Erin Brockovich turns European: is there an interest for class actions?

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The 2014 edition of the Annual Congress took place in the beautiful city of Prague. This publication is a compilation of several reports written by AIJA members coming from different countries and jurisdictions on the topic of class actions. The results of these reports were also discussed at the AIJA Annual Congress during the Session "Erin Brockovich turns European: is there an interest for class actions?".

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INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous "Erin Brockovich" picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named "Towards a European Horizontal Framework for Collective Redress"[1], accompanying its "Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law"[2]:

"Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law."

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent EU "Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union"[3].

[1] COM(2013) 401/2.
[2] C(2013) 3539/3.
[3] Directive 2014/104/EU of 26 November 2014.

LIST OF COUNTRIES AND NATIONAL REPORTERS

This general report is based on the 14 national reports that have been drafted for the following jurisdictions by the following authors:

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1. Existence and scope of class actions/collective redress actions

1.1. In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

It arises from the national reports reviewed that the legislation regarding class actions can be very different depending on the country and whether such legislation on class actions has been applicable for several years now, or since more recently.

Some countries have a single act (United States, France, Poland, Spain, Argentina, Finland), while others have several acts, which define the rules dealing with class actions or collective redress actions (England & Wales, Germany, Japan, Italy).

For instance, Germany has two systems of class actions:

- The first is a procedure called "Streitgenossenschaft", which gives a possibility to parties concerned by individual proceedings to join the proceedings against the same defendant;
- The second system is based on the KapMuG (Capital Market Investors' Model Proceeding Act) and deals with mass claims in the area of capital markets.

Except in the United States and in Argentina, the legislation about collective redress action is quite recent. Indeed, Poland has adopted such a legislation in 2009, Japan in 2013, France in March 2014, and Belgium in May 2014.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Except for Turkey, and to a lesser extent the United States, where class actions can be initiated in all fields of law, class actions generally have a scope limited to some fields of law.

Indeed, in Turkey, collective action is applicable to any legal action. In the United States, there is no provision that limits the application of class actions to certain legal subjects, but the class action requirements may in practice render the procedure unavailable for certain kinds of claims.

In the England & Wales, the CPR's rules are applicable to all types of civil proceedings and fields of law, except competition law that is governed by the specific statutes Competition Act.
In Israel, the law on class actions allows class actions to be brought in several fields of law such as consumer protection, antitrust, insurance, banking, securities, environmental hazards, equality and prohibition of discrimination, or employment.
Generally, collective redress actions have a scope limited to some fields of law such as:
- Consumer law and competition law (Spain, Italy, Belgium, France, Japan, Poland, Finland, Argentina);
- Securities litigation (Germany);
- Damages to the environment (Argentina).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

All countries examined in this report allow to bring a collective redress action on the ground of several statutes, subject to the specific competence of the Courts.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In several countries (United States, Argentina, Finland, Spain), initiating summary/emergency proceedings in a class action is allowed without any condition (except for conditions resulting from general procedural rules).
On the contrary, summary/emergency proceedings are not allowed in Poland or Germany.
It is interesting to point out the specific situation of Japan, where class action itself is a kind of summary proceedings in comparison with the ordinary civil proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

In the United States, Israel, Spain, Argentina, Japan, Finland and Poland, it is allowed to claim for the cessation of unlawful practices/behaviors, and to claim compensation for the damage suffered.

In the England & Wales and in Germany, both claims are also possible, but with different schemes:

- A compensatory scheme before civil courts and the CAT (Competition Appeal Tribunal) in the United Kingdom, and under the KapMuG in Germany.
- A cessation scheme with regards to competition rules, the Civil Procedure Rules and the CAT in the United Kingdom, and with other mechanisms in Germany.

The compensation of the damage suffered is the only purpose of class actions in Italy and in Belgium, while in Turkey, the purpose of collective redress actions is only the cessation of the damage.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Every type of damages is covered by collective redress actions in Israel, Spain, United Kingdom, Poland, Belgium and in the United States.

In Argentina, all damages are covered as regards consumer protection.

In France and Germany, only material damages are covered to the exclusion of any physical injury or moral harm.

In Italy and Finland, it depends on the legal ground of the class action.

The situation is especially unique in Japan, as it has adopted a different distinction between the kinds of damages. Indeed, it covers any damages to the exclusion of indirect damages, lost profits, pain and suffering damages.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

Except in the United States and in England & Wales, it is not possible to obtain a compensation that exceeds the compensation that would have been awarded if the claim had been pursued by means of individual actions.

Indeed, there is a principle of non-enrichment, and the compensation shall be evaluated on the individual damage actually suffered.

There is an exception to this principle in both the United States and in the United Kingdom, where punitive damages are allowed in class actions, leading to an over-compensation in favor of the claimant party of the damage suffered.

In the United States, punitive damages are not automatic, but may, as well as treble damages and attorney's fees, be pursued in class actions on the basis of the substantive law provisions regarding the recovery of damages.

In England & Wales, such punitive damages are only available in exceptional and limited circumstances, such as where the defendant is guilty of oppressive or unconstitutional action or where it has calculated that the money to be made from its wrongdoing will probably exceed the damages payable. Such punitive damages may be awarded in cases involving competition damage claims or deliberate torts – such as deceit and defamation –, but are not available in cases involving a breach of contract.

1.8 More particularly in the anti-trust field, how does the "passing on" defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Up to now, the passing-on defence has only played a role by the courts in Argentina, Germany, England & Wales, Finland, the Netherlands and the United States. In almost all of these countries, the courts have recognized this defence one way or another, provided that it has been sufficiently proven in fact.

In the Netherlands, the district court in the *Insulated switchgear cartel*-case refused to acknowledge the passing-on defence but the decision has been over-

turned on appeal, as the court of appeal has acknowledged the "passing on" defence. In the United States, the passing-on defence was rejected by the Supreme Court in *The Hanover Shoe, Inc v. United Shoe Machinery Corp*., 88 S. Ct. 2224 (1968). On the other side of the coin, an indirect purchaser who paid the marked-up price charged by someone passing on the illegally high price has no claim against the anti-competitive manufacturer who sold to the middleman (Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977). In Belgium, Japan and Poland such a defence should be possible pursuant to law, general principles or literature.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

There are two types of class actions:

- "The collective actions" which are the actions brought by any group of individuals or legal persons claiming to have been harmed by the same defendant;
- "The representative actions" lodged by an authorized/certified or public representative entity on behalf and in the name of individuals or legal persons claiming to be victims of the relevant practice.

In some legal systems, these two kinds of class actions coexist (in the Netherlands, Germany, Spain and in the United Kingdom).

In the United States, anyone can bring a putative class action lawsuit if the requirements are satisfied. The American specificity is that class actions are usually brought as private actions.

On the contrary, in the remaining countries, only the representative class action is applied.

In some of them (Finland, Israel, and Poland), the Consumer Ombudsman, as a claimant, exercise the right of a party to be heard in Court.

Furthermore, several countries, as France, Belgium, Japan and Turkey, provide that the class actions can only be brought by duly registered associations. However, Turkey law is less strict as it admits associations or other legal entities to bring such actions provided that it is specified in their articles of association.
In Argentina, the action can be brought by the Consumer Ombudsman or by registered associations.
Italy is the only country to provide that the class action shall be brought by a single individual assisted by a lawyer and optionally by a consumers association. In practice, the class representative acts in his/her own name and on his/her own behalf by bearing all the relevant costs and expenses.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

In Turkey, Israel, France, Poland, Belgium and in the Netherlands, there are no specific rules for group actions.
On the contrary, in some countries (Finland, England & Wales) the case may be heard as a class action if several persons have claims against the same defendant, based on the same or similar circumstances.
In Spain, either the individuals or the representative entity shall inform each other of the filing of their respective actions in order for the non-claiming party to intervene in the procedure.
In the United States, Federal Rule 23 applies to class actions, whereas representative or mass actions, which are not qualified as class actions, will be governed by specific statutes under either state and/or federal law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

In most of the countries – except in Italy and in Germany – representative entities have to strictly respect some requirements.
As a general remark, in these countries, representative entities must always promote the interests of the victims involved.

Nevertheless, each country has its own features:
- In the Netherlands and in Belgium, the representative entity has to be a non-profit association or a non-profit foundation.
- In Argentina, Finland and in England & Wales, the entity shall be independent of any form of professional, commercial and productive activity and also to be impartial.
- Both French and Belgium law impose a condition of duration of existence of the consumers associations. Indeed, in Belgium, representative entities shall have got legal personality for 3 years on the day the collective redress action is filed whereas in France, they shall have been existing for at least 1 year.
- Moreover, French law distinguishes between national associations and local associations. The national associations have to gather at the date of the certification at least 10.000 members, whereas the local associations have to raise only a sufficient number of members.
- In the United States, the adequacy of a class representative is a question of fact that will depend on the circumstances of each case and typically involves inquiry into two issues: (i) whether any substantial conflicts of interest exist between the representatives and the class and (ii) whether the representative will adequately prosecute the action. Only fundamental or substantial conflicts can render a named representative inadequate.
- Moreover, the Private Securities Litigation Reform Act of 1995 ("PLSRA") requires the Court to identify and appoint a lead plaintiff determined by the Court as being the best representative for the other class members.

In all countries, the actions will be deemed inadmissible if the requirements are not complied by the representative entities.

On the other hand, if the representative entities do not comply with such requirements, they are not all financially sanctioned in the countries examined in this report. For example, while in Israel, they will be personally sanctioned with legal costs, in Spain no sanction is generally foreseen in the same case.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The admissibility of a class action/collective redress action, known as class certification, is a process by which a judge determines by order whether to certify the action as a class action.

In most countries, the admissibility of a class action/collective redress action is examined by the Court at an early stage of the proceedings also called "preliminary examination".
However, in some countries as the Netherlands, Argentina and France, there is no certification stage in the procedure.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Generally speaking, a claimant has to have 'sufficient interest' in all reported countries when he wants to bring a claim. Anyone with sufficient interest has standing to bring an action, whether stand-alone or follow-on. In Belgium, France, Italy, Japan, Spain and Finland it is not possible for third parties to bring actions. The law differs between the reported countries with respect to indirect purchasers. Indirect purchasers are able to bring actions based on antitrust infringements in the Netherlands, Germany, England & Wales, Israel, Poland and Turkey. In Israel however, the recent case-law shows a tendency toward the rejection of the "passing on" defense of indirect purchasers in antitrust private actions. Nevertheless, it has to be recognized that up to now the standing of indirect purchasers has only been recognized explicitly by the courts in the Netherlands, Germany and England & Wales.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

In most of the countries examined in this report, there is no limit concerning the number of claims to be aggregated. The number of claims depends on the facts and circumstances of each case.
Given the structure of the Italian class action, multiple plaintiffs cannot jointly file a complaint in this jurisdiction. The action is brought by a single individual who becomes the class representative.
Nevertheless, in England & Wales, Germany and Poland, there is a minimum required number of claims to be aggregated:
In England & Wales, it is commonly accepted that there must be at least 5 claims purely by reason of the resources required to conduct group litigation.
German law requires at least 10 claims to be filed and registered in order to initiate proceedings based on it.
Polish legal system requires also 10 claims that shall have the same factual basis or the same legal basis regarding judicial civil procedure.

In France, regarding the filing of complaints, there is no implementing provision yet. A decree enacted on September 24th 2014 supports the possibility for several associations to file a unique class action.
It is also interesting to underline the existence of features in the following countries:
- In Argentina, the Federal Civil and Commercial Code recognizes not only the joinder of actions but also the consolidation of claims.
- In Finland, in order to file an action with multiple plaintiffs, certain prerequisites shall have to be met: (i) the subject of the dispute has to be indivisible in a way that only claimants together can be entitled or bound and (ii) plaintiffs have to act as a unique claimant because the court only gives one judgment with the same content for all co-parties.
- In Poland, a class action concerning pecuniary claims is possible only if the amount of the claims of each member of the group has been made equal with the others.
- In Spain, in all actions initiated by qualified entities or consumer groups, the injured consumers shall be called to participate in the proceedings in order to defend their rights. This call is made through the media in the place the harm has occurred.

2.7 More generally, what procedural defenses are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

In most of the countries concerned by this report, the defendant has various defenses before the national court decides on the merits of a collection action. In the United States, there are also procedural opportunities for the defendant to defeat the class claim prior to the examination of the merits.
Moreover, the defendant can use defenses at different stages of the procedure.
1. At first, at the pleading stage, the defendant can:
   - lodge a motion often called a "so what" defense which consists in arguing the plaintiff has no claim, even if the plaintiff allegations are true;
   - challenge the court's jurisdiction and/or argue that another venue would be more appropriate to ending of the class claim.
   - dismiss the class actions on the basis of mandatory arbitration clauses.
2. The defendant can also use procedural defenses at the certification stage, it being specified that class certification is a crucial step in the procedure. In fact, if the certification is denied, the case cannot continue.

3. In the event the defendant loses at the motion to dismiss stage and fails at the class certification stage, he/she can request a summary judgment.

- In England & Wales and in Germany, there are general procedural defenses for the defendant as the lack of standing or the expiration of the statute of limitations.
- In Argentina, the defendant may lodge the following procedural defenses: statute of limitations, res judicata, lack of standing, insufficiency of service of process, a motion for more definitive statements. And, in practice, once the plaintiff replies to the defenses, the Court is entitled to postpone the consideration of these issues until entering final judgment, order the production of evidence or enter an interlocutory decision if there are no facts to be proven.
- In Spain, procedural defenses may refer to the right to stand in Court of the group or entity, but not to their relationship to the merits of the case.
- In Israel, the defendant may oppose three preliminary arguments:
- the plaintiff does not comply with the requirements;
- the action does not raise substantive question of fact or of law in common to all members of the group and in that case, or the class action is not the efficient nor a fair way for a resolution of the conflict;
- In the case a petition for approval was brought against the State or any of its authorities, the defendant may claim that the class action is expected to cause severe harm to the public in comparison with the expected benefit to the members of the group.
- In Poland, the defendant has the opportunity to contest group membership of any group member during a period determined by the court and not shorter than one month.
- Dutch law provides that in case of a collective action, the defendant can argue that the entity does not have standing because of the given circumstances, or that the victims' interests are not sufficiently safeguarded by the representative entity. Furthermore, in group actions, the defendant can argue that the assignments are not valid.

In the remaining countries like France, Finland and Turkey, there are no pretrial defenses.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Several countries have adopted the principle of "opt-in", under which the claimant party or group is formed on the basis of express content of the natural or legal persons claiming to have been harmed (Finland, France, Italy, Japan, Poland, Spain).

However, in France, the simplified procedure of class action tends to be like an "opt-out" system, as the group of victims is already identified, and all the victims are considered as belonging to the group, even though they have not yet been informed of the action.

In Germany, the legislator has refused to create an "opt-in" and an "opt-out" collective action, but the KapMuG (Capital Market Investors' Model Proceeding Act) is considered to have adopted an "opt-in" system, as individual claims have to be filed or registered with the court.

Argentina is the only country where "opt-out" is the only applicable system for collective actions related to consumer protection.

All other countries (Belgium, Israël, the Netherlands, Turkey, England & Wales and the United States of America) apply both the "opt-in" and "opt-out" principles in their jurisdictions.

However, in some of these countries, there is a predominant system. Indeed, in Turkey as well as in England & Wales, the principle of "opt-in" is predominant, but the "opt-out" principle applies in certain circumstances linked to consumer protection. On the contrary, the "opt-out" system mainly applies in Israel, but the court may order to include only claimants who inform the court in writing that they wish to join the action.

There are only 3 countries where "opt-in" and "opt-out" systems are equally applied (Belgium, the Netherlands, United States).

In Belgium, for example, the representative proposes one of the systems to the court, and the court decides on the applicable system in its admissibility

decision (except for physical or moral harm where the "opt-in" system is mandatory).
In the United States, it varies according to the basis on which the mass action proceeds or the class representative seeks class certification. More importantly, there is a third option which is the mandatory class: such a class has no right for its members to opt-out, as the outcome of the litigation will benefit or burden everyone in the class regardless of a personal wish to not be so benefited or burdened.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

Depending on the applicable system, the effects of the judgment on the victims can be quite different.
As regards the United States where both systems apply, a judgment rendered in an "opt-in" class action shall directly bind only the victims who opted-in, whereas a judgment rendered in an "opt-out" class action shall only bind the members of the class who did not opt-out.
Moreover, the decision rendered shall also be used as a precedent judgment in future individual lawsuits that may be brought. Whether in an "opt-in" or an "opt-out" system, individuals who did not opted-in or opted-out may get an individual benefit from a successful class action.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

In the United States, as well as in Spain and Belgium, a member of the claimant party is not free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, in order to avoid such members to back out of the class action and to bring a separate lawsuit against the defendant.
However, in several countries, it is possible for a member to leave the claimant party either at all stages of the proceedings (Germany, England & Wales) or under certain conditions.
Indeed, before the case goes to main hearing, a class member may resign from the class by notifying the court in writing or in person at the court registry. Once the case is in the main hearing, a class member may resign from the class as described above only with the consent of the defendant.

Also, once the case has been heard and is under deliberation by the court, a member of the claimant party shall no longer be free to leave the claimant party (Finland, Poland, Turkey).
Also, it is interesting to point out that in countries where a two-step system applies, victims can leave at any stage of the indemnification phase, as victims join the group of persons to be compensated after it has been ruled on the defendant's liability (France, Japan).

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

In the majority of the countries considered in this report, a natural or legal person claiming to have been harmed in the same mass harm situation is able to join the claimant party before the judgment is rendered or the case is otherwise settled.
Indeed, the "opt-in" must be filed by such a person within the time limit set either by the statutes or the court in its decision, at its discretion.
In the United States for example, the court is required to grant a timely motion for intervention if a statute allows it or if someone has an interest in the litigation. Moreover, the court has discretion to permit intervention upon showing that the applicant has a claim or defense that shares a common question or fact or law with the principal claims in the case.
In countries where a two-step system applies (France, Japan), a victim can join the group of persons to be compensated after the court has ruled on the defendant's liability.
Also, it is interesting to point out that in France, the victim must be a natural person as the definition of a consumer refers to "any individual who acts for purposes that do not enter in the scope of his/her commercial, industrial, artisanal or liberal activity".

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

There are not always specific provisions regarding the information of the defendant about the composition of the claimant party. However, in all the countries examined in this report, there is always a possibility for the defendant to have access to this information.

Indeed, in several countries, once the class action has been filed, the defendant receives notice of the commencement of a class action, which contains a description of the class. It is indeed useful for the defendant to be able to determine the members of the class.
In the other countries, the defendant is informed about the composition of the claimant party by the court within its decision ruling on the defendant's liability (France, Israel, Japan), or by the litigation registry held by the court (Germany, England & Wales for competition matters).
Italy is the only country where the defendant has to take an active step to be informed about the class composition by asking the Clerk's office.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

In most countries, there are no specific provisions regulating the way victims of the practice are informed about a possible or actual class action. Therefore, the court can generally order publicity measures at its sole discretion.
In some countries however, the admissibility decision is published in the official gazette and/or on the website of public entities, such as the Ministry of Economical Affairs (Belgium) or the Consumer Protection Agency (Japan).
Regarding the protection of the reputation or company value of the defendant, the countries examined in this report have no specific safeguards for such a protection of the defendant before and after its responsibility for the alleged infringement is established by the final judgment.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Most countries do not have any registry of class actions or collective redress actions in their jurisdiction (Argentina, Finland, France, Germany for joint actions, Italy, Japan, Poland, Spain, the Netherlands, Turkey, England & Wales for competition's matters, United States).

In some countries, the main decisions rendered are published by the Ministry of Economical Affairs on its website (Belgium, Italy), by the Consumer Protection Agency (Japan), or by some consumer organizations (Italy).
There are only three countries where an official registry exists:
- In England & Wales, there is a case register for Group Litigation Orders;
- In Israel, the director of courts shall keep a registry of class actions;
- In Germany, model cases are listed, and in the German Federal Gazette, the Higher Regional Court discloses the parties, the declaratory judgment proposals and any rendered orders.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In almost all of the reported countries there are no specific rules or regulations for class actions with respect to competition law infringements. Furthermore, both follow-on and stand-alone actions are possible. In England & Wales, stand-alone actions can only be brought before the High Court. In Japan, the Japanese collective redress action is designed to work as a standalone system, but it is not prohibited to use this system for follow-on actions, if at all possible. In France, however, a class action in the competition law area must be started as a follow-on action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

In all of the reported countries stand-alone and/or follow-on actions are in principle available for both bilateral as well as unilateral antitrust infringements. Nevertheless, it has to be noted that in most countries there have been no cases yet based on unilateral antitrust infringements.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In all reported countries the general rules on evidence apply. Pre-trial discovery is only possible in England & Wales, Israel and the United States. In the Netherlands, there is a limited system of discovery in place. A plaintiff is able to claim pieces of evidence (such as documents, audio or digital evidence) under certain conditions. Secondly, plaintiffs are able to start pre-trail witnesses hearings before a judge of a district curt to obtain evidence.

Gaining access to the file of a competition authority is difficult for plaintiffs in almost all of the reported countries and will also depends whether or not an investigation is still on-going. In Finland, the information and evidence submitted to the Finnish Competition and Consumer Authority (FCCA) for obtaining immunity or reduction of a fine cannot be used for any other purpose than the order to terminate a restraint on competition or the order to deliver a product, the commitment decision, the withdrawal of a Block Exemption, or the review of a penalty payment proposal at the FCCA, the Market Court or the Supreme Administrative Court. Also, some documents are protected from disclosure such as corporate statements given as part of a leniency program. Nevertheless, in Japan a plaintiff may have access to the file as it is likely to be regarded as an interested party to the trail. In Germany, a plaintiff in a follow-on case may also have the right to gain access to the file of the competition authority provided that the legitimate interests of the plaintiff outweigh the legitimate interests of the wrongdoer or third party in non-disclosure, and the granted access does not jeopardize the competition authority's investigation. In Turkey, a claimant can also access the file because the investigation is executed by court and not a public authority. Therefore, interested parties may access all the documents obtained for the case.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

In most countries, there are no specific rules which extends the limitation rules so that a plaintiff can wait until the investigation of the public authority has ended. In Germany however, the limitation period is suspended if proceedings are initiated by the German Federal Cartel Office, a competition authority of

one of the German Federal States, the European Commission or a competition authority of one of the EU member states. In Italy, the court may stay the class action until the competent authority issues its final decision. In the Netherlands, the courts have ruled that a plaintiff did have to be aware of its potential claim when an investigation is announced by the competition authority and can therefore wait until a decision is issued. However, this should not be regarded as a hard and fast rule. In France, the law sets a specific limitation period for class actions based on competition law: the claimant must initiate the class action before the expiration of a period of five years from the date the decision cannot be challenged anymore. In Finland, the new Competition Act grants the claimants, for future cases, a limitation period of one year from the final decision in the competition infringement matter. In the United States, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again. Parties can, and often do, enter into private tolling agreements that toll the applicable limitations period for filing a claim in order to discuss settlement, investigate the underlying facts or law, or allow some other related process or event to occur. Courts also have broad powers in many instances to stay the proceedings in the interest of efficiency and justice, particularly where parallel or related proceedings are underway.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

In all the non-EU countries, a decision would constitute an important factor to be considered but is not technically a presumption of proof. Pursuant to the *Masterfoods*-doctrine, an EC decision is binding for the courts of the EU member states but this is also the case with decisions of the national competition authorities pursuant to national law. In the Netherlands, the *Masterfoods*-doctrine have been discussed before the courts in the actions with regard to the *air cargo*-cartel and the *paraffin wax*-cartel. In these cases, defendants attempted to invoke *Masterfoods* in order to stay the proceedings. The Dutch High Court of Amsterdam has given the following rules for a potential stay based on the *Masterfoods*-doctrine:

1. defendants have to show that they have appealed the administrative decision within the applicable time limit.
2. defendants have to show that their administrative appeal has a certain degree of merit; i.e. a *pro forma* appeal or an appeal that is *prima facie* without any merit cannot result in a stay of the civil proceedings.
3. defendants have to give show which defences they are going to bring forward in order to allow a judge to decide to what extend these defences are dependent on the outcome of the administrative procedure.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

In Argentina, Finland, Japan and Spain it is not possible to have class actions financed by third parties and - generally speaking - due to the fact that in these countries class actions may only be started by certain public organizations. The specific regulations in these countries expressly prohibit these organizations receiving financial aid from third parties. In all other reported countries it is possible to have the class action financed by third parties.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

This is not the case in all of the reported countries. Nevertheless, the funding could play a role in the United States if the opposing party makes an adequacy issue out of the proposed class representative's ability to prosecute the case of judgment (including by paying the costs of litigation).

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

In most of the reported countries this will not play role before the court (since class actions may only be started by certain public organizations) or the court is not able to stay the proceedings because of the funding. In Germany, the court could stay the proceeding if the litigation funding is void or if there is a risk that the court and lawyer fees cannot be paid. In England & Wales, France and Israel the courts can also stay the proceedings for the above-mentioned reasons. In Turkey, a plaintiff has to pay the litigation fees while initiating a lawsuit. In case it is seen that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted a two-week term to realize the payment. In the United States, these issues would not typically result in a stay of the proceedings but rather a decision not to certify the class, or not to certify a given named plaintiff as class representative, on the grounds that the class representative is not adequate to the task of representing the interests of the absent class members.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

In some countries (like Germany, England & Wales and the Netherlands) financial aid is available if plaintiffs are unable to pay legal fees due to their financial and economic circumstances. In Israel, a fund is established in order to assist representative plaintiffs to finance class actions which have a public or social importance. Financial aid is available in Spain for consumers and users which are legally registered in the State register for Consumers' and Users' Associations. In the United States, the most ready source of financial support is the class action plaintiff's bar and to find a plaintiff's lawyer willing to take the matter on a contingency basis.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Such fees are allowed in Argentina (but only for individual claims), England & Wales (as from 1 April 2013), Finland, Italy (even though some limits are still to be observed), Japan (but it may not be applied to the collective redress actions), Spain, Turkey and the United States.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

In most countries the losing party has to pay the legal costs of the winning party. Nevertheless, in most countries the amounts are rather limited due to statutory limitations or the mindset of the court. In Argentina, Italy and Finland however, the winning party may recover 100% of its costs. In England & Wales, the winning party may even recover costs against the third-party funder.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Since only specific public organizations can start class actions in a number of the reported countries, these countries have no specific rules and/or safeguards to prevent groundless actions. In the other countries rules and/or safeguards are limited and mainly aimed at managing the proceedings on a constructive and speedy manner (for example in England & Wales).

In Israel however, there are numerous rules and safeguards such as the requirement to conduct the class action in good faith, the obligation to subject a settlement agreement to the approval of the court, the rather high evidentiary standard determined by the courts at the stage of approval of an action as a class action (for example, the requirement to submit an economic opinion in the preliminary phase of approving a class action which is bases on antitrust laws).

In France, the applicable law includes many provisions aimed at avoiding abuses in class actions, among which the fact that the action can only be brought by a certified association and that only material damages may be compensated.

In the Netherlands, collective actions can be brought by a foundation or association with full legal capacity only if the action is intended to protect similar interests of different persons to the extent that the articles of association of the foundation or association promote such interests. In principle, it does not suffice if only the articles of association mention such interests, the foundation or association should, in most cases, actually employ activities related to the interest it promotes. Furthermore, before instituting proceedings, the plaintiff

must make sufficient attempts to negotiate with the defendant in the Netherlands.

