competition law or for their opinion as to the amount of damages caused by an infringement.

### **3. The competition authority as *amicus curiae* in civil proceedings**

*Amicus curiae* is defined as a friend of the court, i.e. one who is not a party to a case but who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it. The information may be a legal opinion in the form of a brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case. The question is whether competition authorities can participate as *amicus curiae* in civil court proceedings where competition matters are concerned. For example in Germany, the Bundeskartellamt is to be informed by the courts of all legal actions arising from cartel agreements and upon request be sent all briefs, records, orders and decisions. Members of staff of the Bundeskartellamt are allowed to take an active part in the court proceedings.

The issue of participation as *amicus curiae*<sup>9</sup> is not covered by the Ashurst study<sup>9</sup>, but was solely raised by the ICN questionnaire. The survey showed that in all but one of

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<sup>9</sup> Nevertheless, it has to be assumed that it is widespread among the Member States of the European Union as the institution of *amicus curiae* is introduced into the Member States’ regimes by Regulation 1/2003/EC.



the 7 jurisdictions the competition agencies are allowed to participate as *amicus curiae* in civil proceedings. Although it showed that most of the competition agencies only sometimes take part as *amicus curiae*, in some jurisdictions due to the fact that there have still been very few private claims. One jurisdiction even claimed never to participate as *amicus curiae*. Only one of the jurisdictions surveyed has no *amicus curiae* system, but here the court requests the opinion of the competition authority with respect to the amount of the damages caused by the competition law infringement. In general, the competition authority has replied to the request and submitted its opinion to the court.

#### **IV. Interaction between leniency programmes and private actions for damages**

The prevailing issue in the discussion about the interaction between public and private enforcement is the concern whether private enforcement has an impact on the effectiveness of leniency programmes. There is often the concern that the incentive of leniency programmes could be considerably reduced if the leniency applicant is confronted with extensive private follow-on claims for compensation. In this respect, two aspects are of relevance: Firstly, the fact that the leniency applicant is cooperating with the competition agency could be used as evidence for its guilt in civil proceedings, especially by ordering the disclosure of documents that were produced specifically for the purpose of a leniency application. Secondly, it is to be questioned whether the collaboration of a leniency applicant is also able to reduce the potential level of damages the defendant has to pay.

The problem was approached slightly differently in the Ashurst study and the ICN questionnaire. The Ashurst study simply queries whether there is an interaction between leniency programmes and private actions for damages, whereas the ICN questionnaire asked about any administrative or legislative measures that have been taken in order to solve the possible conflict between leniency programmes and private actions under competition rules.

The survey has shown that seven jurisdictions have not yet installed a leniency programme.<sup>10</sup> In the other jurisdictions offering a leniency programme in cartel cases, in only one there is an interaction between leniency programmes and private damage claims where the level of damages is reduced by the fact that the defendant has applied for leniency. Most of the jurisdictions argue with different legal objectives: Whilst the public prosecution of competition infringements serves to protect competition and its function in a free market economy, tort law serves to reimburse a private party that has incurred injury at the hands of another party. Therefore public leniency has no bearing on private actions.

In the jurisdiction where there is such an interaction recovery of damages in the amount of three times the damage sustained by the plaintiff is permitted (treble damages). To provide more incentive for leniency applicants the recovery of damages is detrebled for leniency applicants which cooperate with civil plaintiffs in their lawsuit against cartel members. It is important to emphasize that this detrebling legislation reduces civil damages from corporate leniency applicants to single damages in a private lawsuit only if an applicant cooperates with the plaintiffs in that lawsuit. The court in which the civil action is brought determines whether cooperation is satisfactory, but the detrebling statute provides that cooperation shall include providing a full account of all facts known to the applicant that are potentially relevant to the civil action and furnishing all documents potentially relevant to the civil action that are in the possession, custody, or control of the applicant, wherever those documents are located. An antitrust leniency applicant must also use its best efforts to secure the cooperation of its employees.

As regards the second aspect that the incentive of a leniency programme might be reduced by the fact that the collaboration is used as evidence, only three jurisdictions offer the possibility of a paperless or, so to speak, oral leniency application to ensure leniency applicants are not disadvantaged by cooperation with the competition authority<sup>11</sup>. One of these jurisdictions further explained that oral statements are

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<sup>10</sup> Furthermore, one jurisdiction alleged that its leniency programme is only applicable in the event of an abuse of a dominant position, but not in cartel cases.

