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Compendium of Antitrust Damages Actions

International Chamber of Commerce (ICC)

2ND EDITION

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FOREWORD

Antitrust laws and antitrust enforcement are essential to deter and prosecute abusive pricing and other anti-competitive business conducts, which are detrimental to international trade and investment and can be harmful to innovation and consumer welfare.

Once limited to the United States for decades, the role of private competition law enforcement in ensuring fair and undistorted market conditions has been pushed to the fore after the full implementation of the European Union of Directive 2014/104. The European Directive removes practical obstacles to compensation for all victims of anti-competitive conduct and refines the interplay between private damages actions and public enforcement of the EU competition rules within the region. As a result, other countries beyond Europe have adjusted their private enforcement regimes either by establishing new rules or reinforcing existing ones, making the global business regulatory framework increasingly complex.

The consequences for businesses, regardless of their sizes and markets, are enormous. Companies involved in anti-competitive behaviours can face heavy fines and sometimes criminal sanctions from the public enforcement of competition law. But with the importance that private enforcement has gained over the last few years, they may find themselves at greater loss due to private legal actions filed against them by victims seeking compensation for damages.

It is in this particular context that the first edition of the *Compendium of Antitrust Damages Actions* (the “Compendium”) was published by the International Chamber of Commerce (ICC) in 2021.

As the institutional private sector partner to businesses, governments, and international organisations, our intent back then – as it is now – was, first and foremost, to help business understand the heightened risks they face of being sued for damages while raising awareness on the trends that will inevitably influence the international antitrust regulatory environment for the long term.

Indeed, antitrust enforcement is not static. Enforcement agencies are rethinking the way the laws are applied because our economies are undergoing profound changes. And the interesting question remains: how will enforcers, practitioners, businesses, and economic actors as a whole, respond to the new challenges of our time, be they digital, environmental, or political in nature?

ICC is proud to partner with Concurrences to continue bringing clarity and guidance in an area of law that is in constant evolution. The Second Edition of the Compendium gathers the latest developments in antitrust litigation proceedings and new case law in a number of key jurisdictions. These decisions are also available in the Concurrences e-Competitions Bulletin.

The Compendium does not seek to provide a detailed analysis of private litigation practices in different countries. Instead, it aims to profile the legal regime related to

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antitrust damages actions in a variety of key jurisdictions by providing an overview of the key legal principles that are illustrated by a selection of leading cases across various economic sectors and industries.

With nearly 350 court cases, including salient facts and insights on important judgments, the Compendium is a unique tool for all economic actors – antitrust experts and non-experts alike – and was designed to address the concerns of both multinational companies and SMEs that may be exposed to, or already involved in, antitrust litigation. It provides details on the method of calculating damages in numerous jurisdictions as well as the amount of damages awarded, to increase companies’ understanding and awareness of the issue.

We hope that the Compendium of Antitrust Damages Actions will continue to serve as a key reference for antitrust practitioners and enforcers across the globe.

John W.H. Denton AO
ICC Secretary General

François Brunet
*Chair, ICC Global
Competition Commission*

Caroline Inthavisay
*ICC Global Policy
Lead – Competition*

INTRODUCTION

Over the last decade, there has been a significant evolution of the antitrust litigation landscape. We have moved from a world where antitrust law was principally a matter of public enforcement, essentially carried out by competition authorities (particularly outside North America), to a world where private enforcement abounds and legislatures look to implement regimes that facilitate mass claims. Not long ago, antitrust class actions were an almost uniquely North American phenomenon. Not anymore. As new “opt-out” class action regimes have evolved in the UK and Europe, we have seen a surge of third-party litigation funding, making feasible mass claims that would not have been cost-effective if brought on an individual basis.

While some claims continue to piggy-back on investigations by competition authorities, others – emboldened by new regimes and backed by funders – look to bring “stand-alone” cases (*i.e.* cases not reliant on an infringement decision) based on novel theories of harm which push the boundaries of what might traditionally have been thought of as competition law claims. Many of these claims seek eye-watering sums in damages, which would in many cases dwarf fines by antitrust regulators. Claimants are also increasingly emboldened to pursue class actions in multiple jurisdictions in parallel.