In the United States, Congress passed in 2005 the Class Action Fairness Act ("CAFA"). The objective of CAFA was to curb two forms of abuses: forum-shopping by plaintiffs and the class-action plaintiff's bar that was resulting in an unusual number of class action cases being filed in certain forums considered more favorable to plaintiffs, and settlements engineered by named plaintiffs, class counsel, and defendants in a way to ensure handsome payouts to class counsel and paltry or valueless awards to absent class members. CAFA created additional grounds, unique to putative class actions, for removing lawsuits from state courts to federal courts. CAFA also required additional scrutiny of settlements, including by giving state attorney's general a right to receive notice of and an opportunity to object to a settlement affecting class members from their states. Settlements involving coupons for class members enjoy special judicial scrutiny, and CAFA requires attorney's fees awarded on the basis of coupons to consider the amount actually redeemed, not the value available.

5.8 Are the parties to an action able to insure against the cost risks?

This is, some way or another, possible in all of the reported countries. Nevertheless, it is not common in some of these countries (for example, Belgium, Germany and the Netherlands). In the United States, it is usually not done directly, but indirectly through indemnifications for directors and officers and with the use of directors- and officers insurances. Furthermore, professionals such as accountants and lawyers have errors-and-omissions coverage.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

This is possible in Germany, England & Wales, Israel, Japan, the Netherlands (but limited), Poland and Spain. In the United States, it is possible, but such orders are very rarely granted and usually not worthwhile to pursue due to the costs. In France, the claimant is the only one allowed to apply for such an order. The judge can indeed order the professional to pay a security for the costs incurred by the association during the second phase of the proceedings.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

There are ethical or Bar rules with respect to class actions in England & Wales, France, Israel, the Netherlands and the United States.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific international private law rules applicable to class actions and/or collective redress actions in all reported countries.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

There are no specific rules prohibiting a single collective action to take place in a single forum in all reported countries.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

A foreign representative entity has legal standing in Belgium (has to be authorized by the Ministry), Germany, England & Wales, Israel, Italy, Japan (nevertheless it is only theoretically due to several Japanese rules), the Netherlands (only with respect to group actions but not collective actions), Poland, Spain (but it depends on local laws) and the United States.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

In most countries the general rules of civil or international private law would apply and therefore, it is or should be possible to bring a claim against a company and/or individual domiciled outside of the jurisdiction. Under circum-

stances, cases might be stayed pending the outcome of the case in another jurisdiction.

This is not the case in countries (such as Finland and Japan) where only public authorities or certified consumer organizations are able to bring cases to the court.

In France, the application Decree provides that the "Tribunal de Grande Instance" of Paris shall be competent when the defendant has no residence at all or is domiciled abroad.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

Several countries have a specific mechanism that is very similar to what can take place outside of class actions, but without any specific mechanism of alternative dispute resolution allowing the settlement of class actions.

In France and Israel special provisions about this point exist, and a settlement agreement is possible but must be approved by the Court. In France, it is possible for the claimant association to participate in a mediation to obtain damages.

Spain has special provisions regulated by a royal decree since 1993. Under such a decree, all the professionals wishing to become a member of the consumer affairs arbitration system can join it by making a public offer of submission. The consumer affairs arbitration system regarding future conflicts with consumers, therefore, is subject to arbitration. The party opposing to the submission can request an action for annulment of the award under specific conditions.

While in Poland mediation is available at any stage with the consent of the parties, in Belgium there is a compulsory mechanism of collective alternative dispute after the admissibility phase.

In Turkey, Japan or Germany, arbitration or mediation are possible, and both legislation and lawyers promote out-of-court agreements.

In the United States, the court may order parties to participate in alternative dispute resolution, but has no power to order parties to settle or to fashion a settlement.

In England & Wales, there are no special provisions, but the government has showed strong support for the use of alternative dispute resolution in competition cases.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Except in Japan, out-of-court settlements are promoted with more or less force.

In France, England & Wales, Belgium, Israel, Germany, Finland and in Poland, judges or courts have a mission to try and settle or promote a settlement.

These types of agreements are very developed in Spain, and also promoted in Turkey even if there are not very often used.

In the United States, this varies from court to court and even from judge to judge.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

In some countries (Israel, the Netherlands, Germany, Argentina, France), the limitation period is tolled during settlement negotiations or arbitration. In particular, in France, in the event of mediation during the proceedings, the case is not removed from the judge.

In Italy, although there is no formal suspension of the procedure, the parties may ask the Court to grant an adequate postponement of the hearings in order to slow down the proceedings and thus have enough time to conduct the negotiations.

On the contrary, in other countries (Japan, Belgium, Finland, Turkey), settlement discussions, mediation or other forms of alternative dispute resolution do not suspend limitation periods applicable to the claims.

In England & Wales, the principle is also that negotiations will not suspend the limitation period, unless there is a clear agreement to suspend the limitation period, and if this agreement is not in conflict with a relevant rule or practice direction which prohibits any variation of time limits.

In the case of negotiations between the parties before and after a limitation period has expired, it will not constitute waiver or estoppels, unless the defendant has made his intention unequivocally clear. The English legal system

provides a discretionary exclusion of time limit for actions in respect of personal injury or death.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

In the majority of the countries examined in this report, consumers are widely protected. Therefore, a provision which prohibits a consumer from bringing a class action in court is deemed to be void.

It is interesting to point out that Finnish law forbids arbitration clauses in consumer contracts.

The United Kingdom's report points out that an arbitration clause in a party's standard terms is not binding on the customer because it causes a significant imbalance in the parties' rights and obligations, to the detriment of the customer, by preventing the customer from taking legal action other than arbitration.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Provisions exist in several countries regarding the enforcement of the court decision, and more particularly the information of the victims of the practice.

- In Israel, the court may order some or all of the parties to be responsible for the publication of a notice.
- In England & Wales, the decision shall be delivered in public.
- In Spain, there are rules regulating publicity and intervention in proceedings for protection of rights, as well as collective and individual interests of consumers and users; when it concerns association the decision is published in the media.
- In France, it belongs to the judge to define the way the victims or consumers that could be included in the class action will be informed. The publicity costs are in charge of the professional. Moreover, the judge fixes the delay given to

the consumer to adhere to the class action (between 2 and 6 months) and decides whether the consumer has to contact directly the professional or the association or any other person to obtain the damages. On this point, the decree adopted on September 24th 2014 provides for the information required to appear in the measures of publicity set to inform the potential victims.

- More generally, there are publicity measures in Belgium, Germany, Poland and in Japan.

Even in the case where there is no specific provision (Argentina, Finland, Italy) about this point, the general procedural rules allow the victims to be informed (copies of judgment, advertising activities, gazette).

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

Some countries are regulated by general rules regarding the enforcement of the court order and the possible compensation paid by the defendant (the United States, Germany, Finland, England & Wales).

In France, the Court that rendered the decision on the merits of the case is in charge of the enforcement of the decision. The association will represent all the claimants who have obtained the damages by the professional in a fixed delay, and will be considered as the creditor for the purpose of specific performance.

In Finland, as well as in Japan, it is up to the claimant to initiate the enforcement proceedings.

Special provisions exist in several countries:

- In Spain, the orders are enforceable within 5 years from the final decision;
- In Italy, if the court's decision is favorable, it becomes enforceable solely after 180 days and during this 6 months period legal interests do not accrue;
- In Israel, the court may issue orders concerning the supervision over the enforcement of its judgment;
- In Argentina, the law provides that any amount of money that a defendant must pay shall be done through the same means the initial amount paid by the consumer was perceived by the defendant.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Generally, there are no specific rules about the effective compliance of the injunctive orders, and the general procedural rules are applied.

However, some countries have specific provisions. In France and Argentina, it is possible to pronounce pecuniary sanctions in case of a refusal to execute a judicial decision.

A fine is also possible in Germany, where the plaintiff can also request by a motion a security for any damages that may arise as a result of a future violation.

In Spain, the defendant has to declare the assets the seizure of which is sufficient to cover the amount for which the enforcement was made. Regarding non monetary sanction, Spain law provides a fine for each day's delay or compensation for damages.

In Italy and in the United Kingdom, the issue is resolved by the court:

- If an injunctive order is disobeyed in England & Wales, the party against whom it is made would be in contempt of court, generally enforced by committal proceedings;
- In Italy there are no provisions about effective compliance. However, if there is an appeal, the court of appeals must take into consideration the amount of money to be paid. When the court of appeals suspends the decisions' effects, it may order the losing defendant to pay the corresponding sum as a deposit.

The strictest provisions apply in Turkey, where a defendant not complying with an injunctive order can be sentenced by a court to a penalty of imprisonment from 1 to 6 month(s).

National Report of Argentina

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The amendment to the National Constitution passed in 1994 granted to individuals the legal standing to sue in proceedings to protect the environment, fair competition and consumer rights, as well as general collective interests (Article 43, paragraph 2). Indeed, not only the injured party has legal standing to sue, but also the ombudsman and the associations registered and authorised to protect these rights.

This amendment generated a lively debate, and for several years there was no agreement among the courts or legal scholars as to whether the amendment only involves the protection of collective rights that are endowed on a plurality of unnamed individuals whose object is single and indivisible (e.g., the correct labelling of a product) or whether, on the contrary, it also involves individual rights with a divisible object (e.g., monetary compensation in the consumer relationship).

The trend of the case law leaned to admit the legal standing to sue of consumer associations in claims for the protection of both individual rights and collective rights of consumers, especially in cases of homogeneous injuries and small claims (e.g., undue charge of a few cents in utility bills). In these cases the courts have stated that if standing is not grated, access to justice of each of the injured individuals would be restricted.

In re: "Halabi" (February 2009), the Argentine Supreme Court of Justice, after discussing individual and collective rights, identified a "*third category comprising rights with collective incidence that refer to homogeneous individual interests*". In the wording of the Court, these rights are defined as follows: a) there is no collective interest (as would be the case, for example, of the environment) and divisible individual rights are impaired; b) there is a single and continued fact that causes the injury to all of them, and consequently, there is an homogenous factual causation; and c) the proof of all the allegations is common to these interests, except as regards to the injury that is individually sustained. Consequently, in these cases, the Court establishes that "*there is factual and regulatory homogeneity that makes it reasonable to carry out a single lawsuit with expansive* res

judicata *effects of the judgment entered therein, except as to the proof of the injury.*"

Currently, there are several bills addressing Class Actions in the National Congress. It should be noted that one of them is a partial copy of Rule 23 of the US Federal Rules of Civil Procedure.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Following the national constitution amendment (1994), both the Environmental Act (No. 25.675) and the Consumer Protection Law (No. 24.240) provide certain collective procedural rules. The former regulates a procedure to obtain redress of damages to the environment, whereas the latter includes the enforcement authority (National or Local), consumer associations, the Ombudsman and the Public Prosecutor among those with legal standing to advocate for consumer collective rights. "Collective interests" are those that are indivisible and belong to unnamed individuals that share factual circumstances, whereas "individual rights" are divisible and belong to each individual.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

As long as the plaintiff is one of those mentioned in Article 43 of the National Constitution (see answer to 1.1.), the claim can be grounded on one or more statutes applicable. In fact, article 3 of the Consumer Protection Law states that its provisions are integrated with the antitrust and fair trade rules. However, there is no specific regulation of collective actions in the antitrust field.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Yes, in fact the Consumer Protection Law required the Courts determine summary proceedings when possible according to the applicable procedural rules.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors

("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes. In the consumer protection jurisprudence, there are countless precedents of injunctive relief actions initiated by either the Consumer Associations, the Ombudsman, or the Enforcement Authority, especially against insurance companies and banks.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In practice, the collective redress actions sought under the Consumer Protection Law, Area, compensation for monetary damages, which comprise: (i) direct damages, i.e. expectation damages; (ii) consequential damages, i.e. lost profits; and (iii) costs of suit.

There are not precedents yet as to non-monetary damages, such as pain and suffering or emotional distress.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

In April 2008, Law No. 26.631 amended the Consumer Protection and introduced the punitive damages in Argentina. The wording of such provision establishes that the mere non-compliance with legal or contractual duties by the supplier of the product or service is enough to make the supplier subject to punitive damages in favour of the consumers. Courts have been reacious to recognize punitive damages. There is a cap of five millions pesos (u$s 700.000 aproximately). Punitive damages cannot be applied *sua sponte* by the Court, but only at request of the injured party.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

In re *"Aut-O-Gas S.A. v. YPF S.A. et al s/ Ordinary Proceeding"* the First Instance Commercial Court (September 16, 2009), recognized for the first time the "passing on defense". The plaintiff alleged a series of damages related to the abuse of dominant position of the defendant in the bulk liquefied petroleum gas market. The defendant succeeded in proving that plaintiff passed most of the over price to the end consumer ("passing on defense").

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("'collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

As stated in answer to question 1.1., the National Constitution and the Supreme Court in case "Halabi", recognizes standing to file Collective Actions to the affected person, the Ombudsman and the duly registered Associations.

The Consumer Protection Law enables the Consumer Associations, the Regulatory Authority (National and Local), the Ombudsman and the District Attorney to start Collective Actions.

The Environmental Law also recognizes standing to sue to: a) the affected persons, the Ombudsman, environmental protection NGO's, municipal, provincial and national State in order to get the damaged environment repaired; b) all persons affected by en event to seek compensation damages; and c) any person can claim for environmental damages.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Please see answer to question 2.1.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

The consumer associations must meet the following requirements in order to be recognized by the Regulatory Agency: a) shall not participate in partisan political activities; b) shall be independent of any form of professional, commercial and productive activity; c) may not receive donations, contributions or contributions from commercial, industrial or service providers, private or state, national or foreign companies; d) their publications may not contain ads.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

There is no certification stage in the procedure. However, a defendant may enter a defense of lack to standing to sue with the answer to the complaint. In the answer, the defendant may raise certain admissibility defenses which which require plainitffs to meet certain requirements. These are based on the U.S. Federal Rule of Civil Procedure 23. The Supreme Court outlined these requirements in *Halabi* (see above).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Only the person affected and the different entities listed in answer to question 2.1. have standing to sue.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

The Federal Civil and Commercial Code recognizes not only the joinder of actions, but also the consolidation of claims. There is no limit as to the number of claims to be aggregated nor the number of plaintiffs.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

Along with the answer to the complaint, defendants may also file: a) a counter-claim; and b) a wide variety of defences or preliminary issues such as statute of limitations, *res judicata*, lack of standing to sue, insufficiency of service of process, motion for more definitive statements, request for the plaintiff to place a bond to cover possible litigation costs, etc.

Once the plaintiff answers to the defences or preliminary issues lodged by the defendant, the Court is entitled to: a) postpone the consideration of these issues until entering final judgment; b) order the production of the evidence (if there are facts to be clarified related to the preliminary defenses); or c) enter an interlocutory decision, if there are not facts to be proven.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

The "opt-out" principle is recognized for Collective Actions in the Consumer Protection Law.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The judgment has "res-judicata" effect on all consumers or users who are in similar conditions, except those who express a wish to the contrary prior to the judgment in the terms and conditions that the judge provided.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

In practice, the Ombudsman, the consumer associations or the regulatory authority (National and Local) are the plaintiffs in the collective actions regarding Consumer Protection. There is no participation of individuals as co-plaintiffs.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

There is no obstacle for individuals to join the claimants (mentioned in answer to question 3.3.), before the judgment. However, rarely occurs.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

There is no express regulation on this. However, the Courts, following the Supreme Court decision in re "Halabi" have ordered that all possible affected persons be notified in order to let them decide whether to participate or not in the procedure.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There is no provision regulating the way or means in which the victims are to be informed. In practice, it is up to the Courts to decide which is the best way to ensure due process.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

There is no official registry for collective actions in Argentina. However, there are some studies as to the quantity of collective actions initiated in some Jurisdictions.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Class Actions have not been specifically regulated in the area of competition law, and no jurisprudence has been found.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Class Action have not been specifically regulated in the area of competition law, and no jurisprudence has been found.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

There is no pre-trial discovery in Argentina. The procedure usually starts when the complaint is filed. As an exception, prior to filing the complaint, a plaintiff may request: a) preparatory measures (i.e., those aimed at collecting the information necessary to sufficiently ground the complaint); or b) anticipated production of evidence, supported by the eventual disappearance or difficulty in the subsequent production of evidence (e.g., the testimony of an advanced-age or severely ill witness). Parties may obtain documents in possession of a public authority through requests for information.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There are no rules on this topic.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

As stated above, there are no collective actions nor case law to this respect. However, if a collective action is commenced following a decision of the national competition authority, undoubtedly this decision would constitute an important factor to be considered, but is not technically a presumption. A judge is free to appreciate the probative value of all the means of evidence by a reasoned analysis of them, following the rules of logic based on his experience, good sense and human understanding.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

As explained above, the Consumer Protection Law enables to commence collective actions only to the Consumer Associations, the Regulatory Authority (National and Local), the Ombudsman and the District Attorney. None of these entities are allowed to receive financial support from third parties. Indeed, as to the Consumer Association, the specific regulation expressly prohibits receiving donations, contributions or contributions from commercial, industrial or service providers, national or foreign companies.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

Please, see answer to question 5.1.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse

costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Please, see answer to question 5.1.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

The consumer associations receive financial contributions from the national government in order to promote and complete their objectives in accordance with the Consumer Protection Law.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency or success fees are allowed only for representation in individual claims, rather than in collective actions.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

The general principle governing the award of costs of legal actions is known as the 'objective defeat principle' and sets forth that the losing party in the lawsuit must bear the expenses of the opposing party, even if this party has not formally requested it. The winning party may recover 100% of the total expenses and legal fees. However, the judge may exempt the losing party from payment of costs of the suit (for instance, when there are controversial legal issues involved). This power is obviously exceptional and of restricted application.

Consumer associations, when litigating collective actions, are legally entitled to litigate without bearing litigation costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

No, there are not such safeguards. Because consumer associations are legally entitled to litigate without bearing litigation costs, there have been many frivolous or groundless collective actions so far. This issue is one of the major concerns to be addressed in the current bills to regulate class actions in Argentina.

5.8 Are the parties to an action able to insure against the cost risks?

A party may obtain insurance only when the procedural code requires (e.g. to secure possible damages due to injunctions or actions brought by a plaintiff who has no domicile nor real estate assets in the country).

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Since the plaintiffs in actions seeking collective redress in Consumer law are: a) Consumer Associations, b) the Regulatory Authority (National and Local), c) Ombudsman, or d) the District Attorney; the defendants are not able to request an order for security costs.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

There are no ethical nor Bar rules related to class or collective actions.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are not rules applicable to class or collective actions. International private law rules would apply.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

There is no specific rule as to collective actions to this respect.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

No, a representative entity designated by a foreign country has no legal standing to bring representative actions in Argentina. As stated above, only the entities expressly mentioned in the National Constitution and the respective statutes (e.g. Consumer protection law and Environmental Law) are allowed.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different

jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

A collective action may be commenced with the court correspondent to the domicile of any of the consumers affected by the defendant's tort or breach of contract. The plaintiff in a collective action may also join a parent company regardless its domicile (in or out the jurisdiction). If a defendant is subject to a second cause of action in a different jurisdiction arising out of the same facts and practices, he may oppose res judicata or claim preclusion, if applicable, as an affirmative defense.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

There is no specific mechanism of ADR for collective actions.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

There are arbitral tribunals set up in different jurisdictions, but they only deal with single or individual claims.

In the city of Buenos Aires, there is a compulsory prejudicial mediation for all civil and commercial claims. However, since the Consumer Protection Law provides that any settlement of collective actions shall be entered with the leave of the Attorney General and the judge, the mediation procedure is not efficient in practice to avoid the intervention of the Judiciary.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

Since collective actions are eventually negotiated and settled during the judicial procedure, the toll of any statute of limitation has already accrued when filing the complaint.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

A Court would void any clause that restrains the right of consumers recognized by the Consumer Protection Law (public order). Therefore, a court would not enforce a clause restraining the consumer from bringing a class action in Court.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

There are no provisions related to the way victims or any other affected party are informed about a decision rendered in a collective action. The National Supreme Court in *"Halabi"* stated that *"proper notice"* must be given, but did not mention how it should be done.

In practice, courts decide this issue on a case-by-case basis. For example, if the defendant is a bank that was overcharging its clients, the same bank must show that *"proper notice"* is given through the usual means (e.g. email, letters, etc.) to the clients. Moreover, in order to assure this requirement, courts usually order an additional notice through ads in newspapers. Of course, the defendant has the burden to bear the cost of any notice.

8.2 Are there any provisions regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The Consumer Protection Law provides that any amount of money that a defendant must pay, shall be done through the same means that were perceived. There is prolific case law applying such provision when defendants are banks, health care providers, insurance companies, etc.

Moreover, the same statute leaves to the court's discretion the most effective way to implement the distribution of the damages among the persons of the af-

fected group. If the damage is different for each consumer, the court must establish groups or classes, and each person would seek its own damage through a summary procedure.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Courts may impose pecuniary sanctions "*astreintes*" when the losing defendant does not honor the final decision, only if the plaintiff duly and timely requests it. In other words, the court would not impose them ex-oficio or sua sponte.

National Report of Belgium

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Yes. The provisions regarding the collective redress actions have been enacted in the Code of Economical Law (Book XVII, title 2). The definitions are contained in the Chapter XIII of Title 1 of Book 1 of the same Code.

A collective redress actions is defined as: "*the action aiming at the redress of a collective harm*"; where the "*collective harm*" is defined as "*all individual harms with a common cause, suffered by the members of a group*" and a "*group*" is defined as "*all consumers affected individually by the collective harm and represented in the collective redress action*" (article I.21 Code of Economical Law)

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Collective Redress Actions are limited to the cases of harm caused to consumers.

Collective Redress Actions are only allowed (article XVII.36) when the cause of the harm is a (potential) infringement, committed by an undertaking, of (i) a contractual obligation or (ii) one of the European regulations or Belgian laws (or application decrees) listed in the article XVII.37.

[laws listed in article XVII.37: law regarding the protection of competition ; laws regarding competition and price changes; the law on the fair market practices and the protection of the consumer; the law regarding the the payment services and credit services, the law regarding the security of products and services; the laws regarding intellectual property rights, the law regarding the electronic economy; the law regarding drugs , the law on the transport of gas and other products through pipelines; the law regulating residential construction and sale of homes built or under construction; the law on the protection of the health of consumers regarding food and other products; the law on compulsory insurance against civil liability in respect of motor vehicles; the law concerning the liability for defective products; the laws regarding insurances; the law on marital broker-

age firms; the data protection laws; the law on the exercise and the organization of itinerant activities; the law on travel agreements; the EU regulation 2027/97; the laws on the organization of the electricity and gas markets ; some provisions of the laws on the control of the financial sector , the law on the amicable recovery of debts of consumers ; European regulations regarding the passengers rights (flight , train, road transportation , sea transportation), the law regarding the sale of consumption goods to consumers , the law on electronic communications; the law regarding the protection of consumers in connection with broadcasting services; the law on the resale of event tickets].

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

It is allowed to bring a collective redress action on the ground of several statutes, as long as they are listed in the article XVII.37.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

No.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

The aim of the action is to obtain compensation for the damage suffered; however, the compensation may be a compensation "*in natura*", which means that the unlawful practice will take an end.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

All kind of harms.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More

particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

The principles that are applicable to the determination of the quantum of the harm under general civil law remain applicable to collective redress actions: it is therefore not possible to obtain a compensation that exceeds the compensation that would have been awarded if the claim had been pursued by means of individual actions; no punitive damages.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

No published case-law found.

On the basis of the general principles applicable, the validity of a passing-on defense should be assessed taking into consideration all elements of the case, including possible loss of sales due to the passing-on of the overcharge (which would lead to the rejection of the passing-on defence).

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Collective redress actions may only be brought by an authorized representative.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Not applicable.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

The possibilities to be a representative entity are very limited (article XVII.39):

- An association for the defense of consumers rights, having legal personality, and being (a) a member of the Consumption Council or (b) authorized by the Ministry for Economical Affairs;
- A non-profit association whose object (as it appears from its articles of association) is in direct relation with the collective harm, which do not pursue an economical object, and which is authorized by the Ministry. Such association must have legal personality since at least 3 years on the day the collective redress action is filed;
- A specific department of the Ministry for Economical Affairs, to be created (but it will only act as representative in the negotiation phase).

If the representative does not comply with the statutory requirements to be a representative, the court will appoint another representative; if no other representative qualifies, the court must declare that the action has ended.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

It is examined at an early stage, called "*admissibility phase*" (article XVII.42 and foll.).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

No.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

There are no limits to the number of claims that can be aggregated. All plaintiffs are represented by the representative.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

The defendants are party to the admissibility phase and can discuss the fact that the admissibility conditions for a collective redress action are met.

The admissibility conditions are (article XVII.36):

- The harm is caused by a (potential) infringement of (i) a contractual obligation or (ii) one of the European regulations or Belgian laws (or application decrees) listed in the article XVII.37, committed by an undertaking;
- The representative meets all statutory requirements and the court considers he is "adequate" to be representative;
- A collective redress action seems a more efficient action than normal proceedings.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Both systems are possible (both systems are defined in article I.21).

The representative proposes one of the systems to the court and explains why that system should be applied (article XVII.42).

The Court decides on the applicable system in the admissibility decision (article XVII.43).

If the harm to be redressed is physical damages or moral harm, the opt-in system is compulsory (article XVII.43).

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

[article XVII.38]

Opt-out system

All consumer suffering harm and residing in Belgium are part of the group, unless they opt-out; consumers residing outside of Belgium are no part of the group.

The declaration of opt-out must be filed at the court's clerk office.

Opt-in system

The declaration of opt-in must be filed at the court's clerk office. Both consumer residing in Belgium or outside Belgium may opt-in.

Opt-out declarations and opt-in declarations must be filed within the term set in the admissibility decision; the term may not be less than 30 days and not more than 3 months as from the day after publication of the admissibility decision in the Official Gazette (article XVII.43).

All members of the group are bound by the decision on the merits/settlement, to the exception of the member who can demonstrate that he has no reasonable possibility to know the decision of admissibility during the period to opt-out (article XVII.49 and XVII.54).

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

No, the opt-in option (as well as the opt-out option) is definitive (article XVII.38). By exception, a member of the claimant party may leave if he concludes an out-of-court settlement with the defendant.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

The question is only relevant for the opt-in system.

In the opt-in system, the opt-in must be filed with the court's clerk office within the term set in the admissibility decision (see answer to question 3.2.).

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The initial request for admissibility filed by the representative must contain a description of the claimant party and an estimate (as precise as possible) of the

number of consumers harmed (article XVII.42). The admissibility decision also contains that information (article XVII.43)

There is no specific statutory provision regarding the information of the defendant as to the composition of the claimant party and the number of persons that have opted-in, after the expiry of the opt-in term. However, there is a mandatory negotiation phase after the admissibility phase and it is very likely that the defendant will obtain that information during the negotiation phase.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

The admissibility decision is published in the Official Gazette and on the website of the Ministry for Economical Affairs. The Court may impose additional publicity measures (article XVII.43).

No specific safeguards as to the protection of the reputation/company value of the defendant.

The same publicity measures apply to settlement agreements (article XVII.50) and to the decision on the merits (article XVII.55).

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Publication on the website of the Ministry for Economical Affairs (see answer to question 3.6).

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Possible to start a stand alone action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Both (but be reminded that collective redress actions are only possible for harm caused to consumers).

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

General rules on evidences apply (i.e. possibility to ask for disclosure of documents in the possession of the defendant, general principle that both parties should participate to the establishment of the facts).

No specific discovery procedure, unless in specific cases (e.g. infringement of IP-rights); possibility to ask for an expertise as preliminary measure.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

No specific rules.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in Masterfoods (20 September 2001, C-344/98) play

a role in your country with respect to actions based on cartel damages?

Yes.