<sup>11</sup> In this context it is noteworthy that the questionnaires did not explicitly ask for the possibility of paperless leniency applications and therefore only three jurisdictions made reference to this issue. However, it can be assumed that there are far more jurisdictions providing for this possibility.

especially accepted if the applicant is confronted with the discovery system of other countries.

In a second step, the interaction between leniency programmes and potential follow-on damage claims was evaluated by practitioners' experiences. The NGAs were asked, if they consider that the incentives of a leniency programme can be considerably reduced if the leniency applicant is facing extensive private damage claims, if they have experienced a situation where a cartel member decided against a leniency application because it was concerned about potential private damage claims and if they ever had the situation where despite the clear risk of private damage claims a leniency application was still filed.

Only one NGA considers that the exposure to damage claims is the key counter-incentive in leniency cases, as its experience showed that plaintiffs attack the leniency applicants first because these cannot deny the infringement and are limited to arguing that there has been no damage caused by the infringement. Another NGA with no practical experience in this particular matter believed that the potential of private claims might be an important drawback for leniency programmes, since the amount of damages may in many cases be higher than the reduction of the administrative fine. However, the vast majority of the NGAs in the different jurisdictions acknowledged the risk of potential follow-on claims as being a possible disincentive for a leniency application, but they assess it as only one factor among many others. In general, they experienced that the benefits of a leniency application outweigh the potential risk of a follow-on damage claim. The benefits of a leniency application are namely in all jurisdictions the reduction/elimination of administrative fines and in some jurisdictions also the avoidance for criminal prosecution of the company and corporate executives including the threat of jail. Moreover, criminal immunity was identified by NGAs as the key incentive to seeking leniency application. One NGA pointed out that, against the background of more and more international cartels, this aspect of criminal immunity is of growing relevance even for those companies located in jurisdictions where cartels in general are not subject to criminal prosecution.

As the predominant experiences of the NGA show, leniency applicants will decide to make their application in the knowledge that the risk of fines and/or criminal sanctions can be reduced or eliminated, whilst the risk of a damage claim will in any event exist. The applicant knows, in a cartel case, that there is always the possibility that another cartel member will make the application for leniency, leaving the other cartel members exposed both to the risk of public penalties as well as compensation of damages without the benefit. Hence, several NGAs also referred to the race between cartel members as an incentive to seek a leniency application. In this respect, one NGA reported that in its experience the aspect of being exposed to damage claims becomes more important in cases where full elimination of the fine is no longer available and only a reduction can be achieved. In elimination cases the chances of avoiding any fine would normally prevail over the risk of being sued for the compensation of damages. However, this would be a different situation if the parties were not the first leniency applicants and as a consequence did not know what “reduction” of the prospective fine they could expect before applying for leniency.

From the NGAs’ perspective the decision not to seek leniency is rather a practical decision where it is believed that the conduct in question will not otherwise come to the attention of the competition authority. Consequently, only two NGAs experienced a case where a client did not apply for leniency because of concern about potential follow-on claims. Another NGA reported that it had never happened to him, but that he was told that this had occurred in situations where the evidence of liability was not overwhelming and the potential exposure from the public proceeding was insignificant relative to the civil damage exposure.<sup>12</sup> In turn, all other NGAs with experience in this particular matter had many situations where despite the clear risk of private damage claims a leniency application was still filed. This also applies to the two NGAs reporting about cases where a client did not apply for leniency because of the risk of civil proceedings: they experienced more situations where leniency applications were made despite the recognition of the clear risk of follow-on litigation.

A few NGAs assumed that the risk of private damage claims is less significant due to the lack of a established practice in private litigation in cartel cases in their

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<sup>12</sup> This could occur where none of the company’s current executives faced exposure and the company’s sales of the affected product(s) or service(s) were small relative to the size of the market.

jurisdictions and that this issue might raise more concern in the future. This might be possible, but is definitely not proven by the answers given by NGAs from jurisdictions with more experience in civil cartel proceedings.