The significant increase in these types of claims has had a corresponding impact on leniency regimes, with businesses needing to take difficult decisions around their risk profile, usually across multiple jurisdictions (and therefore regimes). It has also had a significant commercial impact, with any consumer-facing business needing to be conscious of the possibility of antitrust damages claims at multiple levels of the supply chain.

Civil liability rules apply to private enforcement. Claimants have to provide evidence of a competition law infringement, the harm suffered from such an infringement, the amount of the damages and a causal link between the infringement and the damages. We have seen development of the procedural and evidential rules in many jurisdictions around the globe to facilitate access to justice, including in the European Union, the United Kingdom, Brazil, Chile, Mexico, South Korea and China.

The difficulty is that not all jurisdictions have adopted the same rules, and antitrust litigation has become extremely complex. Several issues provide a good illustration of these differences: for example, punitive or treble damages are not available in all jurisdictions; rules governing discovery vary from country to country; infringement decisions by competition authorities may or may not have binding effect depending on national law; and not all countries permit claims by indirect purchasers. The diversity of national procedures means that legal practitioners need to have an in-depth and “global” understanding of the different legal frameworks, before bringing or defending a case.

In addition to these procedural and substantive discrepancies, lawyers and companies may also need to take into account the diversity of jurisdictional rules from an international private law standpoint. Indeed, a single anti-competitive behaviour may involve

companies from various countries and affect businesses and consumers in different places. As such, national rules on jurisdiction may limit or promote international claims for damages.

With this Compendium, we intend to contribute to a greater awareness by decision-makers of this new legal environment and the correlative higher risks. The Compendium reflects contributions from leading antitrust law specialists from a number of key jurisdictions around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional section highlighting key issues.

In addition to the overview, the Compendium provides an unprecedented collection of decisions issued in a wide range of jurisdictions, which are also available in the Concurrences e-Competitions Bulletin. This database complements the overviews and will allow a better understanding of how the rules presented in the Compendium have been applied by the judiciary in each country. Each case summary provides users with a brief description of the facts of the case and outlines key rulings from the courts in respect of issues in the case. Rather than performing keyword searches through the common online databases in each jurisdiction, antitrust practitioners and enforcers will have all key decisions to hand. Courts will be able to see what courts in other jurisdictions have decided on a given issue, which may contribute to a greater consistency and, within the European Union, to enhance integration. This Compendium is also intended to support competition authorities by giving them a general view on the consequences of their decisions.

By providing decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, we hope to help them navigate through a new, fast-changing legal environment.

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Compendium of Antitrust Damages Actions

International Chamber of Commerce (ICC)

2ND EDITION

Antitrust litigation has become extremely complex and not all jurisdictions have adopted the same rules. The Compendium of Antitrust Damages Actions was developed to bring clarity and guidance in an area of law that is in constant evolution. It aims to profile the legal regime related to antitrust damages actions in a variety of important jurisdictions by providing an overview of the key legal principles - organized around 9 topics and completed in some jurisdictions by an additional section highlighting key issues. With references to nearly 350 court cases, the Compendium is a unique tool for all economic actors - antitrust experts and non-experts alike - and was designed to address the concerns of both multinational companies and SMEs that may be exposed to, or already involved in, antitrust litigation. The case comments, published in the e-Competitions Bulletin, provide important details on the method of calculating damages in numerous jurisdictions as well as the amount of damages awarded, to increase companies' understanding and awareness of the issue. Courts will be able to see what courts in other jurisdictions have decided on a given issue, which may contribute to a greater consistency and, within the European Union, to enhance integration. This Compendium is also intended to support competition authorities by giving them a general view on the consequences of their decisions. By providing decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, we hope to help them navigate through a new, fast-changing legal environment. Further details on the leading cases across various economic sectors and industries, as well as salient facts and insights on these important judgments, can be read in the e-Competitions Bulletin.

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