For the actions based on cartel damages, it can be referred to the judgment of the Court of Justice in the case C-199/11 of 6 November 2012 (§§ 50 and foll. as well as §§ 65 and foll.):

"*When national courts rule on agreements, decisions or practices under, inter alia, Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.*

That rule also applies when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU"

"*65. Finally, a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.*

66. Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003".

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Yes, but the restrictions set for the designation of the representatives will limit these possibilities.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No specific provision. This is unlikely to be taken into consideration by the court.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency or success fees are prohibited (Preparatory works, Doc. Parl., Ch., session 53, 3300/004, p. 17).

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Yes. The costs to be reimbursed are to be set by Royal Decree. It is very likely that the principle will be a reimbursement of fixed fees, as it is the case for other proceedings.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

The restrictions set for the choice of representatives (see answer to question 2.3)

5.8 Are the parties to an action able to insure against the cost risks?

The law remains silent as to this point. This should be possible, from a legal point of view.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Not foreseen in the Act.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

No. But be reminded that lawyers are not allowed to act as representatives and, therefore, not able to start collective redress actions.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

General international private law rules apply.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

Only the courts of Brussels will be competent for collective redress actions.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

The representative has to be authorized by the Ministry. Nothing would prevent a foreign entity to be authorized by the Ministry.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The Act contains no specific rules as to that point.

On the basis of the general rules regarding international private law, this should be possible, e.g. if the cause of damage is localized in Belgium.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

There is no compulsory pre-trial mechanism of collective ADR.

There is however a specific and compulsory mechanism of collective ADR pending the proceedings, after the admissibility phase: the admissibility decision must mention a term (minimum three months and maximum six months; the term may be renewed for one time if both parties ask for a renewal) aimed at negotiating a settlement (article XVII.43).

The court may also appoint a mediator -if the parties agree with that measure- in order to facilitate the negotiations.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction ?

See answer to question 7.1.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

No.

Suspension however applies in other specific cases (e.g. the limitation period is suspended as from the date of the decision of admissibility until the day of notification of the opt-out).

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

The act contains no specific provision in that regard.

However, it is very likely that the act on collective redress action will be considered as mandatory law and, therefore, an arbitration clause would not get effect (unless the defendant would be a foreign company established in another country of the European Union or in a country which has signed the New-York Convention on Arbitration).

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Article XVII.55 provides for publicity measures for the decision on the merits: the court's clerk office sends a copy of the judgment to the Official Gazette, for publication (to be done within 10 days).

The judgment is also published on the website of the Ministry for Economical Affairs.

The court may also impose additional publicity measures, if it considers it necessary. The costs for such measures are to be borne by the losing party (article XVII.54).

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The enforcement of the court order and the payment of the compensation are regulated (articles XVII.57 to XVII.62), as follows:

- A trustee is appointed by the Court (an attorney-at-law, a public officer, or a judiciary trustee ; the representatives are therefore *de facto* excluded from being trustee in the case they have won);
- The trustee drafts a provisional list of the members of the group and can mention that a member of the group does not meet the criteria set by the Court to get compensation and should therefore be deleted from the list.

The provisional list is sent to the representative and the defendant, and they may oppose to the admission/deletion of members on/from the provisional list.

The members of the group whose deletion has been proposed, are also informed.
The discussions regarding the admissions/deletions take place at a hearing to be set by the court (the whole process of contestation of admissions/deletions is supposed to take 3 months).
The Court then establishes the definitive list of persons entitled to compensation and informs the persons whose admission has been refused.
- The trustee controls the performance of the condemnation *in natura* by the defendant and/or receives the amounts to be paid by the defendant in case of condemnation to payment of amounts to the members of the group (in the latter case, he makes the payments to the beneficiaries).
- The trustee reports to the court quarterly.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

There are no specific rules in the law, but the general rules regarding penalties for non-compliance will apply: payment of a fixed amount for each day's delay is therefore possible.
The case may be sent back to the court in case of problems of performance of the judgment.

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

In Finland, there is a specific act governing class actions between consumers and business entities, namely the Act on Class Actions[1] (hereafter the "ACA"). The ACA has been in force since 2007, but no cases have been filed in the Finnish courts under the ACA as of yet.

Under Section 1 of the ACA, a class action is defined as an action brought by the claimant on behalf of the class defined in the action, with the objective that the judgment to be delivered becomes binding on the class members.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

The scope of application of the ACA is substantially limited to matters of consumer law. The ACA applies only within the competence of the Consumer Ombudsman and only the Consumer Ombudsman can act as claimant in class actions. The ACA only applies to civil cases between consumers and business entities. By way of derogation, the ACA does not apply to a civil case concerning the conduct of an issuer of securities or the offeror in a takeover bid or mandatory bid, as referred to in the Securities Markets Act.[2]

The general provisions of consumer law are provided in the Consumer Protection Act[3] (hereafter the "CPA"), in addition to which some other statutes include specific provisions regarding consumers.[4]

[1] Ryhmäkannelaki (444/2007).

[2] Arvopaperimarkkinalaki (746/2012).

[3] Kuluttajansuojalaki (38/1978).

[4] E.g. Debt Collection Act (513/1999; *laki saatavien perinnästä,*), Act on Guaranties and Third-Party Pledges (361/1999; *laki takauksesta ja vierasvelkapanttauksesta*), Housing Transactions Act (843/1994; *asuntokauppalaki*), Act on Provision of Information Society Services (458/2002; *laki tietoyhteiskunnan palvelujen tarjoamisesta*), Electricity Market Act (588/2013; *sähkömarkkinalaki*).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

As mentioned above, the scope of application of the ACA is limited to the competence of the Consumer Ombudsman and hence, any class actions brought under the ACA must be in the field of consumer law. Consumer law provisions are, however, found in several different statutes, and a class action may be brought on the ground of several such statutes.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

The ACA does not contain any provisions regarding summary/emergency proceedings in class actions. The ACA, however, includes a general reference to the Code of Judicial Procedure[5] (hereafter the "CJP"), the provisions of which shall apply to class actions as appropriate and where not otherwise provided in the ACA.

Under the CJP, a civil case can be heard in summary proceedings where certain provisions are met. However, such provisions mainly relate to matters that are undisputed or which are clearly unfounded. It is unlikely that a class action under the ACA would fall within such provisions.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

It is possible to claim injunctive relief and compensatory relief through class actions under the general provisions of the CJP.

An injunctive relief action (actio negatoria) may be filed if a violation of law has already begun or is imminent in the future, subject to the precondition that the relief sought is enforceable by execution against the defendant.

A claim for compensatory relief is suitable if the class members have suffered damage due to the defendant's actions. Possible compensatory actions are for example a claim for a price reduction or damages. A cancellation of a contract is possible if there is a material error in the contract.

[5] Oikeudenkäymiskaari (4/1734).

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

The type of damage to be compensated depends on the nature of the case and the violated act. The ACA itself does not include provisions regarding the compensation of damage.

Typically when a case concerns a relationship between consumers and a business entity, the compensation rules of the CPA apply. Under the CPA, a business entity in breach of the CPA is always liable for direct damage that such a breach has caused a consumer. Direct damage includes bodily injury, material damage, and damage to property. Liability for indirect damage (such as economic loss) requires that certain further preconditions are met.

Additionally, general tort law provisions i.e. the Tort Liability Act[6] (hereafter the "TLA") apply. However, depending on the type of damage, there are different preconditions to fulfill. The TLA basically allows for the following types of damage to be compensated; bodily injury, material damage, and compensation for economic loss that is not connected to personal injury or damage to property. Moreover, if certain preconditions are fulfilled, intangible damage can also be compensated.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favor of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

Under Finnish law, the determination of the quantum of damages in a class action follows the same rules as the determination of quantum in individual cases. Therefore, compensation awarded to victims should not exceed the amount which would have been awarded through individual cases. Further, the principles of full compensation and of non-enrichment prevail in Finnish Tort Law and hence, overcompensating or punitive damages are not allowed.

[6] Vahingonkorvauslaki (412/1974).

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

The Finnish class action scheme does not apply to private enforcement of competition law. In individual damages claims in the anti-trust field, the "passing on" defence is however allowed and has been invoked. Several damages claims of this type are currently pending and it remains to be seen what effect such a defence will have.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

As mentioned above, Finnish legislation regulates class actions through representative actions. Under the ACA, the Consumer Ombudsman has exclusive standing as the claimant to bring a class action and to exercise the right of a party.[7] The Consumer Ombudsman shall exercise the right of a party on behalf of several persons who have claims against the same defendant, based on the same or similar circumstances. Neither other entities nor individual consumers have a right to bring a class action.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

The ACA applies, within the limits of the competence of the Consumer Ombudsman, to the hearing of a civil case between consumers and a business entity as a class action.

According to the Act, the case may be heard as a class action, if

[7] Section 4 of the ACA.

(a) several persons have claims against the same defendant, based on the same or similar circumstances;
(b) the hearing of the case as a class action is expedient in view of the size of the class, the subject-matter of the claims presented and the evidence offered; and
(c) the class has been defined with adequate precision.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

The only possible representative entity is the Consumer Ombudsman. The Consumer Ombudsman is a state official and can only act when he has the competence to do so. Under the Act on Competition and Consumer Authority[8], the supervision tasks are to be organized so that the Authority's and the Consumer Ombudsman's independence and impartiality are guaranteed.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The procedural requirements for application for summons are examined after the application for a summons is delivered to a court. According to the CJP[9] the court shall at once dismiss the case without considering the merits if the claimant fails to supplement the application for summons and if the application for summons is so incomplete that it is not fit to be the basis for proceedings, or if the court for another reason cannot accept the case for consideration. This section applies also to class actions. A court shall refrain from issuing a summons and at once dismiss the action on the merits by a judgment if the claim of the claimant is manifestly without a basis. Any other claims regarding admissibility are, as a general rule, decided on in connection with the merits.

[8] Laki kilpailu- ja kuluttajavirastosta (661/2012).
[9] Chapter 5, Section 6 of the CJP.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

The Finnish Act on Class Actions does not allow third parties to bring class actions.

2.6 How may claims be aggregated? For example, is it possible for multiple claimants to file a complaint jointly?

The ACA does not provide provisions regarding aggregation of claims, but focuses merely on representative actions by the Consumer Ombudsman.

However, the CJP[10] provides general rules for aggregating / cumulating claims. Actions brought at the same time by several claimants against one defendant may be heard in the same proceedings, if they are based on essentially the same grounds.

In order to file an action with multiple claimants under the CJP, certain preconditions have to be met. The legal relationship which is the subject of the dispute has to be indivisible in a way that only the claimants together can be entitled or obligated, i.e. there is a compulsory joinder between co-parties and all co-parties have to act as claimant because a court can only give one judgment with the same content for the all co-parties. An example of this is co-ownership.

2.7 More generally, what procedural defenses are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

The ACA does not provide for any procedural pre-trial defenses.

[10] Chapter 18, section 2 of the CJP.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Finland has adopted the opt-in system.[11] Participation in the class action requires express accession to the group.[12] Pursuant to Section 8 of the ACA a natural or legal person willing to participate in the class action must deliver within a time limit a written signed letter of accession to the class.[13]

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

In the current opt-in system adopted by Finland, the decision/judgment of the court shall be binding on the class members whom the court has designated in its decision/judgment.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

According to the ACA, resignation from the class is possible under certain conditions. Before the case goes to main hearing, a class member may resign from the class by notifying the court of the same by writing or in person at the court registry. In this event the case shall be struck from the docket in respect of the resigning class member. Once the case is in the main hearing, a class member may resign from the class as described above only with the consent of the defendant. Also in this event, subject to the consent of the defendant, the case shall be struck from the docket in respect of the resigning class member. Once

[11] http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_finland_fi.pdf.
[12] Government Bill HE 154/2006.
[13] Act on Class Action, Section 8.

the case has been heard and is under deliberation by the court, resignation from the class is no longer be permitted.[14]

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

A class member as defined, who has delivered, within the time limit, a written and signed letter of accession to the class shall belong to the class. If a class member delivers a letter of accession after the expiry of the time limit, but before the supplemented application for a summons has been submitted to the court, the claimant (the Consumer Ombudsman) may for a special reason accept him or her as a class member.[15] As a general rule it is not possible to join the claimant party after the claimant has submitted the supplemented application for summons.[16]

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

After the class action has been filed the claimant shall give a notice of the commencement of a class action to the defendant. The notice shall contain a description of the class on behalf of which the action has been brought.[17]

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

After the class action has been filed the claimant shall give the known class members a notice of the filing of the case. The notice may be postal or electronic. If the notice cannot be given in either manner to all class members as defined, an announcement of the class action may be published in one or several newspapers or in some other appropriate manner. The notice must contain a

[14] Section 15 of the ACA.
[15] Section 8 of the ACA.
[16] Government Bill 154/2006.
[17] Sections 5–7 of the ACA.

brief description of the case and the claims to be presented, a description of the class and information about how to accede to the class and the time limit for class accession. Furthermore it has been expressly stated in the government bill that the claimant should try to find out the possible class members before filing the class action.

As for the possible safeguarding of the defendant's reputation or company value, there are no provisions in the ACA protecting the company and its reputation. The possible negative impacts on a company's reputation were acknowledged in the preparatory phase of the ACA, but on the other hand the objectivity of the authority responsible for the class action (the Consumer Ombudsman) has been considered to ensure that the actions are not intentionally detrimental in nature.[18]

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Not applicable.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In Finland there is no class action scheme for competition law, since damages for breaches of competition law were explicitly excluded from the scope of the ACA.

The Helsinki District Court has, however, ruled in an interim judgment on 4 July 2013, that a representative follow-on action in a competition infringement matter was admissible and could be brought under Finnish law. It should be noted, however, that this finding is still challengeable upon appeal of the final ruling.

[18] Government Bill HE 154/2006.

Individual damages claims based on infringement of competition law are possible both as follow-on actions and as stand-alone actions.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Since breaches of competition law were explicitly excluded from the scope of the ACA, stand-alone and/or follow-on class actions for bilateral and/or unilateral antitrust infringements are not as such available in Finland.

In other than class action cases regarding competition infringement, both stand-alone and follow-on actions are available for both bilateral antitrust infringements and unilateral antitrust infringements. The Competition Act[19] provides that an undertaking or an association of undertakings, who either intentionally or negligently, violate the prohibition prescribed in Section 5 (Prohibited restraints on competition between undertakings) or 7 (Abuse of dominant position), or Article 101 or 102 of TFEU, is obliged to compensate the damage caused by the restraint on competition.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for claimants? Is, for example, discovery possible in your country?

As mentioned above, the Finnish class action scheme does not apply to antitrust damages cases.

For individual actions, the general rules regulating access to documents obtained or produced by the public authority are contained in the Act on the Openness of Government Activities.[20] The Act contains provisions relating to the right of access to official documents in the public domain, officials' duty of non-disclosure, document secrecy and any other restrictions of access that are necessary for the protection of public or private interests. According to the Act, official documents shall be in the public domain, unless specifically otherwise provided in the Act in question or another Act. In principle, everyone shall have the right to access an official document in the public domain. The Act also provides

[19] Kilpailulaki (948/2011).

[20] Laki viranomaisten toiminnan julkisuudesta (621/1999).

for the confidentiality of documents submitted to a public authority that form the basis of an inspection or contain information on other enforcement-related circumstances, if the disclosure of such information would compromise the inspection or the achievement of its objectives. In practice for example the FCCA has sought to conceal the identity of a leniency-applicant during the investigative period (i.e. until the FCCA has issued its decision).

In addition, the Competition Act contains a provision regulating the use of information submitted to the FCCA under a national leniency program. According to the Competition Act, the information and evidence submitted to the FCCA for obtaining immunity or reduction of a fine cannot be used for any other purpose than the order to terminate a restraint on competition or the order to deliver a product, the commitment decision, the withdrawal of a Block Exemption, or the review of a penalty payment proposal at the FCCA, the Market Court or the Supreme Administrative Court. Also the FCCÀs Guidelines on the Immunity and Leniency procedure in cartel cases contain a similar provision on subsequent use of the information and evidence submitted to the FCCA.

In Finland there are no extensive discovery rules (like for example in the US) and there is no pre-trial discovery. However, in principle, anyone who has a document needed as evidence may be obliged to deliver it to the court. The obligation to present a document in a civil procedure is governed by the CJP. According to Section 12 of the CJP, when it can be assumed that a document is of significance as evidence in a case, the person in possession of the document shall present it in court. In Finland disclosure of evidence may occur only during the trial and the court orders the appropriate party to deliver the document. The courts may only order the disclosure of relevant and reasonably identified documents. Thus, it is not possible to request the disclosure of entire classes of documents without clear identification. There are also certain documents that are protected from disclosure and for example corporate statements given as part of a leniency program cannot be disclosed. Also some other documents determined by law are protected from disclosure.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

The current class action scheme in Finland does not apply to competition law infringement cases. Due to amendments in the rules regarding limitation periods in recent years, the limitation periods for individual anti-trust damages claims depend on when the (alleged) competition infringement has taken place and

when the damage has occurred. The new Competition Act includes a provision that allows claimants a limitation period of one year from the final decision in the competition infringement matter, but it will apply only to future cases.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

In Finland the infringement decision adopted by the FCCA is not binding for the national courts. The FCCÀs decision is an element that the judge will take into account.

However, if the follow-on action is based on a final decision on a competition law infringement, the conclusion that an infringement has occurred is in practice binding. In other words, in these cases a claimant will have to prove the harm suffered and the existence of a causal link between the harm and the infringement, but it will not have to provide extensive evidence that the infringement took place.[21]

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

In Finland, class actions can only be brought by the Consumer Ombudsman and the actions are financed from the budget of the FCCA.[22] Additional financial contributions from third parties might be against the impartiality requirement set out in Section 4 of the Act on the FCCA or against other laws.

On a related topic it is worth mentioning that, in 2013, a Finnish district court ruled that it was possible for a separate company to buy cartel damages claims

[21] Worth mentioning is that, under the new EU directive on anti-trust damages, final national competition infringement findings will become formally binding for national courts in follow-on actions.

[22] Government bill 154/2006 p. 26.

from other companies and bring an action in its own name. The ruling was given in an interim judgment. [23]

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

Not applicable as the Consumer Ombudsman is the claimant in class action cases and the actions are funded by the FCCA.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Not applicable as the Consumer Ombudsman is the claimant in class action cases and the actions are funded by the FCCA.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

The Consumer Ombudsman represents the consumers for free, and the financing comes from the budget of FCCA even if the Consumer Ombudsman decides to hire an external attorney to plead the case.[24]

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency fees (pactum de quota litis) and success fees (pactum de palmario) are allowed by the Finnish Bar Association, subject to the requirement of "par-

[23] CDC press release 17.7.2013: "CDC achieves court victory in Hydrogen Peroxide Cartel litigation in Finland." http://www.carteldamageclaims.com/Presse/130717_PR_HP_Cartel_04_July2013.pdf. Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza newsletter n. 27/13 (16.7.2013): "Il Tribunale Regionale di Helsinki si pronuncia sulle misure cautelari richieste in un'azione di danno *follow-on*." http://www.osservatorioantitrust.eu/it/newsletter/newsletter-n-2713-del-16-luglio-2013/ (including a link to the interim judgment in Finnish).

[24] Government bill 154/2006 pp. 23 and 26.

ticular grounds".[25] However, they are rarely used.[26] It is noteworthy that according to section 3.3.1. of the Code of Conduct for European Lawyers, contingency fees (*pactum de quota litis*) are not allowed.
It should be noted, however, again that class actions under the ACA in Finland are funded by the FCCA on the claimant side.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Under Finnish law, the general rule is that the losing party has to reimburse all reasonable legal costs incurred by the necessary measures of the winning party.[27] The parties to a class action are the Consumer Ombudsman and the defendant, not the consumers. Therefore, if the defendant wins, the FCCA will reimburse the defendant's legal costs. The consumers represented by the Consumer Ombudsman are liable only for the costs caused by their own misconduct.[28]

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Only the Consumer Ombudsman can bring a class action. The purpose of this limitation is to prevent groundless actions and to ensure the reimbursement of the legal costs of a winning defendant.[29]

5.8 Are the parties to an action able to insure against the cost risks?

Some insurance providers in Finland sell insurances that cover even a part of the winner's legal costs if the insured is the losing party.[30] However, there is no cost

[25] See e.g. Fee Guidelines (15.1.2009) (unofficial translation) para. 1.5. Finnish Bar Association / March 2009. http://www.asianajajaliitto.fi/files/720/B_03_Fee_Guideline_(15.1.2009).pdf.
[26] See e.g. "The Finnish Bar Association" (p. 304). Scandinavian Studies in Law vol. 46 (2004), pp. 299–306 Stockholm Institute for Scandinavian Law. http://www.scandinavianlaw.se/pdf/*46-15*.pdf.
[27] See also "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Finland" (pp. 19–21). Prepared by Klaus Viitanen, edited by Frank Alleweldt et al. (7.3.2008). http://ec.europa.eu/consumers/redress_cons/fi-country-report-final.pdf.
[28] Section 17 of the ACA (444/2007); Chapter 21, Sections 1 and 5 of the CJP.
[29] Government bill 154/2006 p. 20.
[30] Jyrinjärvi, Timo et al.: Oikeusturvavakuutuksen rooli oikeudenkäyntikulujen kattajana (p. 705). Defensor Legis 4/2006 pp. 688–711.

risk for the consumers in a class action brought by the Consumer Ombudsman (excluding misconduct).

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

In Finland, parties to legal proceedings in court are not able to apply for an order for security of future legal costs.[31]

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

The rules and regulations of the Finnish Bar Association do not include specific provisions in relation to class actions, but attorneys involved in class actions will be bound by the same ethical rules and codes of conduct as in other cases.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

In terms of cross-border cases, international conventions and EU legislation determine the competent jurisdiction. For example the provisions of Brussels I Regulation[32] shall apply when a case falls within the scope of the Regulation.

Due to the limited scope of the Finnish class action scheme, and the fact that claims eligible for class actions are limited to the competence of the Consumer Ombudsman, it seems, however, unlikely that cross-border class actions would be brought in Finnish courts under the current scheme.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

In the ACA there is no specific prohibition regarding forum shopping. However it is expressly provided in section 3 that the only competent courts are the district courts of Turku, Vaasa, Kuopio, Lahti and Oulu.

[31] Government bill 179/1990 p. 13.

[32] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Compensatory claims by foreign representative entities do not seem possible, as only the Consumer Ombudsman is entitled to bring a class action for compensation benefiting specific individuals.

Some other entities may be able to bring injunctive actions benefiting future consumers:

A foreign authority or association with a relevant purpose can bring an injunctive action based on consumer rights if it is included in the list of qualified entities published in the Official Journal of the European Union.[33]

A non-EEA public authority cannot bring an injunctive action in Finland. It is unclear whether a non-EEA consumer rights association could bring an injunctive action under the provisions that concern Finnish proceedings.[34]

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The ACA does not include provisions in regards to actions against companies domiciled outside of the Finnish jurisdiction. Further, under Finnish law, any sort of "piercing the corporate veil" or parent company liability is possible only in very exceptional circumstances.

[33] Section 2 of the Finnish Cross-Border Injunction Proceedings Act (1189/2000).

[34] Government bill 179/2000 p. 7. See also Chapter 5, Section 3 of the Finnish Market Court Procedure Act (100/2013).

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

Finnish law does not include specific provisions relating to the settlement of class actions.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

According to general procedural law[35], in a case amenable to settlement the court shall endeavor to promote settlement and allow the parties to settle the case. This is voluntary for the parties, but courts are encouraged to attempt to promote a settlement between the parties.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

There is no collective alternative dispute resolution scheme in place in Finland. Settlement discussions, mediation or other forms of ADR do not, as a general rule, suspend limitation periods in individual cases according to Finnish procedural law.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

In general, the CPA forbids arbitration clauses in consumer contracts. An arbitration clause concluded before a dispute has arisen is not binding upon the consumer in any situation; hence this is not a possibility in class actions.

[35] Chapter 5, Article 26 of the CJP.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Under the CJP[36], the parties shall be issued with copies of the judgment in the form of a court instrument and the copy shall be available to the party in the court registry within two weeks, if an intent to appeal has been registered in the case; and within thirty days, if possible, in other events.

In practice, the court will inform the parties to a civil case a date when the judgment will be available at the court registry. As the Consumer Ombudsman acts as claimant in a class action and represents the class members, it is expected that he/she informs the class members of the judgment. As to judgments on appeal, the Court of Appeal shall send copies of its decision to all parties who have exercised their right to be heard in the Court of Appeal[37].

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The Finnish Enforcement Code[38] (hereafter the "EC") regulates the enforcement of court judgments in civil matters.

It is up to the claimant to initiate the enforcement proceedings. The enforcement is pursued by a written application delivered to the bailiff or another enforcement authority.[39]

[36] Chapter 24, Section 13 of the CJP.
[37] Chapter 24, Section 18 of the CJP.
[38] Ulosottokaari (705/2007).
[39] Chapter 3, Section 1 of the EC.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Under the Finnish EC, the bailiff may impose a threat of a fine in conjunction to the enforcement of injunctive orders. The threat of a fine may be imposed either as a fixed amount or as determined by the lapse of time (threat of an accruing fine).[40] If a threat of an accruing fine is imposed to prevent the breach of a prohibition, the added amount may be linked to each instance of a breach instead of to the lapse of time.

Upon the application by the bailiff, the court will decide on the enforcement of the imposed threat of a fine. [41]

[40] Chapter 3, Section 74 of the EC.

[41] Chapter 3, Section 78–81 of the EC.

National Report of France

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

A class action in France did not exist until recently. The nearest action that existed was a representative action pursuant to art. L.422-1 of the French Consumer Code (hereafter, "**the Consumer Code**") which happened to be really inefficient (the consumers had to give a mandate to a nationally approved association to represent them, but no publicity was allowed to solicit such mandate).

Many draft laws have failed over the years until the Law on consumers' affairs dated March 17, 2014 (hereafter, "**The Law**") which has instituted into French law a class action. An application Decree has been taken on September 24, 2014 which precise some procedural aspects of the action.

The Law was brought before the French Constitutional Supreme Court (*Conseil constitutionnel*) in order to examine its complying with the French constitutional principles. In a decision handed down on March 13, 2014, it ruled that the provisions of the Law relating to this new action were fully in accordance with such constitutional principles (French Constitutional Supreme Court, 13 March 2014, case no. 2014–690 DC).

Article L. 423-1 of the Consumer Code defines class action as the action brought "[…] *before a civil Court aiming at being granted compensation for the individual damages suffered by consumers in a similar or identical situation and having for common ground a breach, by one or many professionals, of their legal or contractual obligations:*

1° in the event of a sale of goods or service delivery;

2° or when these damages result from an anti-competitive practices as defined under Title II of Book IV of the [French] *Commercial Code or under Articles 101 and 102 of the Treaty on the Functioning of the European Union*."

Under French law, such action goes through a two stage process:

1° a first phase during which the admissibility of the claim brought by a nationally certified association as well as the professional's liability will be ruled. The judgment rendered at the end of Phase 1 also touches to the question of how the loss suffered by the Class must be compensated (hereafter, "**Phase 1**"); and

2° a second phase dealing with the actual recovery of damages, in compliance with the guidance given in the Phase 1 ruling (hereafter, "**Phase 2**"). During this second phase, the consumer will have the choice to adhere or not to the class action, and this phase will only be brought before a Court in case of dispute on the performance of the ruling given at the end of Phase 1.

The French class action is *sui generis*, and some author underlined that instead of other actions, the judge decides in one decision (one instance) the admissibility of the action, the liability of the professional, the criteria for determining the group of consumers, the prejudice that might be compensated, and the time and way the consumers will be informed and be able to adhere to the class action.