The companies were also asked about the interaction between public and private enforcement. They were invited to explain how in their view private actions can influence the decision making process of a company that is considering applying for leniency, and if the possibility of private claims in other jurisdictions have any impact on a company's decision to seek leniency.<sup>13</sup> The survey showed, that the set of opinions given by the companies is different from the one given by the NGAs.<sup>14</sup>

The companies indicated that a company's decision to seek leniency is largely determined by the financial risks that such a step involves. At the same time no clear conclusion could be drawn on the basis of the replies. However, the companies surveyed seemed to be slightly more critical than the NGAs regarding the impact of private enforcement on leniency programmes. As a consequence, a first category of companies explicitly stated that the possibility of private follow-on claims on a large scale is a key factor in deciding whether to apply for leniency. A second category of companies stated that since private enforcement in their jurisdictions is still in its early days it is probably not the first thing that would go through a "company's" mind when deciding to apply for leniency. However, if and when it becomes more prevalent, private enforcement may alter a company's assessment of the overall benefits of a leniency application. In this regard, some companies mentioned the potential disincentives of treble or double damages, class actions and broad discovery rules.

Nevertheless, a third category of companies confirmed the NGAs' view that potential private follow-on claims are surely a factor to consider, but not a great obstacle. They considered that the benefits of a successful leniency application are likely to outweigh considerations of exposure to damages in private litigation. One company

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<sup>13</sup> The survey and its responses did not address the incentives that liability for individuals and the possibility of jail time for company executives have on deciding whether to apply for leniency.

<sup>14</sup> Recall that of the companies surveyed, only half had experience with private enforcement, and, of them, only seven had relevant experience as defendants. Therefore, most of the companies are unlikely to have experienced the "prisoner's dilemma". Also, the companies were not asked about situations where despite the risk of private follow-on claims, they (or another company) still filed for leniency.

doubted whether the right for victims to claim compensation should be taken away just because the wrongdoer had been given immunity. Another company pointed out, that private actions could play a role beforehand in deterring companies from participating in a cartel in the first place.

Some NGAs and companies also addressed a different set of considerations given by the risk of multiple, unpredictable claims with uncertain procedural risks in different jurisdictions that would operate as a disincentive to a leniency application. This applies especially to cases where companies are concerned about the exposure to compensation for treble damages outside their own jurisdiction. The fact that the competition authority's decision in some jurisdictions has a binding effect for the courts was also identified by some companies as an disincentive to apply for leniency as this may serve as an element of proof. This also applies to broad discovery rules in other jurisdictions as the leniency application might be ordered as evidence in a civil proceeding outside the company's own jurisdiction. It was expressed that it must be avoided to put the leniency applicant in a worse position in follow-on damage claims than the other cartel members. In this context, some companies expressly endorsed the possibility of an oral leniency application. Another company highlighted the exposure to joint and several liability as extremely negative. Not only is the leniency applicant a possible first target for potential follow-on claims, it may be liable for all losses arising from the cartel.

## CONCLUSION

The survey has shown an internationally increasing awareness of private enforcement in competition matters. This is clearly shown by the fact that already half of the competition law regimes reviewed provide for an explicit statutory basis for action for damages. Even though the specific provisions do not deviate much from general rules for damage claims, in most jurisdictions the enforcement of damage claims in competition matters is facilitated. This applies also to those jurisdictions where an explicit statutory basis does not exist.

However, even though most jurisdictions ease the burden of proof for the benefit of the plaintiff, plaintiffs are still faced with significant obstacles to adequately substantiate their claims. Consequently, evidence requirements play a key role in private law proceedings.

In most jurisdictions private competition law enforcement in the area of hard-core cartels is therefore largely restricted to follow-on claims. This is confirmed by the replies of the NGAs and the companies. The vast majority of NGAs advise their clients to first await the outcome of public cartel law enforcement by the competent authority. Also the companies indicated that their first reaction would be to contact the competition authority, if they suspected that they were a victim of a cartel agreement. This is because competition authorities have compulsory investigatory powers and are therefore better equipped to prove a cartel law infringement.

In the follow-on claims the calculation of the economic damage plays a decisive role. In all jurisdictions the damage is established by a comparison of the plaintiff's actual position following the harmful event with the hypothetical position which would have existed had the harmful event not occurred. Nonetheless, the actual calculation of damage raises severe difficulties in practice because it involves the calculation of the hypothetical competitive price. Three different models are used to do this: the comparative market approach, the cost-based approach and the simulation approach. As far as the survey shows court practice in the jurisdictions surveyed so far does not provide an indication as to which approach is preferred.