The consumer may adhere to the class action only after the ruling of the judge but he has always the choice to join the class action or not. In this last case, he has always the right to bring its own individual claim before the court. This is encouraged by the fact that the class action is a cause of suspension of its individual claim (art. L.430-20 of the Consumer Code).

Moreover, the Law instituted a **simplified procedure** when the identity and the number of the consumers is known and cannot be discussed and when they suffered a same prejudice (same amount for a same service or same amount over a same period or timeframe). In his/her ruling, the judge can order the professional to indemnify directly and individually each victim (L.423-10 of the Consumer Code).

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Based on the new provisions of Article L. 423-1 of the Consumer Code, class actions have a scope limited to:

- Consumer law (Article L. 423-1, 1°); and
- Competition law (Article L. 423-1, 2°).

However, determining what Consumer law encompasses is not so easy, and since the class action applies in case of breach by a professional of its legal or contractual obligations, it should not be limited to a breach sanctioned by the Consumer law.

Furthermore, according to the Law, the government is expected to submit a report to the Parliament after 30 months from the enactment of the Law and

to study the possible extension and application of the Law to broader areas of law, in particular health and environment. The Law is therefore a way to "test" this procedure before extending it to other sectors.

1.3 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

As of today, there are no indications in the Law regarding any specific class actions summary/emergency proceedings.

The application Decree states that the Civil Procedure Code applies to the action, unless otherwise stated. The action is brought before the Tribunal de Grande Instance of the defendant (or of Paris, if the domicile of the defendant is abroad or unknown). The ordinary procedure applies for the first instance, and in appeal, it will be a special procedure with shorter delays (art. 905 of the Civil Procedure Code).

In light of this, one may consider that the several legal provisions of the French Civil Procedure Code regarding summary proceedings still apply in the event of (i) emergency and absence of a valid challenge to the action (Article 808) or (ii) in order to prevent an immediate damage or in order to stop a manifestly unlawful disturbance (Article 809).

1.4 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Pursuant to article L. 423-1 of the Consumer Code, consumers shall only claim "[…] *compensation of the economic harms resulting from the material damages*" they suffered.

In that regard, French class actions may rather be qualified as "compensatory relief actions".

1.5 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Pursuant to article L. 423-1 of the Consumer Code, consumers shall only claim "[…] *compensation of economic compensation resulting from the material damages*" they suffered.

Consequently, compensation on the ground of physical injury and moral prejudice are excluded from the scope of the French class action, as well as the

economic compensation resulting from physical injury (health expenses, assistance expenses...).

For the other types of damages suffered by the consumers, nothing impedes them to seek compensation themselves and bring their individual claims before the court.

1.6 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favor of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

There are no specific provisions, in the Law, regarding the extent of the compensation that the victims can be awarded following a class action.

In light of this, one may consider that the common law provisions regarding compensation shall apply.

In that regard, article 1149 of the French Civil Code provides that "[d]*amages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of* [...]" (underline added).

Accordingly, tribunals shall only grant "*full compensation*", which cannot exceed the loss suffered (See: Cass. Civ. 2e, 13 September 2012, case no. 11–22.051). As a result, punitive damages are not allowed under French law.

1.7 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

The "passing on" defence has no legal ground under French law. However, it seems that such defense has been acknowledged by case law.

Indeed, in a decision handed down on 15 June 2010, the French *Cour de cassation* quashed a decision from the Court of Appeal of Paris which ruled that the fact that the defendant "[...] *passed the overcharges on the increases in the price of the product had no effect on the extent of the right of the claimant to compensation*".

The *Cour de cassation* enounced that the judges "*should have analyzed if* [the claimants] *had passed the overcharges resulting from the infringement imputable to* [the defendant] *on their customers, so that the granting of damages may*

have led to their unjust enrichment" (Cass. Com. 15 June 2010, case no. 09-15.816).

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Pursuant to article L. 423-1 of the Consumer Code, only a "*representative consumer association which has been certified in pursuance of Article L. 411-1* [of the same Code]" can bring the case before a Court.

As of today, only 16 associations have such certification.

Also, Article L. 423-14 recalls that the above mentioned consumer association "[…] *represents the consumers who are members of the group* [of victims]".

Therefore, the French class action may be referred to as a "dedicated action" (*action attitrée*)/representative action by which the representative and certified consumer association will act on behalf and in the name of the individuals claiming compensation for the damages they allegedly suffered.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Such scheme seems not to be applicable under French law to the extent this kind of actions can only be brought by the representative consumer association referred to in article L. 423-1 of the Consumer Code (See 2.1.).

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Pursuant to article L. 423-1 of the Consumer Code, only a "*representative consumer association which has been certified in pursuance of Article L. 411-1* [of the same Code]" can bring the case before a Court.
The above mentioned Article L. 411-1 refers to article R. 411-1 of the Consumer Code which provides for a set of requirements for the certification of consumers association.
Pursuant to article R. 411-1 of the Consumer Code, such certification can be granted to consumers associations which:
1° have been existing for at least 1 year as of its registering;
2° can prove that it has actively and publicly defended consumers' interest in this meantime;
3° gather, at the date of the request for certification, (i) at least 10,000 members for "national" associations or (ii) a "sufficient" number of members for "local" associations.
If failing to comply with the requirements set out in article R. 411-1 of the Consumer Code, the consumer association would be considered as illegitimate to act on behalf and in the name of the alleged victims.
In that case, it is very likely that the actions be deemed inadmissible.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The provisions of the Law dealing with the "decision on liability" only mention that "[i]*n the same decision, the judge acknowledges that the admissibility requirements set out in Article L. 423-1* [of the Consumer Code] *are met and rules on the professional's liability, based on the individual cases defended by the applicant association*" (article L. 423-3 of the Consumer Code).
Under French law, there are two phases regarding the action:
1° a first phase during which the admissibility of the claim as well as the professional's liability will be ruled; and
2° a second phase dealing with the recovery of damages, as set out in the Phase 1.
Therefore, the admissibility of the class action will be examined by the Court at an early stage of the proceedings (i.e., end of Phase 1).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Pursuant to Article L. 423-3 of the Consumer Code, only a "*representative consumer association which has been certified*" is able to bring actions whether dealing with consumer law or antitrust infringements.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

The application Decree supports the possibility for several associations to file a same class action. This makes the procedure even more complex. Under the Civil Procedure Code, this decision to join the two actions is never an obligation for the judge but in the case of class action, this would be particularly necessary.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

It seems that there are no procedural defences for defendants short of trails before the Court decides on the merits of the collective actions given that the judge is required to rule on procedural issues and the merits in the same decision (Article L. 423-3 of the Consumer Code; See 2.4.).

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

The French class action seems to have enshrined the opt-in principle.

Indeed, article L. 423–4 of the Consumer Code mentions the necessity "[…] *to inform the consumers likely to belong to the group of this decision* [ruling on the professional's liability]".

As for article L. 423–5 of the Consumer Code, it requires the judge to "[…] *fix the deadline until which the consumers will be able to join the group*".

Also, such choice in favor of the opt-in principle indirectly results from a decision handed down by the French Constitutional Supreme Court (*Conseil constitutionnel*) on 25 July 1989, which is analyzed as prohibiting any "opt-out" scheme, based on the constitutional principle of freedom of choice (Cons. Const., 25 July 1989, case no. 89–257).

However, the simplified procedure class action tends to be like an opt-out scheme. In fact, the group of victims is already clearly identified (one professional, prejudice of the same amount for the same service or applied to the same period of time) and all the victims are considered as belonging to the group, even though they have not yet been informed of the action.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

As provided by article L. 423-3 of the Consumer Code, the judgment "[…] *defines the group of consumers towards whom the professional has been held liable and sets the connecting factors*".

Also, the judgment "*determines the damages which may be compensated for each consumer or for each category of consumers involved in the group previously defined, as well as the amount or all the elements allowing the assessment of the harms suffered*".

Furthermore, pursuant to article L. 423–5 of the Consumer Code, the judgment "[…] *fixes the deadline until which the consumers will be able to join the group*" and "[…] *determines the conditions of their membership and specifies whether the consumers may contact the professional directly or through the association or a* [specific legal counsel – the application Decree states that those counsel who may assist the association for the indemnification phase can be a bailiff or a lawyer]".

The deadline mentioned should be between 2 and 6 months as of the publicity measures (Article L. 423–5 of the Consumer Code).

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Under the provisions of the Law, victims actually join the group of persons to be compensated *after* it has been ruled on the professional's liability (Article L. 423–5 of the Consumer Code).

If they join, they can always leave at any stage of the indemnification stage (Phase 2 of the action). The consumer must inform the certified association that initiated the action, which will in turn inform the professionals.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

Under the provisions of the Law, victims actually join the group of persons to be compensated *after* it has been ruled on the professional's liability within a period of 6 months (Article L. 423–5 of the Consumer Code).

Victim must be a consumer which is defined as "any individual who acts for purposes which do not enter in the scope of his/her commercial, industrial, artisanal or liberal activity". Therefore, the victim must be a natural person. Legal persons could not adhere to an association that brought a class action. Members of a legal person might however do it on their own behalf if they can allege a personal prejudice that is within the scope of the legal action.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

During the first phase of the proceedings, there are no indications in the Law as to the obligation, for the claimant party, *i.e.* the consumers association, to inform the defendant about the composition of the group of people it represents.

It results from the action's being brought by a representative consumers association, which acts on behalf of still unknown potential victims.

These victims will only be known when the judgment ruling on the professional's liability is handed down.

At this stage, Article L. 423-11 provides that "[t]*he professional shall proceed to the individual compensation of the harms suffered by any consumer* […]".

Therefore, once the judge has ruled on its liability, the defendant will have knowledge of the composition of the victims.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its

responsibility for the alleged infringement is established by the final judgment?

So far, article L. 423–4 of the Consumer Code only provides that the Court, provided it has found the professional liable, "[…] *shall order appropriate measures to inform consumers who may belong to the group*".

Concerning the protection of the reputation of the company, there are no specific provisions regarding that issue in the Law.

Yet, when the draft of the Law was introduced before the Parliament, the Government recalled that the scheme to be set up shall preserve "*the legal and economic security that companies legitimately expect*" (See: Explanatory Statement to the draft of the Law).

There is somehow a protection due to the fact that the publicity will only occur *after* the Court has ruled on the professional's liability to compensate the consumers' loss.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

There are no indications in the Law or in the application Decree regarding such registry. We do not have any further information on this issue.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

The French class action in competition law area is a "follow-on action" since it must be pronounced on the basis of a definitive decision taken from the competent national or European regulating authorities, that is a decision which cannot be challenged anymore. The idea behind this policy was that the anti-competitive litigation is very technical and a civil judge would not have the required expertise to assess liability in a stand-alone action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

The French class action is available for both bilateral and unilateral antitrust infringement. It applies when the damage is the result of anti-competitive practices defined in Title II of Book IV of the Commercial Code or in articles 101 and 102 of the Treaty on the functioning of the European Union (art. L.423-17 of the Consumer Code). These anti-competitive practices include:

- Article L420-1 : *"Common actions, agreements, express or tacit undertakings or coalitions, particularly when they are intended to 1° limit access to the market or the free exercise of competition by other undertakings; 2° Prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices; 3° Limit or control production, opportunities, investments or technical progress; 4° Share out the markets or sources of supply, shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market."*

- Article L420-2 : paragraph 1 : "*The abuse of a dominant position by a company or a group of companies in the internal market or a substantial part of this shall be prohibited in accordance with the conditions specified by Article L.420-1. These abuses may in particular consist of refusals to sell, linked sales or discriminatory terms of sale as well as the termination of established commercial relations on the sole ground that the partner refuses to submit to unjustified commercial terms*." The second paragraph concerns the abuse of economic dependence.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kinds of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The French class action does not provide for specific rules about access to documents for claimants, or discovery.

This class action would have been a stand-alone action, the rules regulating access by claimants to documents in civil proceeding would have been sufficient only if the anti-competitive practice stems from a contract. On the con-

trary, it would have been difficult for the claimant to prove more occult practices through the civil procedural rules since the civil judge does not have discovery power or coercive investigation power like the criminal judge or the competitive public authority.

But, the French class action in the competition law area does not stand alone but is based on a definitive decision taken by the public authority; the claimant does not have to prove the illicit or illegal practice. The evidence as to the existence of the fault and the causality link found by the authority will be used by the claimant in the civil action. As to the evaluation of the prejudice, it could be determined by an expert.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

The Law sets a specific limitation period for class action based on anti-competitive decisions: the claimants must initiate the class action before the expiration of a period of five years from the date the decision cannot be challenged anymore (art. L 423-18 of the Consumer Code).

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

For the purposes of the class action, since there is a decision taken by a national or European competition authority or court, the infringement of the professional is deemed to be irrevocably proved. The anti-competition infringement presumes beyond dispute the civil fault (art. L.423-17 of the Consumer Code). Therefore, the judge does not have to rule on the liability of the professional. The liability is already proved.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

There are no provisions about funding of the class actions by third parties. The claimants are the certified associations, which have to advance the costs for the procedure. The associations will have right to be reimbursed of the costs of the procedure.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

There are no provisions requiring the claimant to declare to the court the origin of the funds that is going to support the legal action.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

The judge can defer the proceedings for a period or until the occurrence of an event that it specifies (art. 378 and f. of the Civil Procedure Code). The case law specifies that besides when it is foreseen by the law, the judge can stay a proceeding for the "good administration of justice" (Civ. 1re, 16 June 1987: Bull. civ. I, no 196).

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No public funding system has been set by the Law (the option has been only discussed during the parliamentary debates).

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action,

gathering evidence and general case management allowed in your jurisdiction?

The claimants are the certified associations which would have right to be reimbursed of all the costs of the procedure, including the fee paid to the legal counsel (bailiff or lawyer) who may be authorized by the judge to assist them pursuant to article L.423-9 of the Consumer Code.

It must be noted that in France, contingency or success fee (where any sum due from the client is only payable in the event that the client 'succeeds' in a claim) is forbidden; it is called the « *de quota litis* » agreement.

However, a conditional fee agreement (where a client agrees with a solicitor to pay his fees only if the client succeeds at trial) is allowed under conditions. An additional fee may be payable upon success if there is a prior written agreement, if the conditional fee is not too high, and its calculation is precisely fixed in the agreement. Otherwise, the conditional fee agreement may be considered as a de quota litis agreement and be void.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

No specific provisions exist in the Law about legal cost. Pursuant to article 700 of the Civil Procedure Code, *"the judge will order the party obliged to pay for legal costs, or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlayed but not included in the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may, even sua sponte, for reasons based on the same considerations, decide that there is no need for such order."*

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Many provisions of the Law aim at avoiding abuses in class actions, among which the fact that the action can be brought only by a certified association and that only material damages may be compensated.

5.8 Are the parties to an action able to insure against the cost risks?

Legal expense insurance is possible under the conditions of articles L127-1 and f. of the French Insurance Code.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Not the defendant but the claimant may apply for such an order.

In fact, the judge can order the professional to pay a security for the costs incurred by the association during the second phase that are not included in the legal costs of the proceeding: like the cost of the legal work provided by the association, preparation of the filing, cost for the publicity of the victims, difficulties to transfer the compensation to the victims, etc… (art. L423-8 of the Consumer Code).

More broadly, article 771 of the Civil Procedure Code providing for a security for costs *ad litem* may also apply to class actions.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

Ethical rules from the Bar applies to class actions (see. The National Internal Regulations (RIN) set by the "Conseil National des Barreaux" laying down the ethical rules for all lawyers practicing in France). As stated above, pursuant to those rules, the agreement « *de quota litis* » is forbidden.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

The general international private law rules apply to collective actions, among which the EU Regulation n°1215/2012 of December 12, 20125, which enters into force on January 10, 2015.

In a decision dated May 11, 2010, the French Court of Appeal of Paris (known as the "*Vivendi Affair*") decided that the class action initiated by the French shareholders of Vivendi before an American Court was not abusive. It ruled that the French shareholders had the rights to participate in a class action against the company in the United States. Since the Council Regulation of

Bruxelles I allows legal action brought before a court where the harmful event occurred or may occur, the shareholders have legally brought the legal action in New York. Since the decision before the American court was not definitive, the French court had not to rule the exequatur of the decision, and in particular whether the ruling complies with the French "public policy".

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No such rules exist.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

A representative entity designated by a foreign country can't have legal standing to bring representative actions in the French jurisdiction since the French collective action can be brought before the court only by a representative consumer association acting at the national level which has been certified pursuant to article L. 411-1 of the Consumer Code.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

It would be possible to bring an action against a company domiciled abroad. In fact, pursuant to the jurisdictions rules set by the application Decree, the *Tribunal de Grande Instance* of the domicile of the defender (the professional) has jurisdiction for the class action; when the defendant has no residence or resides abroad, the *Tribunal de Grande Instance* of Paris is competent (R.423-2 of the Consumer Code).

The Law does not set specific rules where there are several actions regarding the same facts and practices brought in different jurisdictions but when the compensation sought is for different damages. This might happen since the application Decree stands for the possibility for several associations to intervene, several professionals might be defendants in the same action, and pur-

suant to article 42 of the Civil Procedure Code in case of several defendants, the claimant might choose the domicile of one of them.
In this case, the rules of the Civil Procedure Code shall apply. However, the decision to join two instances is never an obligation for the judge. The Consumer Law did not make it compulsory for the class actions but in light of the complexity this might entail, this would be particularly necessary.
However, a class action brought regarding the same facts, the same breaches and the compensation of the same damages than another class action that has already been ruled, would be declared inadmissible (article L.423-23 of the Consumer Code). Common civil rules shall also apply, and the defendant could always raise the "*res judicata*" effect of the said ruling (art. 122 of the Civil Procedure Code).

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

The Law provides also for a optional mediation procedure between the certified association and the professional in order to settle and obtain damages (L.423-15s of the Consumer Code).
The agreement obtained through mediation in the name of the members of the group would have to be officially recorded by the judge, who will check whether this agreement is "fair" as regards to the interests of the claimants, and he will make it enforceable. The agreement shall fix the measures of publicity and the conditions under which the consumer may adhere to this agreement.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Alternative dispute resolutions are encouraged in France. Every judge has a mission to try to settle and approach the views of the parties (art. 21 of Civil Procedure Code). Moreover, mediation may happen during a proceeding, and in this case, it takes place under the control of the judge (articles 131-1 of the Civil Procedure Code).

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

In general, mediation is initiated during a proceeding, and the judge is not disposed of (the case is not removed from the judge).

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

Pursuant to article L 423-25 of the Consumer Code, a clause that would prohibit a consumer from bringing a class action in court is deemed to be void.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

It belongs to the judge to define the way the victims or consumers that could be included in the class action will be informed. The publicity costs are in charge of the professional; then the judge fixes the delay given to the consumer to adhere to the class action (between 2 and 6 months). He will decide whether the consumer has to contact directly the professional or the association or any other person to obtain the damages (L.423-5 of the Consumer Code).

The application Decree provides for the information required to appear in the measures of publicity set to inform the potential victims (R.423-13 of the Consumer Code).

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The judge is in charge of the enforcement of the decision. The association will represent all the claimants who have not obtained the damages by the professional in the fixed delay (art. L 423-13 of the Consumer Code). A hearing will be held before the same judge. The certified association will be considered as the creditor for the purpose of specific performance (R.423-21 of the Consumer Code).

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

There are pecuniary sanctions that can apply in case of a refusal to execute a judicial decision.

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The German Code of Civil Procedure ("**GCCP**") does not provide for the possibility to bring mass claims. However, it does include a procedure called "*Streitgenossenschaft*," i.e. joinder of parties, by which individual proceedings initiated by multiple claimants against the same defendant are heard at the same time (Sec. 59 – 62 of the GCCP).

There is, nonetheless, specific legislation dealing with mass claims in the area of capital markets - the Capital Markets Model Case Act ("**KapMuG**"). The KapMuG came into force in 2005 and prior to this date it was not possible to bring mass claims. In particular, the German civil procedure did not permit bringing a claim in the name of a more or less unknown group of claimants in the form of an U.S.-style class action. Hence, the most important development in German civil procedure as regards class actions was the introduction of the KapMuG in 2005.

The KapMuG allows identical or similar damage actions to be combined in an organized process. The law is designed to make sure that identical issues of law based on similar facts are decided coherently by the Higher Regional Court ("*Oberlandesgericht*"). On the other hand, it avoids the creation of a U.S.-style class action by keeping the cases separate.

The Higher Regional Court decides common issues of the proceedings based on the declaratory judgment proposal ("*Vorlagebeschluss*"). Once the common questions have been decided in a model order ("*Musterentscheid*"), the courts of first instance decide the individual cases on the basis of the binding model order. In other words, since the model order only covers a general question of fact or law, all individual aspects of a case (such as contributory negligence or amount of damages) have to be decided in the subsequent individual proceedings. The main stages of KapMuG proceedings are

- Filing an individual damage action at the Regional Court;
- Motion for declaratory judgment, Sec. 1 KapMuG;
- Litigation stay for other pending proceedings, if case is admitted as model case, Sec. 8 KapMuG ;
- Model proceeding at Higher Regional Court, Sec. 9–21 KapMuG;

- Continuation of the litigation at the Regional Courts based on the model order.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

A model proceeding as described above cannot be brought in every legal field. Rather, the KapMuG covers securities litigation only. In particular, it applies in proceedings relating to (1) a claim for compensation of damages due to false, misleading or omitted public capital markets information, or (2) a claim for compensation of damages due to the use of false or misleading public capital markets information or omitting the disclosure about the fact that capital markets information is false or misleading, or (3) a claim to fulfilment of contract, which is based on an offer under the Securities Acquisition and Takeover Act.

As regards competition law, class actions in which the representative requests a remedy on behalf of an anonymous group of individuals are not available in Germany. However, there are certain options to bring an action on behalf of another party or to 'bundle' damages claims.

Under certain conditions, it is possible to bring an action in one's own name but on another's behalf. The right to do this can be based on either law or agreement. However, it must be noted that authorization for a third party to bring an action on behalf of another party is possible only if there is a legitimate interest to let the third party bring such action, and if the interests of the defendant will not be unreasonably impaired as a result of such authorization.

Pursuant to Sec. 60 of the GCCP, a plurality of persons may jointly sue if similar claims or obligations form the subject matter in dispute, and if such claims are based on an essentially similar factual and legal cause (joinder of parties). Thus, the victims of anti-competitive conduct could consolidate their actions if they concern the same subject matter. As regards the effect of such joinder of parties, it has to be noted that unless stipulated otherwise by civil law or the GCCP, joined parties shall deal with their opponent as individuals in such a form that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage (Sec. 61 GCCP).

A model for bundling damages claims has been developed by the Belgian company Cartel Damages Claims ("**CDC**"). CDC acquired the damages claims of various companies affected by the German cement cartel by way of purchase and

assignment. Then CDC brought an action for damages based on the accumulated claims. While the general admissibility of CDC's approach has been confirmed by the German Federal Supreme Court (German Federal Supreme Court, decision of 7 April 2009, KZR 42/08 – *Cement Cartel*), the Regional Court in Düsseldorf recently dismissed CDC's action for damages and found that CDC's model for assigning claims from the victims of price fixing "violated public morals" (Regional Court Düsseldorf, decision of 17 December 2013, 37 O 200/09 (Kart) U – *Cement Cartel*). CDC has appealed this judgment to the Higher Regional Court in Düsseldorf. The case is still pending.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

The KapMuG only applies to cases where capital market-related information has been used in the sale and distribution of financial products, and hence can be applied to certain classes of claims against banks and other investment advisers. In individual damage actions and actions in which damages claims have been bundled as described above, the plaintiff(s) can bring claims based on various statutes.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

It is not possible to initiate summary/emergency proceedings using a model proceeding pursuant to the KapMuG.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Compensatory relief actions are covered by the KapMuG (Sec. 1 KapMuG), however, this does not extend to injunctive relief actions. The latter actions are possible using other collective redress mechanisms, e.g. the joinder of parties.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

The KapMuG does not cover every type of damages. According to applicable securities laws, the claim for compensation of damages compensates material damages only.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

As the model proceeding will assert only mutual questions, whereas the damages are awarded at the Regional Court in the pending individual cases, the compensation will be evaluated based on the individual damage suffered. The compensation awarded to the plaintiffs will not exceed the compensation that would have been awarded if the claim would not have been covered under the model proceeding.

German law does not recognize punitive damages that could lead to overcompensation in favor of the damaged plaintiff.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

According to Sec. 33(3) of the German Act against Restraints of Competition ("**ACR**"), if a good or service is purchased at an excessive price, damages shall not be excluded on account of the resale of the good or service. However, this provision does not exclude the passing on defence by a defendant. Rather, the German Federal Supreme Court in a decision of 28 June 2011 confirmed that the passing on defence is generally permissible (German Federal Supreme Court, decision of 28 June 2011, KZR 75/10 – *ORWI*). In its decision, the Federal Supreme Court explicitly clarified that indirect purchasers are entitled to anti-trust damages but on the flipside allowed the passing on defence. According to the Federal Supreme Court, the defendant has the right to show that the claim-

ant has successfully passed on its damage (either completely or part of it) to the next market level. This approach is in line with a fundamental principle of German damages law, according to which compensation shall only be awarded to recover actual losses.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Collective actions can be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement. At the same time an authorized representative entity/ ad hoc certified entity/ public authority can file a claim on behalf and in the name of two or more individuals or legal persons claiming to have suffered damages.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes, the rules that apply are general civil law rules, e.g. if the plaintiff is acting based on an assignment or special law, or if the plaintiff is a collection agency that brings the claim on behalf of various individuals/legal persons.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

The KapMuG does not require a specific status of the model plaintiff. The Higher Regional Court designates at its equitable discretion by order the model plaintiff from among the plaintiffs. The court considers the ability of the model plaintiff to lead the model case, consent among several plaintiffs designating a single

model plaintiff and the amount of the claim. The order appointing the model plaintiff cannot be contested.

Representative entities can be public consumer associations as well as collection agencies. The requirements for collection agencies are defined in the German Legal Services Act.

As discussed above, the CDC model for assigning claims in the Cement Cartel was held to violate public morals by the Regional Court in Düsseldorf. The claims that were assigned before 30 June 2008 were deemed void due to violation of the German Legal Advice Act (*Rechtsberatungsgesetz*) and the claims assigned after the introduction of the new law on legal services (*Rechtsdienstleistungsgesetz*) were deemed unconscionable. The court based its holding on the fact that CDC did not have the financial resources to cover the adverse party cost risk at the time of the assignments. An appeal against this decision is pending in front of the Higher Regional Court in Düsseldorf.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The first step in KapMuG proceedings is the procedural admission of the case under the model law. It is comparable to a class certification of a U.S. class action and, therefore, is examined at a very early stage of the proceedings. Only after the admission as a model case will the case proceed on the merits. Other representative actions proceed according to general civil procedure rules.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

According to Sec. 33(1) of the ARC, actions for violation of German or European antitrust laws can be brought by 'the person affected'. This can be other market participants, such as customers or suppliers, as well as competitors. As already mentioned in response to question 1.8., in a judgment of 28 June 2011 the German Federal Supreme Court explicitly confirmed the standing of indirect purchasers in private damages actions. Such broad standard of who has the right to bring an action is in line with the decision of the European Court of Justice in the Courage case (European Court of Justice, decision of 20 September 2001, C-453/99 – *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-6297).

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Under the KapMuG rules, claims will not be aggregated, hence, it is not possible for multiple plaintiffs to file a complaint jointly. On the other hand, the KapMuG requires at least ten (10) claims to be filed and registered in order to initiate a proceeding based on it.

Based on civil procedure rules, various claims can be aggregated and multiple plaintiffs can file a complaint jointly, if the factual circumstances are mutual.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

Defendants can bring general procedural defences, e.g. objections to legal standing of the claimant or expiration of the statute of limitations.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

The German legislator refused to create an "opt-in" and an "opt-out" collective action. However, the KapMuG is considered to be "opt-in" as individual claims have to be filed or registered with the court. Following a revision of the KapMuG in November 2012, potential claimants of the pending KapMuG proceeding can file a motion to register the claim at the Higher Regional Court. It is not required that an individual case is filed at an early stage. However, after three month of the rendered decision in the model case, the claimant has to file a damage action or declaratory action of the registered claims. If, however, the claimant has already filed a damage action, a registration is neither possible nor required.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The model case ruling is final and binds the courts of the first instance that are deciding the individual cases. The individual actions filed at the Regional Court proceed after the declaratory judgment has been rendered.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

The joint plaintiffs are able to withdraw their claim at any point of the proceedings. However, they might still face the cost risk.

The other possibility is to "opt-out" of a settlement, if a plaintiff does not want to be included. The revised version of the KapMuG allows the model plaintiff and the model defendant to agree on a settlement that binds all parties, except those that decide to opt-out within a month of the Higher Regional Court's decision. Prior to the revised KapMuG, a settlement required the consent of all parties, which made settlements practically impossible to reach.

Before the court determines whether an offer is appropriate, a hearing with the joint parties will be held. Once the court has approved the settlement, the joint parties may object to the settlement within a one month period and opt-out of the settlement. After this period, the proceedings will end and the settlement will bind all parties who have not opted out.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

The claimant has to file a motion to register the claim at the Higher Regional Court within a period of six months, which starts to run at the publication of the model proceeding. If the claim is not filed at the Regional Court or registered at the Higher Regional Court, then the claimant is not covered by the pending model proceeding. Hence, the result is that the statute of limitations is not tolled and could expire. A filing during the settlement stage would be considered untimely.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The model defendant is aware of the filed cases and of the appointed model plaintiff and any other interested parties. The parties of the model proceeding are also named in the litigation register of the Higher Regional Court.
Since 2012, the KapMuG allows the registration of claims without actual participation in the proceedings. The model defendants receive a notice of the registration and have an overview of who is registered.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

The claimants are informed about a pending model case based on the information published by the court. As the information is publicly available, the defendant is not protected from being identified as a party in the case. Hence, there are no safeguards regarding the protection of the reputation or the company goodwill of the defendant.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Joint actions are not registered, only the model cases are listed, pursuant to Sec. 10 KapMuG. On the court's website and in the German federal gazette, the Higher Regional Court discloses the parties, declaratory judgment proposals and any rendered orders.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of

infringement of any applicable antitrust laws by a national court or competent authority)?

As explained above (cf. question 1.2), class actions are not available for breaches of antitrust law in Germany. However, there are other options, i.e. to bring an action on behalf of another party or to 'bundle' damages claims. With regard to the latter, it is possible to start stand-alone actions, i.e. actions do not have to follow on from infringement decisions.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Yes, stand-alone and follow-on actions are available for both bilateral as well as unilateral antitrust infringements.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The German legal system does not provide for pre-trial discovery. The GCCP is rather restrictive as regards the disclosure of documents between the parties. While there are certain possibilities for gaining access to documents which are in the possession of the defendant or third parties, the hurdles for such access are comparatively high.

According to Sec. 142 of the GCCP, the court may direct one of the parties or a third party to produce records or documents as well as any other material that are in their possession provided that the party asking for the production can identify such document. However, this option is limited to documents or other material to which one of the parties has made reference.

Moreover, Sec. 422 of the GCCP provides for the right to request the production of a document if the other party is under an obligation to do so pursuant to the stipulations of German civil law. Such obligation does, *inter alia*, exist if the party can show a legal interest in inspecting a certain document and if (1) the document was drafted in his interest, (2) the document certifies a legal relationship between himself and another, or (3) the document contains negotiations in a legal transaction (Sec. 810 of the German Civil Code ("**GCC**")).

As regards follow-on claims, under the German Code of Criminal Procedure an aggrieved person may have the right to gain access to the files of the German Federal Cartel Office (*Bundeskartellamt* – "**FCO**") provided that the legitimate interests of the aggrieved person outweigh the legitimate interests of the wrongdoer or third parties in non-disclosure, and that granting access does not jeopardize the FCO's investigation (Sec. 406e of the German Code of Criminal Procedure). Such right to inspect the file pursuant to Sec. 406e of the German Code of Criminal Procedure is only available to qualified German lawyers. It must be noted, however, that the FCO is quite restrictive as regards granting such access to the file. In particular, the FCO regularly denies third-party access to the leniency applications of cartel participants and so far such denials have been upheld by the courts (Higher Regional Court Düsseldorf, decision of 22 August 2012, V-4 Kart 5 + 6/11 (OWI) – *Kaffeeröster*; District Court (*Amtsgericht*) Bonn, decision of 18 January 2012, 51 Gs 53/09 – *Pfleiderer*).

In addition, plaintiffs have the right, pursuant to Sec. 242 GCC, to request the defendant to disclose certain information required for the estimation of damages, provided the plaintiff can prove that his claim is justified on the merits of the case, and that he is unable, through no fault of his own, to prove the amount of loss suffered. In practice, such a disclosure request will frequently be combined with the actual claim.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

As a general rule, the limitation period for bringing a claim is three years (pursuant to Sec. 195 GCC). This limitation period commences upon the expiry of the year in which the claim arises and in which the claimant becomes aware of the circumstances giving rise to the claim and of the identity of the defendant, or ought to have become aware of those matters but for his gross negligence (Sec. 199(1) GCC).

The limitation period of a claim for damages is, however, suspended if proceedings are initiated by the FCO, a competition authority of one of the German Federal States, the European Commission or the competition authority of another Member State of the European Union (Sec. 33(5) of the ARC).

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

According to Sec. 33(4) of the ARC, if a violation of antitrust law has already been established by a final decision of the FCO, a competition authority of one of the German Federal States, the European Commission or the competition authority – or a court acting as such – of another EU Member State, the court shall be bound by this finding. Thus, the plaintiff does not have to present further evidence as regards to the violation. The binding effect, however, only applies to the fact that a violation has occurred. It does not cover the questions of loss and causation. In contrast thereto, in a stand-alone action alleging a breach of antitrust law, the plaintiff has to prove the existence of the violation before the question of damages is addressed by the court.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Third party litigation funding is possible in Germany. Some companies offer litigation funding services. However, lawyers are prohibited from working on a contingency fees basis.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

The claimant is not required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the

claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

The court could stay the proceeding on the merits of the case, if the litigation funding is void under certain circumstances or if there is a risk that the court and lawyer fees cannot be paid.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

The potential claimants may apply for financial support. If the potential claimants are unable to pay the costs of litigation, or are able to pay them only in part or only as installments due to their personal and economic circumstances, financial support will be granted. It is further required that the action they intend to bring has sufficient prospects of success and does not seem frivolous.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

No contingency fee system is established in Germany. The legal fees are strictly regulated by law (Lawyers' Compensation Act). The Act determines the fees a legal counsel is entitled (and obligated) to charge the client. These legal fees depend on the amount in dispute. Contingency fees are in principle illegal under German law. The reason is that such an agreement would in 99% of the cases be void.

There are, at least in theory, exceptions to this rule as per a judgment by the German Constitutional Court (1 BvR 2576/04), but the requirements are so difficult to satisfy that, in practice, contingency fees still do not play a significant role in German civil litigation.

If the party is not able to pay for the attorney's fees, success fees are allowed in a limited number of cases, Sec. 4a Lawyers' Compensation Act. Under these circumstances, the client and his attorney are allowed to agree on either success fees or a fee below the legal requirements in the Lawyers' Compensation Act.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Like in most other European legal systems, Germany applies the "loser pays principle", Sec. 91 of the GCCP. The non-prevailing party has to bear the costs of the legal dispute, in particular any costs incurred by the other party, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action. However, it has to be noted that there is a statutory limitation as regards the amount of attorneys' fees that are recoverable. The legal costs can only be recovered within the limits of the Lawyers' Compensation Act. If the legal costs of the prevailing party exceed the statutory fee, the excess amount has to borne by the prevailing party.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

The KapMuG was implemented to improve and provide an effective collective redress mechanism. As the application of the law is confined to securities litigation, the risk for an abuse of such collective redress system is limited. The KapMuG follows strict rules and makes it difficult to abuse the regulations based on the structure of the law.

5.8 Are the parties to an action able to insure against the cost risks?

It is not common in Germany to insure against adverse party costs or other costs resulting from the litigation for the model proceeding. As described in question 5.9 below, the defendant can request the court to order for security of costs.

Another possibility in order to avoid the risk of bearing the costs of the litigation is to obtain the financial support of a litigation funder, who will assume the cost risks.

In individual actions, claimants often insure themselves against the costs of a potential litigation.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

The defendant can apply for an order for security of costs in cases where the plaintiff does not reside in a Member State of the European Union or in a signatory state of the Agreement on the European Economic Area.

The court may at its sole discretion determine the nature and the amount of the security. Unless the court has ordered or the parties have agreed otherwise, the security is to be provided, in the form of an irrevocable and unconditional guaranty of an unlimited term, issued in writing by a financial institution authorized to pursue its business in Germany, or by lodging cash or such securities that are suited to serve as security pursuant to Sec. 234 GCC.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

The bar rules of the German Lawyers' Association do not include specific regulations regarding class actions.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

Pursuant to Sec. 11 KapMuG, the general civil procedure rules applies which covers the applicable international private law rules, e.g. jurisdictional rules.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Yes. The Highest Federal Court suggested in its decision regarding the Cement Cartel that it is possible to bring actions similar to "opt-in" class actions by invoking the German civil law and procedure. As described above, various cement purchasers assigned their damages claims against members of the cement cartel to a Belgian company.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Generally, several actions regarding the same facts and practices can be brought in different jurisdictions. Under certain circumstances, cases might be stayed pending the outcome of the case in another jurisdiction.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

The German legislator and law promote out-of-court agreements. Before a complaint is permitted, the parties have to show that they could not reach an out-of-court agreement.

In addition, the German Civil Procedure Law provides regulations about potential arbitration, Sec. 1025 et seq. GCCP. However, the parties have to have entered into an arbitration agreement prior to or at the time of the dispute.

The revised KapMuG in November 2012 improved and made the settlement proceeding of a model case more effective. The settlement is only valid if a quorum of 70% of the interested parties agree. Plaintiffs have the possibility to "opt-out" after a settlement is reached, if they do not want to be bound by the settlement. The settlement agreement will not be published.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

It is common practice in Germany to encourage the parties to settle their dispute out of court, using an out of court approach, dispute resolution offers at the court by a special chamber or arbitration.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The statute of limitations is tolled during settlement negotiations or arbitration pursuant to Sec. 204 GCC.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

A seller of a good or any contracting party can include a mandatory arbitration clause in the general terms and conditions.

Arbitration agreements in which a consumer is involved must be contained in a record or document signed by the parties. Hence, an arbitration agreement involving a consumer has to be signed in addition to the purchase agreement, unless it is notarized. The highest court in Germany held that the consumer cannot waive this requirement. Accordingly, an arbitration clause that is included in the general terms and conditions involving a consumer are void.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

The Higher Regional Court is responsible to publish all relevant case information about a model case, in order to allow sufficient information to register the claim with the court or file an individual action. Proceedings other than a model case are not published and each claimant is responsible to pursue the rights individually.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a

public authority/ an independent entity/ the claimant/the defendant)?

The enforcement of the rendered judgment in the individual cases follows the basic civil procedural rules, Sec. 704 et seq. GCCP. The defendant is responsible to pay the damage award and can be forced to execute the payment. The enforcement is executed by the bailiff, based on an enforcement order.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

An injunctive order may impose a fine on a non-complying losing defendant. The fine could be a fixed amount for each day's delay or any other amount assessed by the court to ensure compliance. The court of first instance can also order a fine for each count of the violation and, in the case that such payment cannot be obtained, the losing defendant can be sent to detention of up to six months. The individual fine may not be levied in an amount in excess of €250,000, and the detention may not be longer than a total of two years.

Prior to a decision, the court has to issue a notice, unless such notice is set out in the injunctive order.

Moreover, the plaintiff can also, by a motion, request a security for any damages that may arise as a result of future violations.

National Report of Israel

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

In 2006, the Class Actions Law 5366-2006 (the "Class Actions Law" or "Law") was enacted. This legislation extracted the provisions regulating class actions from other laws, inter alia, the Antitrust Law, and set out an independent regime regulating the conduct of class actions. The Class Actions Law and the regulation thereunder, regulate, inter alia, the legal requirements for the commencement of a class action such as issues of legal standing, the legal requirements to bring a class action and the relief that may be claimed. The Class Actions Law defines a class action as follows:

"Class action" – an action carried on in the name of a group of persons who did not authorize the representative plaintiff to do so, and which raises substantive questions of fact or of Law that are common to all members of the group;"

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

A class action may be brought only pursuant to the laws specified in the second supplement of the Class Action Law, or in other specific law/s which explicitly enables the submission of class actions.

The Law specifically lists claims (or certain types of claims) from the following fields of law: consumer protection, antitrust, insurance, banking, securities, environmental hazards, equality and prohibition of discrimination, employment, claims against public authorities and claims against publishers of spam.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

There is no general prohibition on the submission of a class action based on several causes of action (alternative or cumulative), provided that they are all

admissible according to the second supplement of the Class Actions Law (or other specific laws as mentioned in 1.2 above).

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

The class action Law and regulations thereunder are silent regarding the possibility to initiate summary/emergency proceedings. However, the Civil Procedure Regulations, ("**CPR**"), to which the Class Actions regulations refer in respect of procedural matters that are not addressed by the Class Actions Law, allow the initiation of such proceedings in a law suit. While there is no doubt regarding the possibility to apply for interim measures in the main action of a class action, the courts' rulings are inconsistent regarding the admissibility of such proceedings prior to the approval of an action as a class action. (Civil application 8615/06 **Jan v. Altman Pharmaceutics** (26.3.08), Civil application 17537/07 **Frank v. Allsale.com Ltd.** (15.10.07)).

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes. It is possible to claim cessation of unlawful practices/behaviors and/or to claim compensation for damage suffered. (See 1.4 above regarding interim measures at the preliminary stage of an application to approve an action as a class action).

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

All types of damages that can be proven may be claimed by the plaintiff (including compensation for other than monetary damage). Nevertheless, the court may not adjudge exemplary compensation (other than in certain cases of discrimination against disabled persons).

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the

damage suffered, allowed and applied in class actions / collective redress actions?

No, the compensation awarded to the victims cannot exceed the compensation that would have been awarded had the claim been pursued by means of individual actions. Punitive damages are not allowed.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

While the 'indirect purchaser' doctrine was asserted in several antitrust matters before the courts, ultimately the cases were settled without the courts explicitly ruling on the issue. However, it seems that there is a tendency towards the rejection of that defence. In November 2013, in its decision to deny a motion to dismiss a class action application, the Central District Court determined that the existence of a conflict of interest between the members of two distinct subgroups of the class action group (direct and indirect injured members) does not deny the possibility of providing compensation to any of the group's members. Note however, that this issue was not in the core of the debate in that application and was not the subject of the decision. Also notable is the opinion submitted just recently by the Attorney General to the Central District Court in the aviation cartel case, which argues that indirect consumers should be allowed to claim their damages from the cartel members. These developments may be the path for rejecting the 'pass on' defence in antitrust private actions.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

According to section 4 of the Class Actions Law the following may petition the Court for approval of a class action:

(1) any person who has grounds for an action or matter said in the second supplement of the Law (see 1.2 above), which raises substantive questions of fact or law common to all members of a group of persons – in the name of that group;
(2) the public authorities in charge of equality to disabled people, equality at work and protection of nature and national gardens, in an action or matter said in the second supplement of the law, that is within the sphere of one of the public purposes in which the public authority engages – in the name of a group of persons, if that action or matter raises substantive questions of fact or law common to all its members;
(3) an organization, as defined in the Law, in an action or matter said in the second supplement of the law that is within the sphere of one of the public purposes in which the organization engages – in the name of a group of persons, if that action or matter raises substantive questions of fact or law common to all its members, provided that the court is satisfied that under the circumstances of the case it would be difficult to bring the petition by a natural person.
(4) the Israel Consumer Council, as defined in the Israel Consumer Council Law 5768-2008, may apply for the approval of an action as a class action, even if it is not difficult for a natural person to submit the petition.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

There are no specific rules defining the cases where one or another kind of actions could apply, except that where a class action is brought by an organization (excluding the Israel Consumer Council), the court must usually be convinced that the claim cannot be brought by a natural person.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

The entities that may apply for the approval of a class action are specified in section 2.1 above.
The Class Actions Law defines an Organization as a corporate, other than a statutory corporation or a religious trust that exists and operates regularly and actually during at least one year for the advancement of one or more public pur-

poses, and its assets and income being used only for the achievement of public purposes, provided that its activity is not on behalf of a political party or of some other political body, or in relation with such party or for the advancement of their purposes;

A Public Authority, which may also submit an application for the approval of a class action, is defined in the first supplement of the Law as:

1. The Commission for Equal Rights for Persons with Disabilities;
2. the Nature Protection and National Parks Authority;
3. the Commission for Equal Opportunities at Work.

A representative entity that does not comply with the aforesaid requirements may not apply to the court for the approval of a class action and may be sanctioned with legal costs. The court may also replace the representative if it finds the representative unsuitable.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The Israeli class action procedure is divided to two stages. At the first stage the court examines the admissibility of the class action and approves it if it finds that all the following conditions are met:

(1) the action raises substantive questions of fact or of law in common to all members of the group, and it is reasonably possible that they will be resolved in the group's favor;

(2) under the circumstances of the case, a class action is the efficient and fair way for a resolution of the controversy;

(3) there are reasonable grounds to assume that the interest of all members of the group will be well represented.

(4) there are reasonable grounds to assume that the interest of all members of the group will be represented and conducted in good faith.

If the court accepts the application to hear the action as a class action, then the main case is heard as a class action.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Generally, any person that has suffered damages, including third parties, may bring an action, provided that he/she has an admissible cause for a class action. With regard to indirect purchasers, please refer to section 1.8 above.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

It is possible for multiple plaintiffs to file a complaint jointly.

Moreover, if the court notes that a previous petition for approval or a previous class action is pending, in which common issues of fact or of law arise that are similar to the issues raised in the petition before it, then the court may – if it deems it justified to do so under the circumstances – order that the hearing of the petition for approval be transferred to the other court.

If, in addition to the similarity of issues there is also essential similarity in the groups represented in the two actions, then the court shall order that the hearing of the later petition for approval be transferred to the court in which the former petition for approval, or the former class action, is being heard.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

A defendant may raise three preliminary arguments:

1. That the plaintiff does not comply with the requirements of Section 4 of the Law, that is to say the plaintiff is not the suitable plaintiff.

2. A defendant may argue that the action should not be approved since the requirements of Section 8 of the Law are not met, that is to say: the action does not raise substantive questions of fact or of law in common to all members of the group; it is unreasonably possible that the matter will be resolved in the group's favor; under the circumstances of the case, a class action is not the efficient and fair way for a resolution of the controversy; there are no reasonable grounds to assume that the interest of all members of the group will be appropriately represented and conducted by the plaintiff; there are no reasonable grounds to assume that the interest of all members of the group will be represented and conducted in good faith.

3. If a petition for approval was brought against the State, any of its authorities, a local authority or a statutory corporation, an entity which provides an essential

service to the public, a banking corporation, stock exchange, a clearing house or an insurer, the defendant may claim that the class action is expected to cause severe harm to the public compare to the expected benefit to the members of the group and/or to the public. If the damage cannot be avoided by approval of the application with changes (according to Section 13 of the Class Actions Law), then the court may take that into consideration when it decides whether or not to approve the class action.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Generally, when the court has approved a class action, then in its decision it shall define the group on behalf of which the action shall be conducted. This definition applies to all individuals belonging to the defined group and claiming to have been harmed by the same or similar practice unless they actively opt out of the group within 45 days from the day on which the Court's decision to approve the class action was published or within a longer period prescribed by the court.

Nevertheless, in special circumstances, the court may order to include only claimants who inform the Court in writing – in a manner and by the time prescribed by the Minister of Justice – that they desire to join to the action, provided that it is reasonably possible to identify and locate the members of the group on behalf of which the petition for approval was brought, and to inform them of the class action's approval, all at a reasonable cost. This exception does not apply to class actions brought pursuant to the Antitrust Law or the Securities Law.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The judgment in a class action shall constitute a binding ruling in respect of all members of the group, on behalf of which the class action was heard, except where the law explicitly provides otherwise.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Following the approval of an action as a class action, every member of the group as defined by the court is deemed to have agreed that the class action would be brought on his behalf, unless he informed the Court of his desire not to be included in the group, within 45 days from the day on which the Court's decision to approve the class action was published or within a longer period prescribed by the Court.

The court may, on application of a member of the group who asks not to be included therein, extend the period for leaving the group, if it finds that there is a special reason for doing so.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

Section 10(b) to the Law enables the court to permit a person to be added to the group it defined, no later than the date it shall prescribe for that purpose.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Within its decision to approve a class action petition, the court defines the group on behalf of which the action shall be conducted. This information is open to the defendant.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its

responsibility for the alleged infringement is established by the final judgment?

Section 25 of the Law lists the subjects on which a notice should be given to the members of the group, among them the Court's decision to approve a class action.

The version of notices, its format and how it should be presented shall be brought to the court's approval before it is published. Publication of a notice under this section shall be in the manner and at the time set by the court, and it may prescribe different manners of publication for different categories of group members, all while taking into account – inter alia – the following considerations:

1. the expenses involved in a form of publication and the degree of its effectiveness;
2. the extent of monetary compensation or other relief that each member of the group is likely to be entitles to, if the class action is decided in the group's favor, and the extent of the damage liable to be caused to each member of the group, if the class action is rejected;
3. the estimated number of group members and the ability to identify and locate them with reasonable effort and at reasonable cost;
4. the ability to give notice personally to group members with a reasonable effort and at reasonable cost, also through continuous communication in existence between a party and some or all members of the group;
5. special characteristics of group members, including language.

To the best of our knowledge, there are no specific safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment. However, Section 8(b)(2) of the Class Actions Law determines that where a class action submitted against the State or certain specific entities (in essence, financial entities or entities providing essential services) might cause harm to the public as a result of undermining the defendant's economic stability, and provided that the damage may not be mitigated by approving the class action application with changes, then the court may take that into consideration when deciding whether or not to approve the class action.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Section 28 of the Law states that the Director of Courts shall keep a Registry of Class Actions, in which the notices given him under sections 6(a), 10(b), 14(b), 16(d)(3), 18(c), 19(e) and 25(g) of the Law (among them, the submission of a petition to approve an action as a class action and the court's decision), as well as every other particular prescribed by the Minister of Justice, shall be registered; the Registry, as well as the documents delivered to the Director of Courts with the said notices, shall be open for viewing by the public on the website of the Directorate of Courts at http://elyon1.court.gov.il/heb/tovanot_yezugiyot/list.htm .

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Both follow-on actions and stand-alone actions are possible.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Yes.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

A request for access to information submitted to government authorities may be made under the Freedom of Information Law, 5758-1998. Section 9 of the Freedom of Information Law, however, sets out the circumstances in which the

government authority may not disclose the information provided to it, including where: the information constitutes commercial or professional secrets or has an economic value, which would be seriously damaged by such disclosure; the information is commercial or business information relating to the business of a person, the disclosure of which information would significantly damage the business, commercial or economic interests of such person; the information was provided to the authority on condition of confidentiality; disclosure of the information would jeopardise future receipt of information; or disclosure of the information would result in the disclosure of the existence or identity of a privileged source. Note, however, that Section 11 of the Freedom of Information Law provides that, where the concerns addressed in Section 9 may be alleviated by omitting or altering the details contained in the information or providing the information subject to conditions, then, unless it proves too burdensome on the authority concerned, these steps should be taken, and the remaining information, subject to the necessary amendments, must be provided to the person requesting access.

In addition, a plaintiff may apply for a disclosure and inspection order pursuant to the CPR. It should be noted however, that the right for disclosure is more limited in the case of a petition for a class action and be subject to stricter conditions compare to individual claims / the main hearing of the class action.

In addition, according to section 4 of the Class Action Regulation 5770-2010, if the court determines during a petition for a class action that a pre-trial should be conducted in order to make the procedure more efficient or in order to examine whether the parties are willing to settle, it may render a disclosure and inspection order provided that:

1. The requested documents concern the relevant questions for approving the class action;
2. The party who requested the documents provided a primary evidentiary basis for the fulfilment of the cumulative conditions for the submission of a class action.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

In general, the same limitation rules apply to individual claims and class actions. Thus, there is no specific limitation rule that refers to public enforcement.

Section 26 of the Law determines specific prescription rules in cases of approval and rejection of a class action as well as situations of opting in and out.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in Masterfoods (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

A special evidentiary significance is attributed in private actions, including in class actions, to the following:

1. The findings and conclusions of a final verdict of the court, convicting the defendant in the criminal proceeding, serve as prima facie evidence in a civil proceeding to which the defendant is a party (Section 42A of the Evidence Act, 5731-1971);

2. A determination made by the Director General of the Antitrust Authority pursuant to Section 43 of the Antitrust Law (e.g. regarding the existence of an illegal restrictive arrangement or the abuse of dominant position) shall constitute prima facie evidence in any legal proceedings (Section 43(e) of the Antitrust Law).

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

The Class Actions Law is silent about such possibility (except for the special fund for class actions – see 5.4 below) and to the best of our knowledge, there is no ruling by the courts regarding this issue. In practice, there is substantial criticism against lawyers funding class action claims (which is based on the lawyers' ethical code).

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to

meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Theoretically, the court may consider such consideration in the framework of the requirement of section 8(a)(4), that is to say the requirement that the applicant conduct the class action proceedings in good faith. To the best of our knowledge, in practice the courts do not tend to stay the proceedings for a reason relating to the funding of the action.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

Pursuant to Section 27 of the Class action Law a fund was established in order to assist representative plaintiffs to finance the submission and hearing of petitions for the approval of class actions and class actions that have public or social importance.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

The court may determine the representative attorney's legal fees for conducting the class action, including the petition for approval. The representative attorney may not accept legal fees in excess of the amount determined by the court as aforesaid (Section 23 of the Class Action Law).

When determining the representative attorney's legal fees, the court shall, inter alia, take the following considerations into account:

- the benefit the members of the group yield by the class action;
- the complexity of the proceeding, the hassle taken by the representative attorney and the risk he assumed by bringing and conducting the class action, as well as the expenses he incurred for that purpose;
- the degree of public importance of the class action;
- the manner in which the representative attorney conducted the proceeding;
- the gap between the relief sought in the petition for approval and the relief adjudged by the Court in the class action.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

The court may oblige the losing party in a class action to pay the winning party legal costs in an amount according to its judgment.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

There are several rules and safeguards aiming at avoiding incentives to abuse the collective redress systems, **inter alia**: the requirement to conduct the class action in good faith, the obligation to subject a settlement agreement to the approval of the court, the requirement to obtain the court's approval to the withdrawal from the proceedings, the high evidentiary standard determined by courts at the stage of approval of an action as a class action (for example, the requirement to submit an economic opinion in the preliminary phase of approving a class action which is based on the antitrust laws), the determination of the legal fees of the attorney by the court.