As private cartel law enforcement is basically restricted to follow-on claims in the case of hard-core cartels, the relation between private and public cartel law enforcement is of fundamental importance. For example, the survey showed that the burden of proof is significantly eased in private law suits if the decision of the competition authority has evidential value. In seven jurisdictions the decision is even binding for private follow-on claims.

In the discussion on the relation between private and public cartel law enforcement the question as to what extent private enforcement presents a disincentive for leniency applications often arises. The survey showed that the decision to seek leniency is first of all determined by financial aspects and that potential significant private follow-on claims are clearly a financial risk to consider.

The companies put it as follows: The greater and less determinable the financial risks are, the less attractive a leniency programme becomes. In this context, some companies voiced their concern that the attractiveness of leniency programmes would be reduced if private litigation in cartel cases in their jurisdictions were characterized by treble or double damages, class actions and broad discovery rules. However, the vast majority of the NGAs and a few companies assess the risk of potential follow-on claims as only one factor among many others. In general, they experienced that the benefits of a leniency application outweigh the potential risk of a follow-on damage claim, especially since the latter can never be ruled out as another cartel member may make the first application for leniency, leaving the other cartel members exposed both to the risk of public penalties as well as compensation of damages. This applies especially to leniency applications where full elimination is granted whereas for applications for reduction the disincentives stemming from “excessive” private follow-up claims are considered to be more important.

Nevertheless, in an international context it is noteworthy that some of the legal aspects in a few jurisdictions raised concerns among many NGAs, companies and a few jurisdictions, namely mandatory multiple damages and what they considered to be excessive pre trial discovery. In the view of almost all jurisdictions reviewed, multiple damages are contrary to the restitutionary nature of damage claims but attract private plaintiffs from other jurisdictions to seek damages in this multiple



damages jurisdictions if somehow possible.<sup>15</sup> As some NGAs and companies pointed out this can stand in the way of an effective public enforcement if leniency applications are not made because of the fear of being exposed to extensive damage claims in another jurisdiction. This applies especially if a leniency application is subject to a pre-trial discovery. In reaction to the disincentive of such pre-trial discovery some jurisdictions offer the possibility of a paperless or, so to speak, oral leniency application to ensure leniency applicants are not disadvantaged by cooperating with the competition authority. The possibility of an oral leniency application was also explicitly mentioned by companies as a way to promote the attractiveness of a leniency programme.

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<sup>15</sup> Notwithstanding, there are limitations to such claims. For example, in *Empagran*, the U.S. (joined by several foreign governments) argued in its amicus brief that U.S. courts should not be open to treble-damages actions arising from non-U.S. transactions between non-U.S. buyers and non-U.S. sellers. The United States Supreme Court held that claims for injury sustained in foreign markets that was independent of anticompetitive harm in the United States was beyond U.S. jurisdiction (*F. Hoffman-La Roche, Ltd. V. Empagran, S.A.*, 542 U.S. 155, 159 (2004)). The Court, however, remanded the case to the DC Circuit Court of Appeals to consider the plaintiffs' alternative theory that the foreign harm was connected to the U.S. harm. The Court of Appeals held that a proximate cause relationship is required between the domestic effects and the foreign injury, and rejected the plaintiffs' claims.

## **ANNEX 1 – Questionnaire NCA**

The questionnaire is part of the project “Interaction of Public and Private Enforcement”. The objective of the project is to develop and compile information and data on the basic role of private enforcement, the extent to which private enforcement currently exists, its role in deterring cartel conduct as well as the interaction between public and private enforcement with a special focus on leniency programs.

In respect of the private enforcement of competition law, a distinction should be made between two case constellations: One involves cases where the infringement of competition law is a result of an anti-competitive merger or the abuse of a dominant position/monopolization. The second involves cases in which private plaintiffs file actions for damages which they have incurred as a result of anti-competitive cartel agreements. As this particular project is a Cartels Working Group project, only the latter case constellation applies. Furthermore, although various aspects of private enforcement can take place, a particular focus of this project is on actions for damages brought by third parties against cartel members.

The aim of the questionnaire is to gain an insight into the current significance of this element of private enforcement of cartel law in the individual jurisdictions and in particular the role it plays in relation to the public enforcement of cartel law. One essential indicator in this respect are the respective legal bases of private cartel law enforcement. Many questions therefore refer to the substantive legal situation and procedural requirements for actions for damages in the case of competition law infringements.