5.8 Are the parties to an action able to insure against the cost risks?

The defendant may insure itself by a regular insurance policy that covers regular lawsuits. As for the applicant, to the best of our knowledge such practice does not exist in Israel.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Section 2(f) of the Class Actions Regulations 5770-2010 determines that the court shall not condition the submission of an application for the approval of an action as a class action in the deposition of a security by the applicant in order to secure the defendant's costs, except for in special circumstances.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

In the Israeli Bar association's ethical rules there are several general rules that may be relevant to class actions, for instance, the prohibition on a lawyer to fund a lawsuit. Note that a criticism is raised against the applicability and suitability of these rules to class action cases.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

The general international private law rules apply to such actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

There is no rule prohibiting the submission of a class action by a foreign person.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

It is possible to bring an action against a company and/or individual domiciled outside of the jurisdiction.

In such case, the applicant has to file an application for permission to serve outside the jurisdiction, pursuant to regulation 500 of the CPR. The applicant must satisfy, cumulatively, three hurdles in order to obtain such permission:

(a) He must prove that he has a proper cause of action, i.e. he must present "prima facie evidence of the cause for the action";

(b) He must comply with the conditions of one of the alternatives of Regulation 500 of the CPR (e.g the action is based on an act or omission perpetrated within the boundaries of the State; or the person outside the territory of the State is a required litigant, or appropriate litigant, in an action properly submitted against another person, on whom ex-territorial service was performed).

(c) He must submit an affidavit supporting his Application.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

A settlement of a class action can be conducted only according to Sections 18 and 19 of the Law which determine that a settlement agreement will be approved by the court following its examination.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

According to section 4 of the Class Action Regulations, the court that hears the petition for a class action may determine to hold a pre-trial hearing in order to make the hearing of the case more efficient or in order to examine whether the parties are willing to settle.

A settlement agreement in class action cases (reached at any stage) must be brought to the court for approval.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The limitation period is suspended from the moment the class action is filed.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

There is no clear answer to this question. To the best of our knowledge, there is no ruling regarding this issue. Nevertheless, we assume that any clause restricting a claimant from suing its damages will be void (for example, such clause may amount to forbidden depriving condition under the Uniform Contracts Law, 5743-1982). More specifically, section 11 of the Class Action Law determines that opting-out is only possible after the submission of a class action, not before.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

See question 3.6.

The Court may order some or all of the parties to be responsible for publication of a notice and to be responsible for all or part of the costs of publication, as it deems efficient and fair under the circumstances.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

According to section 20(f) of the Law, the court may issue orders concerning the supervision over the implementation of its judgment.

In addition according to the Execution Law, 5327-1967, the party that obtained a judgment in its favor may apply to the Enforcement and Collection Authority with a request to execute the judgment.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

The regular rules for compliance with injunctive orders apply in class actions as well (e.g Contempt of Court, Execution etc.)

National Report of Italy

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Under Italian law, class actions in general are ruled by a single provision, *i.e.* by Article 140-bis of the Legislative Decree 6th September 2005 no. 206 (so called "*Italian Consumers Code*").

Article 140-bis was first introduced in the Italian Consumers Code at the end of the year 2007: since then, the provision has been amended many times and it has stably come into force on 1st January 2010. Article 140-bis now consists of 15 lengthy paragraphs – unfortunately none of which gives a clear-cut definition of "class action". Due to the very complex legislative process, Article 140-bis' interpretation appears to be still quite knotty. For this reasons some scholars deem that Article 140-bis is likely to undergo some further modifications in the future.

For clarity's sake, it must be pointed out that another Italian law provides for a sort of "public" class action, *i.e.* the Legislative Decree dating 20th December 2009 no. 198, in application of Law 4th March 2009 no. 15 ("*Legge Brunetta*"). Under Legislative Decree no. 198/2009, in case of inefficient provision of services a collective redress action can be brought by the users against any Public Administration entity or against any private entities which provide public services.

Moreover, another provision of the Italian Consumers Code – namely Article 140 – provides for special inhibitory proceedings to be brought by consumers associations to safeguard the interests of consumers and users as set by the same Consumers Code and by other Italian laws. The main difference between these injunctive relief actions and class actions ruled by Article 140-bis is due to the fact that class actions have a representative nature: they are brought by individuals ("*class representatives*"), even though they may be assisted by a consumers association.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

The scope of application of Article 140-bis of the Italian Consumers Code is defined both *rationae personae* (i) and *ratione materiae* (ii).

(*i*) From a subjective perspective (*rationae personae*), Article 140-bis applies to legal actions to be brought by *consumers* or *users*. Article 3 of the same Consumers Code specifies that a "*consumer or user*" is any individual who acts for purposes not related to any entrepreneurial, commercial, artisanal or professional activities.

(*ii*) As to the *ratione materiae* perspective, paragraph 2 of Article 140-bis effectively specifies that a class action can be brought to safeguard:

a) the contractual rights of a group of consumers which find themselves "in the same homogeneous situation" towards a certain business entity;

b) the "homogeneous rights" of the consumers of a given product/service towards the relevant manufacturer/supplier, notwithstanding the existence of a direct contractual relationship between the parties (so called "*product liability*" cases, also ruled by the Italian Consumers Code);

c) the "homogeneous rights" of consumers deriving from unlawful business practices or by anticompetitive conducts (so called, "*private enforcement*").

In a nutshell, under Article 140-bis Italian class actions' scope is limited to consumer law (including product liability issues) and to some aspects of anticompetition law.

Last but not least, if we take into consideration also the collective redress action provided for by Legislative Decree no. 198/2009 in application of *Legge Brunetta*, we could say that to some extent class action applies also to administrative law.

Anyway, from now on in this Report we will refer solely to class actions ruled by Article 140-bis of the Italian Consumers Code.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

In theory, under Italian law nothing would prevent a class action claimant (*i.e.*, a class representative) from bringing the action on the basis of the provisions set forth by different statutes. For instance, by using the remedy provided for by Article 140-bis, a claimant might seek protection for his/her rights by asking the Court to ascertain both the defendant's product liability (ruled by certain provisions of the Italian Consumers Code) and the existence of unlawful business practices (ruled by other Italian competition laws).

The above being said, from a practical point of view it must be stressed that Article 140-bis of the Italian Consumers Code expressly requires that the consumers' alleged rights are "*homogeneous*" (in the very first version of the provision the rights were required to be "*identical*"). Moreover, when the Court declares the class action as admitted, it also firmly sets the "perimeter" of the consumers' rights at stake, thus restricting in a certain way the area of the Court's analysis (paragraph 9 of Article 140-bis). As a consequence, we deem that an interplay between different statutes would often lead to practical difficulties such as the exclusion of several potential class members.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

A decision issued by the Italian Supreme Court (*Corte di cassazione*) on 10th July 2014 (No. 15825) has expressly stated that class actions can be brought both by following the ordinary civil proceedings or by initiating a summary proceedings.

Italian most authoritative scholars, however, believe that summary proceedings could undergo some practical limitations. For instance, a class action claimant could not easily be awarded with a pre-trial (*ante causam*) precautionary seizure of the defendant's funds or goods. At this stage of the proceedings the number of the class members is still undefined; as a consequence, the amount of the global damages to be seized (*i.e.*, the amount of the defendant's money, movables or immovables) is still incomputable. In other words, the claimant would need to ground its pre-trial precautionary claim on a simple statistical forecast, which would likely be rejected by the Court.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

As already pointed out in 1.1 above, Article 140 of the Italian Consumers Code provides for an injunctive relief action to be brought by consumers associations to safeguard the interests of consumers and users by asking for the cessation of unlawful conducts.

Said inhibitory proceedings under Article 140 is quite different from the class action provided for by the following Article 140-bis. Under Article 140-bis, paragraph 1 and 2, class action proceedings aim at ascertaining the business entity's liability and at condemning the defendant to pay the relevant damages to the class members. Accordingly, paragraph 12 of Article 140-bis establishes that, if the Court issues its decision in favour of the class, it also orders the business entity to pay damages to the class members.

In the light of the above, Italian class action ruled by Article 140-bis can be considered as a compensatory relief action.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

The type of damage that can be claimed depends on the legal ground of the class action, pursuant to paragraph 2 of Article 140-bis (see above at 1.2).

In case of damages deriving from the breach of some contractual obligations or in private enforcement cases, only material damages can be claimed and compensated.

In product liability cases, pursuant to Article 123 of the Consumers Code the class members can claim for the following damages:

- death or bodily injures;
- the destruction or the deterioration of material properties (excluded the defective product itself), when the relevant value exceeds EUR 387.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the

damage suffered, allowed and applied in class actions / collective redress actions?

In Italy, the compensation awarded to the class members collectively cannot exceed the compensation that would have been awarded through individual actions. From a practical point of view, it is worth noting and winning an individual action could imply being entitled to receive a slightly higher amount. As a matter of fact, quite a peculiar provision is set forth by paragraph 12 of Article 140-bis At the end of a class action proceedings, the favourable Court's decision becomes enforceable solely after 180 days and during this 6-month period legal interests do not accrue. On the contrary, a favourable Court's decision issued at the end of an individual action is immediately enforceable and the winning party is entitled to receive also the accrued legal interests. The provision set forth by paragraph 12 of Article 140-bis entails an evident inequality and is therefore much criticized by the doctrine.

Generally speaking, under Italian law punitive damages are not allowed. The Italian legal system is firmly based on the "compensative principle", according to which the amount of the awarded damages must strictly correspond to the prejudice effectively suffered by the victim. Because of this principle, Italian Courts traditionally tend to reject the recognition of foreign punitive damages awards, grounding the denial on *ordre public* reasons.

That being generally said, we must also stress that in the past decades the possible introduction of punitive damages in the Italian legal system has become a more and more debated topic (*e.g.*, according to some scholars some Italian provisions appear to have a punitive nature, such as *e.g.* Article 96, paragraph 3, of the Italian Code of Civil Procedure).

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Article 140-bis of the Italian Consumers Code does not rule this aspect.

More generally, the passing on defence is not ruled by Italian legislation and is seldom observed in case law. Once again, Italian Courts (esp. in antitrust cases) tend to apply the compensative principle, by also analyzing the possible factual contribution of the victim to the occurrence of the damage.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Under Italian law, the class action may be brought by a single individual (*i.e.*, by the "class representative"), to be necessarily assisted by his/her lawyer(s) and facultatively by a consumers association. The class representative acts in his/her own name and on his/her own behalf, by bearing all the relevant costs and expenses (at least formally: from a practical point of view, the fund raising by the consumers association proves fundamental).

After the starting of the legal action, all the individuals who find themselves in the same "homogeneous" situation of the class representative may apply to be inserted in the class (opt-in system). The legal assistance is not required for the joining members and they may apply also by certified e-mail or by telefax.

In short, under Italian law class action is a sort of "representative action".

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

See above at 2.1.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Pursuant to Article 140-bis of the Italian Consumers Code, there aren't any special requirements to be met nor by class representatives, nor by consumers associations. Nevertheless, according to some scholars, the assisting association should be listed in the Registry of the "Consumers and Users Association most representative at a national level", provided for by Article 137 of the same Con-

sumers Code. Said Registry is hold by the competent Ministry (*Ministero dello Sviluppo Economico*).

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The admissibility of the class action is examined at an early stage of the proceedings, during the first hearings: the Court issues an admissibility/inadmissibility order, which however may be opposed (Article 140-bis, paragraph 6).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Under Italian law, third parties are prevented from entering the class actions proceedings (Article 140-bis, paragraph 10).

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Bearing in mind the peculiar structure of the Italian class action (see above at 2.1), multiple plaintiffs cannot file a complaint jointly. The action is brought by a single individual, who becomes the class representative.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

The consumers and users who do not opt-in in the class action may start any other individual legal action against the wrongdoer, in accordance with the Italian Code of Civil Procedure.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar

practice unless they actively opt out of the group ("opt-out" principle)?

Article 140-bis of the Italian Consumers Code provide clearly for an opt-in system.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The judgment is effective for all the class members, *i.e.* for all the consumers that have filed their complaint and thus have joined the class (Article 140-bis, paragraph 14). On the contrary, the judgment is ineffective towards all the individuals that have decided not to join the class. This means that the victims who have not joined the class can bring individual actions against the wrongdoer.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Article 140-bis of the Italian Consumers Code does not contain any express provision thereupon. Anyway, since Article 140-bis establishes that joining the class implies the waiving of any further individual action by each class member (paragraph 3), it could be inferred that leaving the class is not allowed. The future case law will hopefully shed light on this aspect.

To this purpose, it must also be stressed that any settlement agreement between the class representative and the defendant must be expressly accepted by each class member; in the negative, the settlement agreement is ineffective towards said class members.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

Article 140-bis provides that, if the Court declares the class action as admissible, it orders the parties to carry out the appropriate advertising activities and it also establishes a deadline for the filing of class members' applications. Said deadline may not exceed 120 days after the conclusion of the advertising activities.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The defendant may ask in the Clerk's Office to be informed about the class composition.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

As already pointed out at 3.4, Article 140-bis provides that, if the Court declares the class action as admissible, it orders to carry out the appropriate advertising activities. Anyways, there aren't actually any more specific provisions. The Court may order to carry out the activities that it deems more useful, at its sole discretion: for instance, the Court could order to publish the decision on the main newspapers, on some websites, and so on.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

In Italy there isn't any official registry of class actions. Anyway, the website of the *Ministero dello sviluppo economico* contains a list of the major class actions brought in Italy (see at http://www.sviluppoeconomico.gov.it).

Some consumers associations also try to monitor and list the ongoing class actions on their websites; anyway, this information may be inaccurate or not updated.

As already pointed out, the *Ministero dello Sviluppo Economico* holds a Registry of the "Consumers and Users Association most representative at a national level", provided for by Article 137 of the Italian Consumers Code.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start

a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Under Article 140-bis of the Italian Consumers Code, a class action may be brought to safeguard the "homogeneous rights" of consumers or users deriving from unlawful business practices or by anticompetitive conducts (so called, "*private enforcement*"; see above at 1.2). So, it is possible to start a stand-alone action.

That being said, it must also be stressed that Article 140-bis expressly takes into account the possible "overlapping" between a class action and one or more public enforcement procedures. In such cases, the District Court may suspend the class action proceedings until the conclusion of the public enforcement procedure (or until the conclusion of a single procedural phase, as the case may be: *e.g.*, the District Court may stay the class action until the competent Authority ends the gathering of evidence).

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

The stand-alone actions are available for bilateral and unilateral anticompetitive conducts.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

See above at 4.1. The District Court may stay the class action until the competent Authority ends the gathering of evidence: this is a discretionary power. Moreover, the District Court has the power to "rule the investigation as it deems more appropriate" (Article 140-bis, paragraph 11).

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

Potential claimants may bring a class action whenever they prefer. Anyway, the Court may stay the class action until the competent Authority issues its final decision. See above at 4.1.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in Masterfoods (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

Lacking a deep-rooted case law, we would deem that a decision of the national competition authority could create a strong presumption of proof in a class actions proceedings before the District Court.

As to class actions based on cartel damages, again we lack sufficient case law. In general we can underline that, by applying the *Masterfoods* principle, a recent decision by the Italian Supreme Court (*Corte di cassazione,* decision dating 11th May 2012, no. 7319) has held that a decision by the European Commission – when undisputed by the Member State or by the party directly affected (by means of an action to be brought before the Court of First Instance within the time limit of 2 months, as set forth by Article 263 of the EU Treaty) – becomes binding for the national Court, which cannot substitute its evaluation to the Commission's one.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

As already pointed out, under Italian law class representatives are individuals and they may facultatively be assisted by a consumers association. This means that, formally, class representatives should bear alone all the relevant costs and expenses. It must also be stressed that the Court may declare the class action as inadmissible when the class representative "*appears to be unable to adequately take care of the class interests*" (Article 140-bis, paragraph 6).

Practically speaking, consumers associations play a great role in helping the class representatives in financing the advertising campaign ordered by the Judge and/or in paying the consultants' fees.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No, he/she isn't.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No, it can't.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No, they don't.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

During the recent years, the Italian lawyers' fee calculation system has undergone a deep innovation and the forensic reform is still in progress.

Traditionally, lawyers' fees had to be calculated according with national Tariffs and contingency fees (*patto di quota lite*) were absolutely not allowed. The Tariff system and the prohibition of contingency fees have recently been abolished and substituted by indicative guidelines (*Parametri*), even though some limits are still to be observed. Despite the reform, contingency fees are seldom used in Italy. Success fees (calculated as a percentage of the recovered credit) are allowed and more frequently used.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Under Italian law, the winning party has the right to be reimbursed by the losing party with all the costs and fees paid ("loser pays principle").

It must however be noticed that, at its discretion, the Court may order that each party pays shall pay own costs and consultants ("*compensazione delle spese*"); this normally happens in quite complex cases, where the interpretation of the rule of law to be applied is quite unclear or debated.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

No, there aren't specific rules there upon.

5.8 Are the parties to an action able to insure against the cost risks?

The parties can take out an insurance policy for the costs relating to legal proceedings, including the fees and costs related to a class action proceedings (see the decision of the European Court of Justice dating 10th September 2009, in case C-199/08, *Esching vs UNIQA*).

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

No, he/she/it isn't.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

No, there aren't.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

In Italy there aren't any specific international private law rules on class actions. As a result, general international private law rules apply to such proceedings, both as to the identification of the Court having jurisdiction over the case and as to the applicable law.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, there aren't. The Italian law provisions foster the concentration in a single forum of all the possible class actions against a given defendant. With regard to the territorial venue, paragraph 4 of Article 140-bis provides that class actions must be brought exclusively before the District Court (*Tribunale*) of the region where the company has its "seat". However, it is not specified if the word "seat" here means solely "registered office" or if it could mean also "operational head-

quarters" (lacking any stable case law there upon, for the time being a restrictive interpretation would be advisable). There are however some exceptions, since some District Courts are competent for more than one region.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Nothing prevents a foreign class representative from bringing a class action in Italy, provided that he/she is a consumer or a user and the Italian Courts have jurisdiction over the case.

Apart from that, pursuant to Article 140-bis of the Italian Consumers Code, there aren't any special "subjective" requirements to be met nor by the class representative, nor by the consumers association. Anyway, according to some scholars, the assisting association should be listed in the Registry of the "Consumers and Users' Association most representative at a national level", hold by the competent Ministry (*Ministero dello Sviluppo Economico*) (see above at 2.3 and at 3.7).

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Article 140-bis of the Italian Consumers Code provides for the criterion to identify the competent District Court (as a matter of venue), but – from a transnational perspective – it does not contain any express rule about the jurisdictional criteria to be observed.

Therefore, in case of foreign defendants, the general rules provided for by EC Regulation no. 1215/2012 (former EC Regulation no. 44/2001) would apply. As a result, if the defendant is a foreign company, it could be sued in Italy:

- in contractual cases, when Italy is the *forum destinatae solutionis* according to Article 7, paragraph 1.a) or paragraph 1.b), of the EC Regulation 1215/2012 (*e.g.*, in a sale and purchase agreement, when the delivery of the goods has taken place in Italy);
- in product liability cases, when Italy is the *forum commissi delicti* pursuant to Article 7, paragraph 2), of the EC Regulation 1215/2012;

- when it is possible to rely on the application of Articles 17–18 of the EC Regulation 1215/2012 (jurisdiction over consumers contracts).

Talking about the application of Articles 17–18 EC Reg. 1215/2012 (former Articles 15-17 of the Reg. 44/2001 and 13–15 of the Brussels Convention), it must be stressed that a well-known decision by the European Court of Justice (decision dating 18th October 2002, in case C-167/00, *Henkel*) has established that "*a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers*" (point 33). This is quite irrelevant for Italian class actions: in Italy, consumers associations are simply *assisting* the class representative, but they cannot be held as parties of the class action proceedings. In a nutshell, the *Henkel* principle cannot be applied to Italian class actions and the class representative can surely bring his/her action in Italy by applying also Articles 17–18 EC Reg. 1215/2012.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

In Italy there isn't any *specific* mechanism of collective alternative dispute resolution for the settlement of class actions.

That being said, it must be pointed out that the Italian legislator has shown its favour for settlements to be reached between the parties *after the proceedings*, esp. with reference to the phase of the damages calculation. This can be inferred by analyzing paragraph 12 of Article 140-bis: if the District Court (*Tribunale*) ascertains the right of the class action members to be paid damages, the Court may alternatively determine the relevant amount or it may fix a deadline for the parties (not exceeding 90 days) for reaching a settlement. If the parties do not reach an amiable solution within the fixed deadline, the Court determines the amounts to be awarded to the class members.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Article 140-bis came stably into force on 1st January 2010. In these last few years, a limited number of class actions proceedings have been brought so far and most of them are still ongoing. So, we still lack a stable case law.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

If, during the class action proceedings, the parties try to reach a settlement, there isn't any formal suspension of the procedure; nevertheless, practically speaking, the parties may ask the Court to grant an adequate postponement of the hearings, in order to slow down the proceedings and thus have enough time to conduct the negotiations.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

With reference to individual actions brought by consumers on contractual grounds, the existence of a valid arbitration clause in the agreement may prevent the District Court to examine the case.

With reference to class actions, it is doubtful if the existence of an arbitration clause – to be raised by the defendant (*exceptio compromissi*) - would have such an effect. For instance, some Italian authors deem that the existence of an arbitration clause would prevent the class members to join the class action already brought by the class representative, thus blocking the entry of new applicants. Other scholars deem that Article 140-bis provide for the exclusive jurisdiction of the ordinary Courts, therefore any *exceptio compromissi* by the defendant should be dismissed.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are

such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Article 140-bis of the Italian Consumers Code does not provide for the information to be given to the potential victims. Anyway, paragraph 11 establishes that the Court may order the parties to take care of the advertising activities which are held necessary to protect the class members: apparently this provision refers to the activities to be carried out during the proceedings (*e.g.,* to the gathering of evidence, and so on), but nothing prevents the Court to apply it also for the decision.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

As already pointed out above (see 1.7), paragraph 12 of Article 140-bis provides that, if the Court's decision is favourable, it becomes enforceable solely after 180 days and during this 6-month period legal interests cannot accrue on the due sums.

If the defendant does not pay the due damages, the claimant can start an enforcement procedure.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

We must make a clear distinction between class actions pursuant to Article 140-bis of the Italian Consumers Code and injunctive relief actions pursuant to Article 140.

With reference to class actions, there aren't any provisions about the effective compliance by the losing defendant. On the contrary, paragraph 13 of Article 140-bis provides for quite a peculiar rule: if the decision is opposed before the Court of appeals and the losing defendant asks for the suspension of the decision's effects, the Court of appeals must take into consideration the amount of money to be paid, the number of creditors, the difficulties of being paid back if the decision is reversed. This provision has been interpreted as a sort of "hidden invitation" to Courts of appeals to suspend the first degree decision's effects,

when requested to do so. To counterbalance it, the last part of paragraph 13 of Article 140-bis provides that, when the Court of appeals suspends the decision's effects, it may order the losing defendant to pay the corresponding sum as a deposit. In such a case, the deposit sum is blocked until the Court of appeals' decision becomes final.

National Report of Japan

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The answer is yes. Collective redress actions in Japan are stipulated in the Consumer Protection Law (with respect to injunction) and the Law concerning Special Rules of Civil Procedure for Collective Redress of Proprietary Damages of Consumer (with respect to litigation). The latter passed the Diet in 2013 but not yet implemented. There is a specific definition of collective redress actions in these laws.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Japanese collective redress actions is allowed only if the ground related to consumer contract (B to C contract).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Generally speaking, interplay of several statutes is allowed under Japanese law. For example, Japanese Antimonopoly Act ("AMA") has a provision regarding a special damages claim, but a plaintiff can bring a general tort damages claim against the cartelist under the Civil Code.

Although the AMA itself does not provide collective redress actions, because a consumer can bring a general tort claim by using collective redress action with respect to a B to C agreement with a company, it may be possible that the consumer uses this collective redress action to sue a company which involved in a cartel. Please note that the law has not yet been implemented as mentioned above.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Japanese collective redress actions adopted a special procedure. At the first step, a certified consumer organization will bring a law suit against a company and try to confirm the existence of common obligation of the company. Then at the second step, each consumer can opt in to the procedure and the amount of claim of each consumer opted in will be determined. These two-step procedure itself is a summary proceedings compared to the ordinary civil proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes. Both injunctive relief and compensatory relief is available under Japanese collective redress actions.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Indirect damages, lost profits, damages arising out of body injuries or pain and suffering damages are not covered under Japanese collective redress actions.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

No. Punitive damages are not allowed under Japanese law.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

I could not identify the specific case which allowed the "passing on" defense. However, there is a commentary of this issue which suggest that such defense is effective and makes it difficult for the claimant to prove damages.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

It is the latter. The collective redress actions in Japan will be brought initially by a certified consumer organization.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes. The detailed criteria is set out in the law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Yes. A consumer organization must satisfy certain requirements under the law and must be certified by the Consumer Protection Agency. The Consumer Protection Agency has an authority to disqualify the consumer organization if it does not comply with the law or does not satisfy the requirements.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

Admissibility of a collective redress action is likely to be reviewed by the court at an early stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Collective redress action must be brought by a consumer against the direct party to the consumer agreement. Therefore, third parties cannot use this collective redress action.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

As explained above, collective redress actions in Japan must be brought by certified consumer organization. Therefore, it is not expected that many claims are aggregated. However, the law provides a procedure to merge different cases to one procedure. This suggests that two or more certified consumer organization may jointly become complaints.

Just for the avoidance of doubt, there is no restriction on number of plaintiffs in the ordinary civil litigation.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

The Japanese collective redress action adopted opt-in principle.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The judgment will have effect on victims who opted in. Please note that the victim can decide whether to opt-in or not after the first step judgment is rendered/settlement is reached.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

As explained above, Japanese collective redress action has two step system and the victims can decide whether to opt-in after the judgment is rendered/settlement is reached with the certified consumer organization. The victims can withdraw from the procedures until amount of their damages are finally determined in the collective redress action.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

As explained above, Japanese collective redress action has two step system and the victims can decide whether to opt-in only after the judgment is rendered/settlement is reached with the certified consumer organization.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The defendant will know the composition of victims at the second stage when the opting-in period becomes due.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

It is set out in the law that the commencement of the second step (i.e. the step when victims can opt-in to the procedure) will be published in the official gazette. In addition, the certified consumer organization can publish it on its webpage as well request the defendant to publish it as well. Consumer Protection Agency will also publish the result of the judgment/settlement of the first step on the webpage as well.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

There is no registry. However, Consumer Protection Agency publishes ongoing actions in a timely manner.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

The Japanese collective redress action is designed to work as a standalone system. As mentioned above, the scope of the system is narrowly tailored to only cover monetary damages arising out of B to C agreements, but it is not prohibited to use this system for follow-on actions, if at all possible.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

So long as the infringement relates to B to C agreements, it may be possible to structure the collective redress action as ordinary tort claim against the company which conducted cartel or abuse of dominance.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The victims of antitrust infringement may have access to the antitrust trial files kept by Japan Fair Trade Commission as it is likely to be regarded as interested party to the trial.

Although there is some limited method to ask the other party to disclose documents in the civil procedure, general discovery is not possible in Japan.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There is no limitation period allowing potential claimant to wait with collective redress action.

Please note, however, if it is not a class action, the claimant can choose whether to bring a damages claim based on general tort claim under the Civil Code or special claim under the AMA. The latter can only be brought after the cease and desist order is rendered by the JFTC.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in Masterfoods (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

Generally speaking, the decision by the JFTC or the Tokyo High Court with respect to the administrative procedure is totally different from damages claim in the civil court. However, the decision by the JFTC (or the Tokyo High Court) has a de facto influence on existence of infringement. Moreover, claimant will try to access to the JFTC file by the method mentioned above, so there will be common evidence between the administrative procedure and civil procedure.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

No. It is structured that certified consumer organization which will lead the collective redress action is run in a very transparent way.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its

members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No. The transparency of the certified consumer organization is secured by the law and monitoring by the Consumer Protection Agency.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No. There is no specific system to support potential claimants in collective redress actions. However, certified consumer organizations are typically non-profit organizations and it may be receiving subsidies or tax merits from the government.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

As a general rule, contingency or success fees for legal services covering the above items are not prohibited. However, it may not apply to the collective redress actions in Japan.