The questionnaire is closely based on the one used for the Ashurst Study, which was commissioned by the European Commission. This was done with the aim of achieving comparable results, since the results of the Ashurst Study, which provide a comprehensive overview of the legal situation in Europe, will also be included in the final report.

**A. Actions for Damages - Legal Basis**

**I. Statutory Basis**

1. Are there explicit statutory bases for actions for damages in competition law? If so, what are the statutes and what do they provide?	
2. Do these statutory bases differ from other bases for actions for damages? If so, what are the main differences?	

**II. Preconditions for claims and legal consequences of an action for damages**

1. Does the infringement have to imply fault? If so, does fault cover bad faith/intent and negligence?	
2. What forms of compensation are available?	
3. Are there any others forms of civil law liability (e.g. disqualification of directors)?	

**III. Grounds of Justification**

1. Are there any grounds of justification for an infringement of competition law?	
2. Is it possible for the defendant to claim the passing on defence?	
3. Are indirect purchaser issues taken into account?	
4. Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to the apportionment of damages) or has benefited from the infringement?	

#### **IV. Damages**

<b>Calculation of damages</b>	
1. What economic or other models are used by courts to calculate damage?	
2. Are damages awarded for injuries suffered on the national territory only or more widely?	
3. Are ex ante (time of injury) or ex post (time of trial) estimates used?	
4. Are there maximum limits to damages?	
5. Are damages assessed on the basis of profits gained by the defendant or on the basis of injuries suffered by the plaintiff?	
6. Are punitive or exemplary damages available?	
7. Are fines imposed by competition authorities taken into account when setting damages?	
<b>Interest</b>	
8. Is interest awarded from the date the infringement occurred, the date of the court decision or the date of a decision by a competition authority?	

#### **B. Procedural enforcement of actions for damages**

##### **I. Competent Courts**

1. Are there specialised courts for private enforcement of competition rules?	
2. In general, how many judges sit in actions for damages cases?	
3. Are alternative means of dispute resolution available? If so, to what extent are they successful?	

## II. Standing

1. Do any limitations on the standing of natural or legal persons exist, including those from other jurisdictions? If so, what are the limitations?	
2. Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If so, explain what types of claims are available.	

## III. Rules of Evidence

1. In general, on which party lies the burden of proof ?	
2. What standard of proof is required?	
3. Are there any limitations concerning the form of evidence? If so, what are the limitations?	
4. Do the parties have a claim to pre-trial or other discovery within and outside the jurisdiction of the court? If so, what types of discovery are available?	
<b>Proving the infringement</b>	
5. Is expert evidence admissible?	
6. Is there a possibility for the court/competition authority to get access to the file of the competition authority/court? If so, under which circumstances?	
7. Under which conditions does a statement and/or decision by a national competition authority, a national court, or any other authority from another jurisdiction have evidential value?	

<b>Proving damage</b>	
8. Are there any specific rules for evidence of damage? If so, what are the rules?	
<b>Proving causation</b>	
9. Which level of causation must be proven?	

#### **IV. Timing**

1. What is the time limit in which to institute proceedings?	
2. On average, how long do proceedings take?	

#### **V. Legal Costs**

1. Who bears the legal costs?	
2. Are contingency fees permissible?	

#### **C. Interaction between public and private enforcement**

1. Please describe the interaction between public and private enforcement in your jurisdiction: Is private enforcement in your jurisdiction predominantly a supplement to public enforcement or is it part and parcel of an effective combating of cartels?	
2. What is the relationship of the proceedings of the competition authority and of the court? Is any of them under a duty to stop its proceedings if the same cartel activity is the subject of an investigation by the other?	
3. Is a decision of the competition authority establishing the infringement a precondition	

for a private claim? If so, what is the relevant process and what are time limits?	
4. Does your competition authority participate always or sometimes as <i>amicus curiae</i> ?	
5. The incentive of a leniency programme can be considerably reduced, if the leniency applicant is nevertheless confronted with extensive private claims for compensation. In your jurisdiction, have any administrative or legislative measures been taken in order to solve this conflict between leniency programmes and private actions under competition rules?	