As mentioned above, Japanese collective redress actions adopted two step systems. At the first step, the certified consumer organization must bring a claim by its own without involving the victims. At the second stage, the certified consumer organization can receive fees and costs from the victims. However, given that the judgment is already rendered/settlement is already reached at the second stage and considering the characteristic of typical certified consumer organization as non-profit organization, it is unlikely the fees will be on contingent/success fee basis.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Losing party must pay costs such as court fees and other fees paid to expert witnesses, etc. However, it does not cover legal costs of the other party and both parties should borne their own legal costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Japanese collective redress actions are only available by certified consumer organization. It cannot receive fees from victims at the first stage. Although the law has not been implemented yet, I think these will work as safeguards of abusive usage.

5.8 Are the parties to an action able to insure against the cost risks?

The law does not prohibit covering the risk by relevant insurances.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

In an injunctive relief procedure, the court will usually require the claimant to provide certain amount of deposit to cover costs. Also the claimant must prepay the costs for ordinary litigation including monetary damages claim.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

No. The law has not yet implemented and we do not have rules. However, there will be certainly lawyers who represents the certified consumer organizations and the fees payable to such lawyers may potentially include some ethical issues.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

General conflict of law rules and jurisdiction rules will apply to collective redress actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

As explained above, the representative entity must be a consumer organization certified by Consumer Protection Agency. In addition, the collective redress action must relate to B to C agreement. Furthermore, the Japanese court must have jurisdiction on underlying claims. If these conditions are all met, it may be theoretically possible for a foreign consumer to opt-in, but it may not practically happen.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Because the representative entity must be a certified consumer organization, it is unlikely that the actions in the different jurisdictions are based on the same facts. However, this may happen inside Japan (i.e. different certified consumer organization bring cases to different courts in Japan). The law provides the authority to the courts to transfer the forum and integrate the cases.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

I am not familiar with the existence of such collective alternative dispute resolution is available in Japan, but I am sure that it has not yet developed well in Japan. What usually happens is that consumer protection lawyers will gather individual victims and try to negotiate or bring a law suit to the court in a traditional manner rather than using collective alternative dispute resolution.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

No. The typical resolution is the in the court settlement after it is brought to the court.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

No.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

Including a mandatory arbitration clause itself is not prohibited. However, whether or not a mandatory arbitration clause is effective or not may be re-viewed by the court on case-by-case basis in light of the Consumer Protection Act. Whether or not the court will dismiss the case due to a mandatory arbitration clause should be further assessed after the system is implemented.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Please see my answer to 3.6 above.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

There is no specific rule in the collective redress action and general rule will apply. Therefore, the claimant is in charge of enforcement. It should file compulsory execution to the court if it needs to seize assets of the defendant.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

There is no specific rule in the collective redress action which ensures the effective compliance of injunctive order.

National Report of Poland

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

In Poland, the legislation dealing with class actions is the Act dated 17 December 2009 on Group Litigation (the "**GLA**"). According to Article 1 thereof it pertains to judicial civil procedure in cases where the same type of claims are sought by at least 10 people, provided that all claims have one and the same, or at least the same, factual basis.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

The GLÀs applicability is limited to the following types of claims: (i) consumer claims, (ii) product liability claims, (iii) tort claims (with the exclusion of claims for protection of personal rights).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Each class action is to be grounded on the GLA. There is no other piece of Polish legislation that would refer to this type of proceedings. Any issues not addressed in the GLA are subject to the standard provisions of the Polish Code of Civil Procedure. Obviously, in terms of substantial law, the plaintiffs may base their claims on every statute (significant in view of the facts of the given case), for example on the Polish Competition and Consumer Protection Act or the Polish Civil Code. Thus, the charges are based on the substantive law and the function of the GLA is merely limited to the modification of the court proceedings.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

No, it is not allowed.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes, in principle, it is possible to claim both, cessation of unlawful practices as well compensation for damage suffered.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In Clause 1.2 we refer to the types of damages the compensation for which can be sought under the GLA. In every case (assuming it qualifies for the GLA) every type of a damage might be compensated.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

The GLA does not provide for such measures.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

The availability of the 'passing-on' defence has yet to be established in the Polish legal system. Currently, there are no Polish law provisions which would expressly admit or preclude a 'passing-on' defence. Nor does the Polish law know the notion of an 'indirect purchaser', whether as a defence raised in a damages suit, or as a way of reducing the amount of the damages payable. But a similar quantifying effect in relation to damages is achieved by the principle of

compensatiolucri cum damno. According to this principle, the damages awarded to the harmed party cannot exceed the amount of the loss suffered by the party, which cannot be enriched following the award. Damages have the sole purpose of compensating for the loss and not that of punishing the wrongdoer (in general terms, punitive damages do not exist in the Polish legal system). If the harmed party not only sustained a loss but also obtained some benefits in connection with the loss, the court will take this into account after considering all the circumstances of the case. This approach can be applied where the loss and benefits are natural consequences of the same event, such as overcharging resulting from a cartel or abuse of a dominant position, if the harmed party passes the excessive price on to another market participant with a profit margin added. In other words, an entity suffering from an overcharge imposed by a cartel or dominant company may reduce its own losses by 'passing on' the higher prices to its customers. The entity will suffer losses having been charged excessively, but at the same time it passes on some of its losses to its customers. In consequence, the amount of damages awarded to such entity should reflect the circumstance in which the plaintiff has gained partial compensation by way of charging its customers with excessive prices.

It is also noted that, although the passing on defence and the notion of indirect purchaser are alien to Polish law, there are some conclusions that can be drawn about them by reference to the general rules. As regards the passing on defence: (i) there is no presumption that higher prices have been passed on; and (ii) the burden of proof that the loss has been passed on is on the defendant, i.e. the cartel members or the dominant company. This means that first the harmed party (plaintiff) proves its loss and next the defendant, in response to the plaintiff's claim, proves that the plaintiff has passed the loss on. As regards the notion of indirect purchaser: (i) there is no presumption that higher prices have been passed on; and (ii) an indirect purchaser can claim damages relying on indirect causation.

With no authority on the matter to date, we are yet to see how the civil courts will tackle the issue of damages claims from indirect purchasers.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same

alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

A class action is brought to court by a group's representative which may be a person who is a member of the group. A group's representative can bring group proceedings in which he/she is the only plaintiff, but whose claim serves to represent those of the other group members. In consumer protection cases, a group may elect a Municipal Consumer Ombudsman to fulfil the role of plaintiff. The plaintiff must be represented by a qualified attorney-at-law. In the Polish legal system, a Municipal Consumer Ombudsman is an official appointed by a competent local authority.

Under the GLA, representative bodies may not bring a claim.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Not applicable.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Not applicable.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The court decides on the admissibility of a group claim and on the admissibility of a group litigation at an early stage of the proceedings. If the requirements for a group litigation have not been fulfilled, the claim is rejected. Parties can appeal the decision on admissibility of a group litigation, as well as the decision rejecting the claim. The same legal consequences to those which follow bringing of a group claim apply to the same claims brought individually by group members within six months from the time when the group claim was rejected.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

It is possible for third parties to bring an action. After the decision on the admissibility of a group litigation has become enforceable, the court issues a decision commencing the litigation. The decision contains information regarding, among other things, the information for potential group members including the announcement that they can join the group by issuing a statement to the group representative within two months from the date of publication of the decision (joining the group after the two months' period has expired is not possible).

The statement on joining the group should contain the claim, the circumstances justifying it, circumstances justifying group membership, and should present evidence.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

The GLA concerns judicial civil procedure in cases where the same type of claims are sought by at least 10 people, provided that either of the following requirements is fulfilled:

1) claims have the same factual basis; or

2) claims have the same legal basis, and the crucial factual conditions justifying the claims are common for all the claims.

It is possible for multiple plaintiffs to file a complaint jointly. However, a class action concerning pecuniary claims is possible only if the amount of the claim of each member of the group has been made equal with the others. This can also be done in sub-groups consisting of minimum 2 group members.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

The defendant may contest group membership of any group (or sub-group) member during the time period specified by the court, not shorter than one month.

The claimant, if so requested by the defendant, has to give security for costs. Such a request cannot be made by the defendant later than upon the completion of the first procedural activity.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Polish law provides for the "opt-in" principle with respect to the formation of a claimant group in class proceedings. Natural or legal persons claiming to have been harmed may become a member of the claimant group based on a clear statement confirming their intention to join the group stating that they accept the group representative, and that they agree for their claims to be included in the group litigation.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The final judgment issued by the court in class action proceedings produces legal effect only with respect to the members of the particular claimant group (*res judicata*). Therefore, any other party which did not decide to join such claimant group, but has the same type of claim as the claim which was subject to given class action proceedings, may still assert its claim in court, i.e. by way of individual proceedings or other class action proceedings.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

A member of the claimant group may leave the group based on a respective statement which can be addressed to the court by the time the court makes a final decision on the membership of the group (which decision may be made by the court in a closed-door hearing). After such final decision has been made by the court, no person or entity may join or leave the group anymore.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the

claimant party at any time before the judgment is rendered or the case is otherwise settled?

No, a natural or legal person may join the group only by the time the court makes a final decision on the membership of the group (please refer to our respective answer in Clause 3.3 above).

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The group representative is obligated to make a list of all those who joined the group and deliver it to the court, attaching all the statements of group members (together with the statement of claim). The court delivers such list together with the statement of claim to the defendant. The final decision of the court on the membership of the group (issued after the period of time during which the composition of the group may change) is also delivered to the defendant.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There are no specific safeguards regarding the protection of the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment. After the decision on admissibility of the group litigation has become enforceable, the court issues a decision commencing the litigation. Such decision contains, in particular, information for potential group members, including an announcement that they can join the group by issuing a statement to the group representative within two months from the date of publication of the decision. This decision is published in the Court and Commercial Gazette (*Monitor Sądowy i Gospodarczy*), as well as in the press if the court considers it desirable. The publication is not necessary if the circumstances clearly show that all the potential group members already issued statements on joining the group.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, there is no such registry in Poland.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In Poland the class action proceedings may apply to the following areas of law / sectors: (i) consumer protection cases; (ii) product liability cases; and (iii) tort cases (including cases resulting from the infringement of the competition law), excluding personal rights protection e.g. defamation. Therefore, if a particular claim may be allocated to one of the areas mentioned above, it may be asserted within the class action proceedings as a stand-alone action or follow-on action (as defined in the question) which may be important in the case of proceedings relating to the infringement of the competition law.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Yes. Such stand-alone and/or follow-on actions are available for both bilateral antitrust infringements and unilateral abuse of a dominant position.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

According to the general rule in Article 73 of the Polish Act on competition and consumer protection, no information obtained in course of antimonopoly proceedings may be used in any other proceedings. The Act allows just a few exceptions to this rule, as follows:

– criminal proceedings commenced at public prosecutor's initiative or fiscal crime proceedings;

– other proceedings conducted by the Polish Competition Authority (PCA);

– exchange of information with the European Commission and competition authorities of other Member States pursuant to Regulation 1/2003/EC;
– exchange of information with the European Commission and relevant authorities of other Member States pursuant to Regulation 2006/2004/EC;
– provision of information to relevant authorities that suggests violation of other laws.

These exceptions do not include civil proceedings. Therefore, it should be expected that information obtained by PCA in course of antimonopoly proceedings cannot be used for private enforcement of claims arising from competition infringements. Legal scholars argue that Article 73 § 1 of the Act generally forbids provision of any information for the purposes of other proceedings if such information was obtained in course of PCA proceedings. This rule extends to all kinds of information, whatever its nature or the procedure during which it was obtained. But its principal purpose is to provide additional protection and safeguards, on top of those laid down in Article 69 of the Act, against unauthorized access to business secrets (and information protectable under other laws). It will be noted that the Article 73 rule is addressed to the PCA, and not to others (such as the parties in the proceedings).

It is worth noted that Polish law does not recognize a disclosure obligation in the sense recognized by the common law systems. The litigating parties are obliged to disclose only those documents on which they intend to rely. However, the court may, usually at the request of another party, order any party to produce a document to the court. The requesting party must justify its request by stating the relevance of the document and showing what facts are to be proven thereby.

A refusal to submit the requested document is permissible only if the document contains State secrets or if the person requested could refuse testimony as a witness as to the circumstances contained in the document, or the person requested holds the document on behalf of a third party that would be allowed to withhold the document for the same reasons. However, the foregoing exemptions do not apply if such holder of the document or such third party owe a duty to produce the document to any of the litigating parties, or if the document was issued in the interests of the party requesting the disclosure.

Further, a disclosure may not be refused by a party to the proceedings if the party would sustain a loss in the form of the lost suit due to production of the said evidence. It is worth noting that according to the doctrine a party is obli-

gated to submit requested document even if it results in losing both ongoing proceedings or any other one.
Whenever party to the proceedings makes refusal to produce evidence it is always leave for the court to decide whether such action has justified grounds and whether it may have negative implications.
The GLA does not contain any specific provisions in that respect. Therefore, the general provisions relating to collection of evidence contained in the Polish civil procedure will be applicable. Those provisions allow for a number of ways in accordance with which the evidence to be used in court proceedings may be collected.
Under Polish civil procedure there is no obligation to disclose all documentary evidence. The court is entitled to require each party and, if necessary, third parties, to disclose specific documents or groups of documents.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There are no specific rules on limitation periods contained in the GLA. Therefore, with respect to any claims addressed by way of class action proceedings general rules on prescription periods are applicable.
In general, limitation periods in Poland are set out in the Civil Code. They differ according to the type of action. Unless there is a special rule providing otherwise, the period of limitation shall be ten years, or three years for claims in business/commercial cases.
There are special rules for specific types of action, including damages claims. Pursuant to Article 442(1) § 1 Civil Code the prescribed period of limitation for a claim for remedying damage caused by tort is three years after the day on which the aggrieved party learns of the damage and of the person obliged to remedy it. However, in any case, a damages claim shall expire after the lapse of ten years from the day on which the harmful event occurred.
Claims under the Unfair Competition (Combating) Act also become time-barred within three years. This applies not only to damages claims but also to other types of action resulting from unfair competition practices.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play

a role in your country with respect to actions based on cartel damages?

A decision of the national competition authority does not create a rebuttable presumption of proof.

The decisions issued by the Polish Competition Authority (PCA) is treated as fact-finding (the PCA can, for example, declare whether a certain action violated competition law, or whether a certain action was legally valid). Therefore, if a decision of the OCCP President is of a preliminary character (it is conclusively resolves an issue that is crucial for the resolution of some other dispute before a court or arbitral tribunal) it is applied in the sense that its dispositive part is a fact that does not need further proof.

Preliminary character of the final decisions issued by the PCA has been confirmed by the Supreme Court judgment dated back to 2008. Ruling in question expressly reaffirmed when the PCÀs decision finding undertaking guilty of abusing its dominant position becomes final, it binds the court with respect to the circumstances of competition law infringement.

As regards the court ruling, according to the Polish civil procedure, the final ruling is binding not only upon the parties and the court that issued it, but also upon other courts, as well as other state bodies and bodies of public administration, and, in the cases provided for by the provisions of law, also upon other persons.

So far, there have been no class actions in cartel damages claims in Poland.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

A class action can be financed by any person, not necessarily a party to the proceedings. There are no special rules in this regard.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No, there is no such obligation.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest

between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

The court cannot stay the proceedings for reasons relating to the funding of the action, but lack of payment may result in returning or rejecting the claim.

The claimant in a class action must be represented by an attorney or a legal advisor. According to the general civil procedure rules, pleadings filed by an attorney or a legal advisor, which were not duly paid for shall be returned by the presiding judge without a prior request to pay the fee due, provided that such pleadings are subject to fixed charges or charges calculated as a ratio of the value of the matter at issue claimed by the party. A party may make any due payment within one week from the day of delivery of an order to return a pleading. If payment is made in correct amount, he pleading shall become effective as from the date of the initial filing thereof.

As regards the rejection of the claim lease see Clause 5.9 below.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

There are no such funds.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Pursuant to the GLA, the fee payable to the counsel representing the group can be agreed as the percentage of the award, however it cannot exceed 20% thereof.

The above provision is an exception from the general rule stipulated, stated by the rules of professional conduct for lawyers, according to which the counsel's fee may not be contingent exclusively upon success.

Whether the fee will cover only the representation before court or also other actions (such as gathering evidence, case management etc.) depends only on the agreement between the parties.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

General rules of the Polish civil proceedings govern the class action lawsuit. It means that the losing party, at the request of the winning party, has to reimburse legal costs (i.e. court fees, attorneys' fees etc.) borne by the party that was successful. The court fee for a class action is the lesser of 2% of the value of the claim or PLN 100,000 (approximately EUR 25,000).

Where only a part of the claim is granted, the legal costs shall be reciprocally exclusive or adjudicated in proportion to the granted and rejected parts of the claim. However, the court may oblige one of the parties to reimburse all costs if the adverse party lost only a minor part of the claim or where the amount due to the latter party depends on the reciprocal calculation or evaluation by the court.

The costs shall be reimbursed to a defendant despite a complaint being upheld, if the defendant gave no reason to start a case and recognised the complaint at the originating procedural action.

In specially justified circumstances, the court may charge the losing party with only a part of the costs or no costs at all.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

There are no specific rules or safeguards in this regard.

5.8 Are the parties to an action able to insure against the cost risks?

Certain insurance companies in Poland offer insurance of legal protection. It provides for the protection against the risk of reimbursing legal costs in case of losing the case.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

The claimant, if so requested by the defendant, shall give security for costs. The court shall specify the time for satisfying the request for security for costs, not shorter than one month, as well as the amount of the security deposit, taking in-

to account the probable costs to be incurred by the defendant. The deposit shall be paid in cash. It cannot exceed 20% of the value of the claim.
If the security is not paid, after the expiry of the time period specified by the court, the latter can, upon the request of the defendant, reject the claim or the appeal. The costs shall be apportioned as if the claim has been withdrawn.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

There are no (other) ethical or Bar rules, which will be relevant with respect to class actions.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific international private law rules applicable to class actions. General rules apply.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

A single collective action in a single forum is not prevented by any particular rules on admissibility of foreign groups of claimants.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Under the GLA, a class action is brought to court by a group representative (see Clause 2.1. above). There are no particular rules that would prohibit representative entities designated by a foreign country to have legal standing to bring an action before Polish court.
In each case, the claimant must be represented by an attorney or a legal advisor (national or foreign – admitted to practice in Poland).

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the

jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The general rules of the Polish Code of Civil Procedure apply. If the same action between the same parties had been previously brought before a foreign court, the Polish court will stay its proceedings. After the commencement of foreign proceedings, the court will decide whether to acknowledge the foreign judgment (the prerequisites for refusal are stipulated in the Polish Code of Civil Procedure, e.g.the judgment will not be acknowledged if the party was deprived of the possibility of defending its rights during the proceedings) or to discontinue the proceedings.

Although the general rule is that the Polish court is competent to hear the case if the defendant is domiciled or has its seat in Poland, there are some exceptions from the above, for instance:

- if a consumer is the plaintiff, the case can be brought before the Polish court also if the consumer is domiciled in Poland, and it is in Poland that he/she performed actions necessary to execute the contract;
- Polish courts are competent for cases relating to (i) obligations resulting from legal action taken or to be taken in the Republic of Poland, (ii) obligations not resulting from legal actions, which arose in the Republic of Poland;
- claims connected with the activity of a Polish branch of foreign entity will also be heard by Polish courts.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

Mediation is available at any stage of class action proceedings. It can be pursued either on the basis of a mediation agreement or in compliance with instructions given by the judge in court proceedings.

According to the GLA, the court can refer the parties to mediation at any stage of the proceedings. However, the general civil proceedings rules (which apply here) stipulate that, after the end of the first scheduled hearing, the court may refer the parties to mediation only subject to a joint petition from such parties.

In no event shall mediation be conducted if a party does not express its consent thereto within one week from the day, on which a decision to refer the case to mediation is announced or served on a party.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Although the courts encourage alternative dispute resolution, the recommendation is usually not followed.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The general rule is that the limitation periods are interrupted (i) by any act before the court or other authority entitled to hear cases or enforce claims of a given kind or before the court of arbitration, performed directly either to vindicate or to establish, or to satisfy or to secure a claim, (ii) by the acknowledgement of the claim by the person against whom the claim is made (iii) by initiating mediation.

After each interruption of limitation period it shall run anew.

In the case of interruption of limitation period by an act in proceedings before the court or other authority entitled to hear cases or to enforce claims of a given type, or before the court of arbitration, it shall not run anew until the proceedings are concluded.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

No, it is not allowed. Such provision will be considered by the Polish Court for Consumers and Competition Protection as inadmissible and, consequently, ineffective towards the consumer.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are

such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

The decision rendered in class action proceedings is announced publicly (in an "open-door" hearing) by the court. Neither the parties to the proceedings nor any other third parties are informed in any other way about the decision.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

An enforceable judgement has legal effects for all members of the group.

The enforcement order with a writ of execution appended in the case of a pecuniary claim awarded to each member of the group is a judgement specifying such claim, in particular its amount. Each member of the group can initiate execution with respect to the amounts he has been awarded.

As regards cases concerning non-pecuniary claims, the execution of the awarded claim is initiated upon the request of the group representative.

If the awarded non-pecuniary claim has not been satisfied within six months from the time when the judgement became enforceable, and, during this time, the group representative did not request commencement of the execution, each group member can request execution.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

There are no particular rules in this regard.

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*, hereinafter "LEC") recognizes the right to be a party in civil proceedings to the following (Arts. 6.1.7º and 8º):

● To consumer or user groups affected by a harmful event, when individuals who compose those groups are determined or easily determinable. To stand in court, the group will need to be formed by the majority of the affected.

● To entities qualified under EU law to exercise injunctive relief actions (cessation of practices/behaviours) in defense of collective interests and diffuse interests of consumers and users.

Furthermore, Art. 11 LEC establishes that:

● Notwithstanding the individual standing of the injured, legally constituted associations of consumers and users are entitled to defend in court the rights and interests of its members and those of the association, and also the general interests of consumers and users.

● When the injured by a harmful event are a group of consumers or users whose components are clearly identified and are readily determinable, standing to claim defense of these collective interests corresponds to the associations of consumers and users, to the legally constituted entities for the defense or protection of such interested and to the affected groups themselves.

● When the injured by a harmful event are an indeterminate or difficult to ascertain plurality of consumers or users, standing to sue in court to defend these diffuse interests shall lie exclusively with the associations of consumers and users which, under the Law, shall be deemed to be sufficiently representative.

● Also, the Public Prosecutor and qualified entities under Art. 6.1.8º LEC shall be empowered to claim the injunction for the defense of the collective and diffuse interests of consumers and users.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law

(such as consumer law, competition law, environmental law…)?

Class/collective actions have a scope limited to some fields of law, namely consumer law (including unfair terms in consumer contracts) and unfair competition (including unfair advertising).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

It would theoretically be possible to bring a class action/collective redress action on the grounds of several statutes, although it may sometimes be difficult, considering the specific scope of each area of law where class actions/collective redress actions are allowed.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Summary/emergency proceedings are not specifically foreseen under Spanish law for class actions (or individual actions for that matter). It is allowed, however, to initiate interim/provisional measures.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

When the action is started by the group of persons directly affected by a harmful event or by the Public Prosecutor, it is possible to claim cessation and compensation for the damage suffered.

When the action is started by entities qualified to defend collective and diffuse interests, only the claim of cessation is generally possible.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Yes, all kind of material and moral damages may be compensated.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

The compensation may never exceed the compensation that each victim would have received in an individual action. Overcompensation is generally forbidden under Spanish law.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

In does not play a significant role and it has been analysed by scholars with skepticism. We are not aware of relevant Spanish case law of that defence.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Both, see answer to 1.1.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Collective and representative actions are complementary to one another, to the extent that Art. 15 LEC establishes that either the individuals or the representative entity must inform each other of the filing of their respective actions, in order for the non-claiming party to intervene in the procedure.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Except for public entities, representative actions may only be started by entities with a relationship between its main objectives and the rights they claim to have been violated.

In a class action, no sanction is generally foreseen in case the representative entity does not comply with such requirement. However, its action will most likely be rejected, which will generally result in the obligation to pay all legal costs.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The right to stand in Court may be examined at the beginning of the proceeding, for example by reference to the list of entities qualified by the EU to defend collective interests, published in the Official Journal of the European Union.

However, the admissibility of the class action with regards to its relationship with the objectives of the acting entity will generally be ruled together with the merits of the case.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Third parties may not bring actions under Spanish law. However, EU, national and regional public entities competent on antitrust law may be heard in proceedings related to antitrust infringements (Art. 15 bis LEC).

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Yes, multiple plaintiffs may file a complain jointly.

In addition, in all actions initiated by qualified entities or consumer groups, individual harmed consumers shall also be called to participate in the proceedings in order to defend their individual rights (namely, their right to a compensation).

This call shall be made through the media in the place where the harm derived from the wrongful conduct may have manifested.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

Procedural defences may refer to the right to stand in Court of the group or entity, but not to their relationship to the merits of the case.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

We have an opt-in system (see answer to 1.1).

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

Victims not participating in the class action may benefit from a declarative judgement and use it in a later individual/collective claim for compensation.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

No, a member of the claimant party is not free to leave the claimant party.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

Yes, see answer to 2.6.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Yes, the defendant is informed fully at the beginning of the procedure.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

See answer to 2.6. As for the second question, there are no safeguards on this regard.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, there is no such registry.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

It is possible to start a stand-alone action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Yes, they are available for both unilateral and bilateral antitrust infringements.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of

devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

Discovery is not possible in Spain.

However, civil procedures allow broad access to documents in possession of the other party or of third parties.

Access to documents in the hands of a public authority would generally be accessible in an antitrust case, except where other rights would need to be protected (personal data, privacy, etc.).

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

No.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

EU case-law, including *Masterfoods*, is binding over Spanish Courts.

Therefore, Spanish courts may not rule in a manner inconsistent with Decisions already taken by the European Commission. When deciding on agreements or practices which may be the subject of a pending Commission Decision to be adopted, Spanish Courts are required to avoid ruling in a manner inconsistent with the decision that the Commission intends to take.

To this end, Spanish Courts may resort to consultation and cooperation mechanisms or request a preliminary ruling to the ECJ.

On the other hand, there is no rule under Spanish law conditioning the exercise of judicial actions to a prior administrative decision of the European Commission or the Spanish Tribunal for the Defence of Competition.

In fact, in the judgments delivered in the cases *DISA* of 02.06.2000, *Mercedes Benz* of 02.03.2001 and *Petronor* of 15.03.2001, the Spanish Supreme Court has applied the first paragraph of Art. 81 TEC without a prior declaration of infringement by the European Commission or the Spanish Tribunal for the Defence of Competition. One might even question whether such a requirement would be inconsistent, by itself, with the direct effect recognized to Arts. 81.1 and 82 TEC.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

There is only Art. 27. RDLeg 1/2007, TRLGDCU[1], containing a prohibition for consumers' and users' Associations to "receive economic or financial benefits from companies or groups of companies supplying goods or services to consumers or users."