#### **D. General**

1. Are some of the answers to the previous questions specific to the private enforcement of competition rules?	
2. If the answer to the previous question is affirmative, in what way does private enforcement of competition rules differ from general private enforcement ?	
3. Are there any differences according to whether the defendant is a public authority or a natural or legal person? If so, what are the differences?	
4. If possible, please indicate (preferably from the years 1995-2005): <ul style="list-style-type: none"> <li>a. the total number of competition based actions for damages</li> <li>b. the number of actions for damages where the infringement is based on a cartel</li> <li>c. the number of actions for damages where the infringement is based on unilateral conduct</li> </ul>	

d. the ratio between public and private competition based claims.	
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## **ANNEX 2 – Questionnaire NGA**

The questionnaire is part of the project “Interaction of Public and Private Enforcement”. The objective of the project is to develop and compile information and data on the basic role of private enforcement, the extent to which private enforcement currently exists, its role in deterring cartel conduct as well as the interaction between public and private enforcement with a special focus on leniency programs.

In respect of the private enforcement of competition law, a distinction should be made between two case constellations: One involves cases where the infringement of competition law is a result of an anti-competitive merger or the abuse of a dominant position/monopolization. The second involves cases in which private plaintiffs file actions for damages which they have incurred as a result of anti-competitive cartel agreements. As this particular project is a Cartels Working Group project, only the latter case constellation applies. Furthermore, although private enforcement can take various forms, a particular focus of this project is on actions for damages brought by third parties against cartel members.

The aim of this questionnaire is to analyse the interaction of public and private enforcement from a private lawyer’s perspective. While another questionnaire, which has already been sent out to a number of ICN member agencies, refers primarily to the substantive legal situation and procedural requirements for actions for damages in the case of competition law infringements, the focus of this one is directed towards experiences gained from counselling clients on matters relating to cartel offences and leniency applications. The results of both questionnaires, together with the overview of the legal situation in Europe given by the Ashurst study, which was commissioned by the European Commission, will be included in a final report.

**Interaction between public and private enforcement**

<p>1. Please describe the interaction between public and private enforcement in cartel cases in your jurisdiction from the point of a private lawyer: Is private enforcement in your jurisdiction predominantly a supplement to public enforcement or is it part and parcel of an effective combating of cartels?</p>	
<p>2. In your professional experience, have you ever counselled either a) a party claiming damages against a cartel or b) a party being sued for such a competition law infringement?</p>	
<p>3. If the answer to 2 a) is affirmative and you encountered difficulties in proving e.g. the infringement, the damage sustained or the causal connection, how did you overcome such problems? If you were unable to overcome such problems do you think that there is a need for policy intervention to help overcome the problem (please explain)?</p>	
<p>4. If the answer to 2 b) is affirmative, were you able to defend your client against the infringement claim, disprove the alleged damage , or the causal connection, and how were you able to do so?</p>	
<p>5. How do you assess the role of settlements in private claims? If possible, please indicate the percentage of settlements in private claims.</p>	
<p>6. When a client approached you claiming to be a victim of an alleged infringement of competition law before a competition authority started its investigations, did you advise him to contact the competition</p>	

<p>authority, take private legal action, or pursue both enforcement mechanisms? Please explain.</p>	
<p>7. Do you consider that the incentives of a leniency programme can be considerably reduced if the leniency applicant is facing extensive private follow-on claims for compensation? Did you experience a situation where a cartel member decided against a leniency application because it was concerned about potential private follow-on claims? Have you had a situation where despite the clear risk of private follow-on claims a leniency application was still filed?</p>	

## **ANNEX 3 – List of NGAs**

### **Brazil**

José Alexandre Buaiz Neto, Ivo Teixeira Gico

### **Canada**

Chris Hersh, Randal T. Hughes, Martin Low

### **Finland**

Janne Kairo

### **France**

Melanie Thill Tayara

### **Germany**

Ingo Brinker, Jochen Burrichter, Dirk Schroeder, Christoph Stadler

### **Hungary**

Zoltán Hegymegi Barakonyi

### **Japan**

Kei Amemiya

### **New Zealand**

Andrew Peterson

### **South Africa**

Hylton Petersen

### **United Kingdom**

John Pheasant

### **United States**

James M. Griffin, Daniel Swanson

## **ANNEX 4 – Questionnaire companies**

The questionnaire is part of the project “Interaction of Public and Private Enforcement” which was launched last year. The 2006 report (available at: <http://www.internationalcompetitionnetwork.org/capetown2006/ICN-private-enforcement-final-version.pdf>) on the Interaction of Public and Private Enforcement in Cartel Cases compiled information provided by competition authorities and Non Governmental Advisors (NGAs) on the extent to which private enforcement currently exists and may complement or conflict with public enforcement, with a special focus on leniency programmes. The objective of this follow-up is to extend the project by obtaining the views of companies, whose point of view will be an additional valuable factor in assessing the current role of private enforcement.

In respect of the private enforcement of competition law, a distinction should be made between two case constellations: One involves cases where the infringement of competition law is a result of an anti-competitive merger or the abuse of a dominant position/monopolization. The second involves cases in which private plaintiffs file actions for damages which they have incurred as a result of anti-competitive cartel agreements. As this project is a Cartels Working Group<sup>16</sup> project, only the latter case constellation applies. Furthermore, although private enforcement can take various forms, a particular focus of this project is on actions for damages brought by third parties against cartel members.

The aim of this questionnaire is to analyse the interaction of public and private enforcement from a company’s perspective. By no means the impression should be created that the companies surveyed are suspected of being potential cartelists. The questionnaire merely seeks to address companies that are internationally active.

The results of this questionnaire will be incorporated into the 2006 report. The 2006 report was based on two questionnaires: one addressed to the competition agencies and one addressed to NGAs as in their daily work lawyers are often more concerned with private enforcement matters than the competition agencies. The findings of the

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<sup>16</sup> More information about the ICN Cartels Working Group you will find at <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/cartels>.

“Study on the conditions of claims for damages in case of infringement of EC competition rules”<sup>17</sup>, as commissioned by the European Commission in preparation of the Green Paper on private enforcement, were also included in the report.

**Jurisdiction:**  
**Name of contact for this project:**

**Interaction between public and private enforcement**

<p>1. Please describe the interaction between public and private enforcement in cartel cases in your jurisdiction from a company’s point of view. How do you assess the role of private enforcement in your jurisdiction: is private enforcement in your jurisdiction predominantly a supplement to public enforcement or is it part and parcel of an effective combating of cartels?</p>	
<p>2. Has your company ever been a) a party claiming damages against a cartel or b) a party being sued for (allegedly) participating in a cartel?</p>	
<p>3. What challenges/difficulties of proof do plaintiffs face in private cartel-related cases (i.e. evidence of cartel conduct, the damage sustained or the causal connection etc.) How can plaintiffs overcome such problems?          Do you think that there is a need for policy intervention to help overcome the problem and exactly what legal provisions would be needed to remedy existing shortcomings (please explain)?</p>	

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<sup>17</sup> The study is available at [http://www.europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp.html](http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html).

<p>4. What litigation challenges/difficulties do defendants face in defending against allegations of cartel conduct?</p>	
<p>5. How do you view the role of settlements in private claims? Does your company has any experience with settlements in private claims?</p>	
<p>6. Assume your company suspects it is a victim of a cartel agreement, but is not aware of any competition authority investigation of the conduct. What is likely to be your company's initial reaction: contact the competition authority, take private legal action, or pursue both enforcement mechanisms? Please explain.</p>	
<p>7. What effect, if any does the possibility of private actions have on the effectiveness of a leniency programme and a company's decision to seek leniency? Do you consider that the incentives of a leniency programme can be considerably reduced if the leniency applicant is facing significant private follow-on claims for compensation? Explain how in your view private actions can factor in the decision-making process of a company that is considering applying for leniency.</p> <p>In your view, can the possibility of private claims in other jurisdictions have any impact on a company's decision to seek leniency?</p>	

## **ANNEX 5 – List of companies**

### **Australia**

Spier Consulting

### **Brazil**

Cobraço, Comercial Brasileira de Aço Ltda

### **Canada**

La Cie McCormick Canada Co.

### **European Union**

Bayer AG, Manufacture Françaises des Pneumatiques Michelin, ABB Asea Brown Boveri Ltd

### **Finland**

Fortum Oyj, Kesko Oyj, Stora Enso Oyj

### **Germany**

BASF AG, DaimlerChrysler Financial Services AG, Deutsche Bank AG, Deutsche Post AG, Deutsche Telekom AG, Siemens AG

### **Netherlands**

Unilever Europe, Philips International B.V.

### **Portugal**

Confederação do Comércio e Serviços de Portugal, Associação Portuguesa de Empresas de Produtos de Marca

### **United Kingdom**

British Telecommunications plc, BP plc

### **United States**

DuPont