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

In Spain the judge does not examine the origin of the funds that are going to be used to support the legal action at the outset of the proceedings. The matters being analyzed by the judge in order to admit an action are all procedural matters: legal and procedural capacity and procedural requirements to the proceedings.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

In Spanish regulations there is no possibility of staying proceedings for any reason relating to the funding of the action. Thought it could be case that defendant will start proceedings against a third party on the grounds of unfair competition, should it be the case.

[1] REAL DECRETO LEGISLATIVO 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias. (Royal Legislative Decree 1/2007 , November 16, approving the revised text of Law for the Protection of Consumers and users and other complementary laws). For future citation " RD 1/2007, TRLGDCU "

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

For consumers and users being legally registered in the State Register for Consumers' and Users' Associations, it is established under RD 1/2007, TRLGDCU the granting of public funds, as well as the benefit of Legal Advise established under Law 1/1996 of January 10.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

There is no legal regulation in Spain prohibiting the use of the Quota Litis. Before, it was the Spanish Bar Associations that was imposing minimum fees under penalty in case of breach thereof. This was the situation until 2008, when the Supreme Court gave judgment declaring that lawyers would be free to agree with their clients the charge of a fee percentage depending on the results of the proceedings.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

It depends on the jurisdiction to be taken into account:

In civil jurisdiction, in first instance the party having all its claims dismissed will have to reimburse the costs, provided the Court considers, and gives a reason therefore, that the case presented important doubts de facto or de jure. When bringing an extraordinary appeal for annulment and procedural error it can be ordered a payment of costs in case of being dismissed all the claims. For total amount not exceeding a third of the procedural expenses, by each one of the litigants obtaining such judgment, provided that the Court declares the recklessness of the litigant ordered to reimburse the costs.

In jurisdiction of administrative courts, in first or in sole instance, the party having all its claims dismissed will have to reimburse all the costs, provided that the court considers, and gives a reason therefore, that the case presented important doubts de facto or de jure. In the rest of instances the appellee will be ordered to reimburse the costs if the appeal is totally dismissed, provided that the court, by giving a reason therefore, considers that there is a coincidence of circum-

stances justifying not to order the reimbursement thereof. The reimbursement could be made on the total, partial or to a maximum amount.
In jurisdiction of labour matters, in first instance, there is generally no order to reimburse the costs, and in case of appeal the losing party will reimburse the costs, provided it has benefited from complete or partial legal aid or it is a trade union. To the maximum amount of 1.200 euros in appeals for reversal and 1.800 euros in appeals to Supreme Court Excluding the proceeding about industrial actions (actions affecting several workers, usually class actions), in which each party will be accountable for the costs incurred with their intervention. All that provided that the Court it declares that they acted recklessly or in bad faith.
The holders of the right to legal aid will only reimburse costs in those circumstances established under the Act of Legal Aid.
Additionally, there are institutions such as the public Prosecutor, Ombudsman and administrative bodies that cannot be ordered to reimburse any costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

The order of costs reimbursement is itself a rule aimed at avoiding incentives to abuse not only the collective redress systems but also any other kind of actions, and in some jurisdictions such as the jurisdiction of labour matters, there are fines for those cases in which there is wilful misconduct or recklessness. In addition, there are other fees and deposits demanded in cases of appeal.

5.8 Are the parties to an action able to insure against the cost risks?

There are circumstances in which if the person gives prove that he/she acted in good faith, he/she can avoid the order for costs reimbursement, which is the case of out-of-court claims in civil jurisdiction, or when reconciliation settlement is been followed in jurisdiction of labour matters.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

In enforceable proceedings the person can apply for an order for security of the costs of an amount not exceeding the 30% of the capital.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

I am not aware of any ethical Bar rules.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There is no specific general because first you have to determine the victim and what would the action be (e.g: consumers, workers...).

The answer to international private law rules has to be searched in the general instruments in the case of Europe, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (particularly, Article 15 regarding consumers), or the Regulation (ec) no 593/2008 of the european parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Their application depends on the answer given to a previous conflict, i.e, on the descriptions made about the actions.

With regard to specific internal rules, there are specific acts, being applicable the Royal Decree 1/2007 of November 16 of the consolidated text of the general Act for the Protection of Consumers and Users. There is also the LEC in its Article 11 and 11bis ruling the legitimacy for collective actions.[2]

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No. It depends on the type of action. See above 6.1

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

For this question it is necessary to consult domestic procedural law. The entities of other Member States of the European Community founded to protect the collective interests and the individual interests of the consumers prepared through its inclusion in the list published for that purpose in the Official Gazette

[2] Laura Carballo Piñeiro, *Proteccion de inversores, acciones colectivas y derecho internacional privado*, 37 Revista de Derecho de sociedades 2011 at 209.

of the European Communities do have legal standing. For those countries outside the EU it will be necessary to consult the bilateral Agreements signed in each specific case.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Section ninth of the Regulation 44/2001 states the lis pendens and related actions:

"Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court."

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

Yes, there are, and they are regulated by the Royal Decree 636/1993 of May 3, regulating consumer affairs arbitration system. The rules under this Regulation do not regulate in an exhaustive way the consumer affairs arbitration, for consumer affairs arbitration system is executed under the Act 60/2003 on Arbitration.

All the professionals and businessmen wishing to become a member of the consumer affairs arbitration system can join it by making a public offer of submission to consumer affairs arbitration system regarding future conflicts with consumers. Therefore, once the company has become a member of the consumer affairs arbitration system, it is subject to arbitration. The fact that this company has a conduct of inactivity won't prevent the award to be passed or deprive it of effectiveness. And this award will be binding and will have identical effects on the res judicata. (Art.10 and 17 Royal Decree 636/1993). Another thing would be that the party opposing to the submission can request an *Action for annulment of the award*. *(Art. 40* Act 60/2003), on the grounds of, pursuant to Art. 41 Act 60/2003:

1. The award can only be annulled when the party requesting annulment alleges and proves:

a) That the arbitration agreement does not exist.

b) That the appointment of an arbitrator or the arbitration actions has not been dully notified, or it cannot, for any reason, make use of its rights.

c) That the arbitrators have decided about matters not subject to their decision.

d) That the appointment of arbitrators or the arbitration proceedings have not been done under the agreement between the parties, provided that the said agreement was against a peremptory norm of this Act, or, because of the lack of such agreement, have not been done pursuant to this act.

e) That the arbitrators have decided about questions not subject to arbitration.

f) That the award is against public order.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Thanks to the Royal Decree 636/1993 of May 3, regulating the consumer affairs arbitration system, which was quickly established in Spain. Disputes settlements through arbitration or reconciliation are really developed in the sphere of consumers actions. This is not happening in other spheres, that is the reason why the disputes settlement out of the court is being promoted from public bodies, being useful for that purpose the Act 5/2012 of July 6, about mediation in civil and commercial matters.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

Pursuant to Art. 1973 of *CC* limitation periods applicable to the claims can be suspended in three ways: for its execution before courts, for creditor's out-of-court claims and for action of recognition of the debts by the debtor.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

The Royal Decree 1/2007 of November 16, by which the consolidated text of the General Act for Protection of Consumers and Users and others complementary acts are passed, includes different provisions preventing a seller from imposing to a consumer terms subject to mandatory arbitration. In this sense Art 10 establishes that "previous waiver of consumers' and users' rights protected under this act is void", and thus Art. 82 establishes that:

"All the terms not negotiated individually and all the practices not expressly permitted that, against good faith requirements, to the prejudice of consumers and users, a significant imbalance in rights and obligations of the parties taking part in the agreement will be considered as unfair terms. And under section 83 the consequences of the said unfair terms are described in the sense that "the unfair terms will be considered as null and void and will be removed".

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Yes, provisions do exist, which regulate the way the victims of the practice are informed about the decision rendered in the class action. Which is the case of Art. 15 *LEC*, regulating publicity and intervention in proceedings for protection of rights and collective and individual interests of consumers and users.

1) In the proceedings promoted by associations, or by affected groups, those having been damaged as consumers or users of the good or service will be called to appear. This call will be made by the Court Clerk by publishing the admission of the claims in the media broadcasted throughout the whole territory where the damages on rights and interests are caused.

2) When it is about proceedings in which the persons damaged by the harmful event have been determined or are likely to be determined, the claimant or the claimants must have previously warned all the concerned persons about their purpose of lodging a claim.

3) When a harmful event damages several indeterminate persons or those persons unlikely to be determined, the call will stay the proceedings for a period not exceeding two months and the Court Clerk will decided in each case by taking into account the circumstances and complexity.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

Pursuant to Art. 517 of the *LEC* the orders are enforceable within 5 years from the final decision (Art.518 *LEC*). The claimant will lodge the corresponding claims for enforcement in case the defendant has not voluntarily paid the amount that he/she was ordered to pay. Once the claims for enforcement are lodged there is no deadline thereof.

The same Court that followed the ordinary proceedings will follow the proceedings for enforcement.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Pursuant to Art. 589 of the *LEC* the requirement to the judgment debtor so that he/she declares the assets, whose seizure is sufficient to cover the amount for which the enforcement was made, could be done with warning letters about the imposing sanctions in case he/she does not provide his/her assets declaration. For the non-monetary sanctions Art.. 710 of the *LEC* establishes that in case the defendant breach the order:

- Reversion of the damage caused and abstention of repeating the misconduct will be demanded;
- To order compensation for damages;
- To order a fine for each day's delay.

The amount of this fine should be deposited in the State Treasury, it can range from 600 to 60.000 euros depending on the type and importance of the damage caused and the economic capacity of the convicted person.

- To order the total or partial publication of the resolution against defendant.

[1] COM(2013) 401/2
[2] C(2013) 3539/3
[3] COM(2013) 404 final

National Report of The Netherlands

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Yes, there is specific legislation for dealing with class actions and mass settlements. In general, there are three ways to approach mass damages in the Netherlands.

First: collective action. Article 3:305a of the Dutch Civil Code allows an entity to act on behalf of a class to the extent that its articles promote that interests. The 3:305a-entity can (in general) only obtain declaratory judgment. In July 2014, a legislative proposal was published. The proposal creates the possibility to claim damages in a collective action in the Netherlands.

Second: group action. In case of mass damages, one could choose to act with (for instance) an assignment of claims model in which the victims assign the claim to a special purpose vehicle.

Third: mass settlement (also called 'WCAM-settlement'). Once a mass settlement is reached, this settlement can be declared binding for all victims, save for those who opt-out within a certain period of time determined by the court. The request must be made by a representative entity.

Please note that combinations of the abovementioned possibilities are possible. For instance, a collective action can be followed by a WCAM-settlement.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Collective redress applies to all substantive area's of Dutch law.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

In the Netherlands, it is allowed to bring a class action/collective redress action on the ground of several statutes.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In the Netherlands, there is no rule that forbids emergency proceedings on behalf of a class. However, the merits of the case should be suitable for such proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes, it is possible to claim cessation of unlawful practices.

Also, it is possible to obtain monetary compensation in a group action (for instance with an assignment model).

At this moment, in a collective action, one cannot claim monetary compensation yet (this may change if the legislative proposal as referred to in our answer to question 1.1 is adopted). However, it is possible to obtain a declaratory judgment. After obtaining this declaratory judgment, the plaintiffs can either try to reach a settlement or claim for damages in a 'follow-on' procedure.

Please note that it is also possible to claim damages by combining a collective action and a group action. If the claims are assigned to the 3:305a-entity, the 3:305a-entity can claim those damages.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

See previous answer. Every type of damage that can be claimed in other Dutch civil procedures can be claimed in a group action as well. One big exception is that, at this moment, it is not possible to claim monetary damages with a collective action (again: this may change if the legislative proposal as referred to in our answer to question 1.1 is adopted).

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

Punitive damages are not awarded in the Netherlands.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Litigation in the field of anti-trust actions for damages is, mostly, still ongoing. So far, the passing on defence has played a role in a follow-on action regarding the gas insulated switchgear cartel. The district court refused to acknowledge the passing on defence. However, the decision by the district court has been appealed and the passing on defence was one of the main themes in the ongoing appellate procedure. The decision of the district court was overturned on appeal, the court of appeal thus acknowledged the passing on defence, confirming that damages consist of the overcharge minus the amount which has been passed on. The court of appeal has, at the time of writing this questionnaire, not yet ruled on the question regarding the division of the burden of proof of the passing on defence.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Both are possible. The action can be brought by both a group of individuals (group action) and by an entity that promotes the interests of the class (collec-

tive action). In a group action, only the individuals who assigned their claim to the special purpose vehicle directly benefit from a judgment.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes. Collective actions can be brought by a foundation or association with full legal capacity. The action must be intended to protect similar interests of different persons to the extent that the articles promote such interests. Before instituting proceedings, the plaintiff must make sufficient attempts to negotiate with the defendant.

There are no specific rules for group actions.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Yes. The entity must either be a non-profit foundation or a non-profit association. The articles must allow the entity to promote the interests of the victims involved. If the entity does not comply with the provisions, the claim will be dismissed.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

No, there is no separate certification stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Yes. A claimant should have 'sufficient interest' in the case it brings. Dutch courts seldom deny standing because of insufficient interest. Anyone with sufficient interest has standing to bring an action. Under Dutch law, no distinction is made between direct or indirect purchasers.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Yes, that is possible with a group action, in which claims may be aggregated in a joint complaint (see also our answer to question 1.1). For instance by providing a special purpose vehicle with a assignment in order to be able to commence proceedings on behalf of every victim involved.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

In a collective action, the defendant could state that the entity does not have standing because in the given circumstances, it has not made a sufficient attempt to achieve the objective of the right of action through consultations with the defendant. The defendant could also state that the interests of the persons on whose behalf the right of action is instituted have not been sufficiently safeguarded by the entity.

In a group action, the defendant could for instance argue that the assignments are invalid or unclear.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Both. A group action is based on the opt-in principle. Only those who expressly join the proceedings will benefit from the proceedings.

In a collective action, the entity tries to obtain a declaratory judgment for the benefit of every victim. In a 'follow-on' action, individual victims have to recover their own damages.

A WCAM-settlement is based on the opt-out principle. The settlement will be binding for every victim, save for the victims that expressly opt-out.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

Various answers:
Effect of a judgment in a group action: the judgment is only binding for the victims who assigned claims.
Effect of a judgment in a collective action: every victim can use the precedent to recover their own damages (by either 'follow-on' procedure or settlement).
Effect of a judgment in a WCAM-settlement: binding for every victim, save for those who opt-out.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

We will answer this question with regard to a group action. In that case, the entity that acts on behalf of the claimant, will have to reduce its claim. In a group action, entities in general want to avoid claimants to leave the proceedings and effectuate this with contractual provisions.
After a WCAM-settlement is declared binding, the claimants can only opt-out during the opt-out period. The length of the opt-out period is determined by the court.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

With regard to a group action: yes, by increasing the claim, but the defendant can bring forward objections. In case of such objections, the court has to rule if adding parties to the procedure is against good procedural order.
The question is less relevant with regard to both a collective action and a WCAM-settlement because any victim will benefit from the outcome of these proceedings.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Group action: the entity must make clear on behalf of who it acts, for instance by submitting the assignments to the court.

Collective action: in its articles, the entity must clearly describe its objectives and in particular the interests of which group it promotes.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There are only provisions on the way in which victims are informed about a WCAM-settlement. When the court declares the settlement binding, it will also rule that the settlement must be published in at least one newspaper.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, there is not.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In the Netherlands, it is not required to have class actions / collective redress actions follow on from infringement decisions. Having said that, collective actions for damages in the field of competition law have so far been started following a finding of an infringement by a competition authority (or during the investigation by a competition authority).

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Even though no actions have been started following a unilateral antitrust infringement, it would be possible to start an action following a finding of an abuse of a dominant position. All of these actions are based on tort, as such, unilateral conduct could qualify as wrongful behaviour in largely the same way as bilateral conduct.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In the Netherlands, a distinction should be made between civil and administrative "fact finding".

Regarding civil fact-finding, there is a limited system of discovery in place, based on article 843a of the Dutch Procedural Code ("DPC"). This article gives claimants the possibility to claim pieces of evidence (such as documents, audio or digital evidence) under certain conditions. These conditions are as follows:

1. The evidence has to concern a legal relationship (including tort) to which the claimant is a party.
2. The evidence has to be sufficiently described, in the sense that it is possible to identify the claimed evidence.
3. The claimant has to show a genuine interest in obtaining the evidence.

Apart from these conditions which must be satisfied to grant access to evidence, parties which hold the evidence may refrain from providing access if important reasons prevent them from granting access to the evidence.

With regard to the administrative track, the Dutch *Wet openbaarheid van bestuur*, the Freedom of information Act ("FIA"), grants claimants the possibility to acquire documents from the administrative procedure prior or pursuant to a finding of an infringement. The authority has long refused to make documents public whilst the investigation is ongoing. The court has abolished this policy since the FIA is applicable to the administrative track with the authority, therefore, no exception should be made. However, the authority still often refuses to grant access to documents on the basis that they contain confidential information.

With regard to evidence obtained under the leniency program, the Dutch authority has always felt that the importance of its public enforcement outweighs the need for public access to leniency documents. Given that the rule following out of the *Pfleiderer* and *Donau Chemie* judgments are to be reversed by the proposal for a directive on actions for damages for infringements of competition law, it is likely that the authority will revert to its preferred policy of not granting access to leniency material.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

Under Dutch law, limitation periods commence when it is possible for claimants to start an action. As such, it might depend on the case at hand if the limitation period commences prior to or following a finding of an infringement of competition law. So far, the Dutch court has ruled on this issue in favour of the claimants. In a case following the Gas Insulated Switchgear-cartel, defendants raised the issue that the limitation period had lapsed since claimants were, or had to be, aware of their potential claim since the publication of the investigation by the European Commission. The District Court did not agree with the defendants' view. It ruled that claimants did not have to be aware of their potential claim when the investigation was announced. The limitation period therefore commenced at the date of the Commission decision finding an infringement. The judgment on the start of the limitation period has been confirmed on appeal in September 2014. However, this should not be regarded as a hard and fast rule. Under circumstances it could be possible that claimants would have to be aware of their potential claim prior to a decision by a competition authority.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

The Dutch Supreme Court ("DSC") ruled on the issue of the binding force of Dutch administrative decisions in the *Smit/Staat*-case. In this case, the DSC ruled that a civil court is bound by the presumption that an admistrative decision is binding until it has been annulled in an administrative procedure.

With regards to *Masterfoods*, the Dutch court has ruled on this case in the procedures regarding the *air cargo*-cartel and the *parafin wax*-cartel. In these cases, defendants attempted to invoke *Masterfoods* in order to stay the proceedings. The Dutch High Court of Amsterdam has given the following rules for a potential stay based on the *Masterfoods*-doctrine:
1. defendants have to show that they have appealed the administrative decision within the applicable time limit.
2. defendants have to show that their administrative appeal has a certain degree of merit; i.e. a *pro forma* appeal or an appeal that is *prima facie* without any merit cannot result in a stay of the civil proceedings.
3. defendants have to give show which defences they are going to bring forward in order to allow a judge to decide to what extend these defences are dependent on the outcome of the administrative procedure.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

There is no formal prohibition on third party financing of procedures as long as the independence of the claimant is not in any way limited. The code of conduct regarding collective redress actions stipulates that representative parties are not allowed to receive third party funding if this might endanger its independence.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

There are no public funds available for the funding of collective actions. However claimants could, in some instances, receive funding from their legal aid insurance. This does depend on the coverage of the insurance.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency or success fees for legal services rendered by a member of the Dutch Bar are, at present, not permissible under Dutch law.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

The "loser pays principle" applies under Dutch law. However, the legal costs are fixed, so there is no reimbursement of the actual costs borne by the winning party.[1] As such, the winning party will, in most cases, not be able to reimburse the total legal costs since the fixed fees in general do not cover the costs of legal representation. The financial risk of litigation is mitigated to a large extent since the losing party does not have to fully reimburse the costs of the (expensive) lawyer of the winning party.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

With reference to the answer to question 2.2, collective actions can be brought by a foundation or association with full legal capacity only if the action is intended to protect similar interests of different persons to the extent that the articles of association of the foundation or association promote such interests. In principle, it does not suffice if only the articles of association mention such interests, the foundation or association should, in most cases, actually employ activities related to the interest it promotes. Furthermore, before instituting pro-

[1] Apart from intellectual property-cases where article 1019h DPC provides for a *lex specialis* regarding the reimbursement of actual costs in IP-cases.

ceedings, the plaintiff must make sufficient attempts to negotiate with the defendant.

5.8 Are the parties to an action able to insure against the cost risks?

Given the limited "loser pays principle" in the Netherlands, most of the cost risks concern the lawyer's fees.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

The DPC provides for very limited possibilities to apply for an order for security of costs. Such an application is only open to a defendant who has been summoned by a claimant who is not domiciled or habitually resident in the Netherlands. This proviso limits the scope of the article dramatically.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

The code of conduct regarding collective redress actions provides a number of rules with respect to the diligent use of the collective redress mechanism. Additionally, article 25 paragraph 2 of the Bar rules prohibit the use of contingency fees by lawyers admitted to the Bar. This is sometimes considered to be a limiting factor on the successful starting up of an action for collective redress.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

The general international private law rules apply to such actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, there are no specific Dutch rules which forbid that.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

No, that is not possible with regard to a collective action. However, a non-Dutch entity can have standing in a group action.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

In such a situation, the general international private law rules on jurisdiction apply: where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings (article 28 Brussels I).

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

A mechanism for the collective settlement of mass claims has been implemented through the Law on the Collective Redress of Mass Claims ("CRMC"). The law has been implemented in the DPC. This system is entirely based on alternate dispute resolution since the role of the court is limited to the ratification of a settlement that has been concluded between a representative foundation or association and a party which has committed itself to the payment of damages.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Article 3:305a paragraph 2 DCC requires claimants acting on behalf of a group to attempt a settlement prior to filing an action. Failure to adhere to this requirement might result in the inadmissibility of the claim. In general parties to a dispute who attend a court session are generally encouraged by judges to pursue an out of court settlement.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The limitation period regarding the claims would be interrupted by starting negotiations regarding a settlement. The limitation period is then "renewed" following the action which initiated the interruption of the limitation period. For example, if the limitation period of five years for an action following a tort is interrupted, an additional period of five years commences from the moment of interruption.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

The rules on consumer protection stipulate that contractual clauses which prevent consumers from bringing an action before the competent court are considered to be unreasonable and are therefore at risk of being nullified. However, these rules do not preclude the possibility of mandatory arbitration. Furthermore, it remains to be seen if representative parties are able to invoke these rules since they are not themselves consumers.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

If a collective settlement has been ratified, the decision is made public by the court. Additionally, the decision is made public through one or more national newspapers in order to allow the victims to *opt-out* of the settlement.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a

public authority/ an independent entity/ the claimant/the defendant)?

The injured parties are considered equivalent to third parties which have accepted a "third-party clause". The method of payment and damage scheduling are established in the ratified settlement agreement.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

With regard to injunctive orders, there are no hard and fast rules regarding their effective compliance. However, upon the request of a party, courts may impose non-compliance penalties in their injunctive orders. This is often an effective way to ensure effective compliance of the court order since it allows the winning party to collect these non-compliance penalties.

National Report of England and Wales

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

For the purposes of this review and in the following sections, we will focus on the situation in the UK at the time of writing (March 2014). Where relevant, we also refer to proposed reforms.

In the UK, there are three key mechanisms for collective action. Two of these mechanisms are provided for in the Civil Procedure Rules (CPR). These include representative actions and Group Litigation Orders (GLOs). A third mechanism for collective action is made possible by the Competition Act 1998. This mechanism is referred to as a "Competition Action". These are explained in greater detail below.

1. *Representative Actions* (CPR Part 19II). Representative actions can be brought "*by or against one or more persons that have the same interest*". This mechanism is rarely used, as the courts have interpreted the term "*same interest*" very strictly (see *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch.)). The action cannot be used, for example, where the claimants have different personal rights or defendants have different defences. Representative actions are brought in the High Court.

2. *GLOs* (CPR Part 19III). Group Litigation Orders allow for common management of similar claims. A case register is maintained (including all claims in the group) and any judgments entered against a claim in this register are binding on all other claims registered. In order to join the GLO, claimants must apply to be entered on the register by a date specified by the court (i.e. they must opt in). Parties to GLOs must have similar claims that give rise to "*common or related*" issues of fact or law and these causes of action have to be pre-existing and identified. In competition cases, an application for a GLO can only be brought before the High Court.

3. *Competition Action* (s.47 B Competition Act 1998): this is a follow-on procedure; i.e., it enables an entity to seek compensation for damage incurred as a result of anticompetitive behaviour. Under the Competition Act 98, a *specified body* can bring a damages action for breach of competition law (both EU and UK) on behalf of a group of named consumers who suffered loss as a result of the anticompetitive behaviour. Competition Actions are brought before the Competition Appeal Tribunal (CAT).

The procedure has so far had only limited success. Currently *Which*? is the only specified body designated to bring competition claims. The Consumers' Association (Which?) brought a claim in 2007 on behalf of approx. 130 individual consumers against JJB Sports (*Consumers' Association v JJB Sports plc*, registered on 5 March 2007) following on from the Office of Fair Trading's (OFT) decision that JJB Sports had infringed the Chapter I prohibition (s2(1) Competition Act 1998) by fixing the prices of certain football shirts. Only about 0.1% of the consumers that were affected by the illegal price fixing signed up to the action and the case settled. There have been no other cases to date.
For the balance of this questionnaire response, we refer to rules applicable to Representative Actions and GLOs "Mechanisms Governed by the CPR." As for Competition Actions, we refer to these as "Matters Governed by the Competition Act 98".

Reforms:
The Consumer Rights Bill is currently being scrutinised before Parliament. If this Bill passes, it will introduce significant changes in the context of competition actions. Collective actions for damages will be able to be brought on a stand-alone basis and not just as a follow-on from an established competition law infringement by a public enforcement authority. In addition, the Bill sets out a number of changes, including, amongst others:
1. The inclusion of an opt-out procedure in addition to the current opt-in mechanism. Collective proceedings will be brought by a representative body authorised by the CAT (but only when the CAT makes a collective proceedings order).
2. New rules for damages and costs (including a prohibition on exemplary damages and contingency fees).
3. A power of the CAT to grant injunctions in collective proceedings.
4. Rules on limitation periods, collective settlements and voluntary redress schemes.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

For Matters Governed by the CPR:
The two mechanisms governed by the CPR rules, namely representative actions and GLOs, are applicable to all types of civil proceedings. This is evidently de-

pendent upon the relevant criteria being met, namely that the parties have the *same interest* if a representative action is brought or that the claims raise *common or related issues* in the context of a GLO as set out above at 1.1.

For Matters Governed by the Competition Rules:
If a Competition Action is brought before the CAT, it can only be brought as a follow-on action. This means that there has to be a previous decision establishing an infringement of competition law and the Competition Action must be based on this decision. A claimant cannot rely on a finding of fact made by a regulator that could amount to an infringement as a basis for a claim. Competition Actions are therefore limited to claims for damages based on previous competition infringement decisions (note however, that claims in competition law can be brought before the High Court as well. In that case, there is no need for a previous infringement decision of a UK or EU competition authority; cases in the High Court can be brought both on a stand-alone basis and as follow-on actions).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

As mentioned above, representative actions and GLOs, are applicable to all types of civil proceedings. A claimant would therefore choose through which of these mechanisms a claim is to be brought. In relation to Competition Actions a claimant (currently only *Which?*) would bring an action on the basis of s.47 B Competition Act 98.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

For Matters Governed by the CPR:
Part 24 of the CPR allows the court to give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that:
1. The claimant has no real prospect of succeeding on the claim or issue; or
2. The defendant has no real prospect of successfully defending the claim or issue.

In both cases, the court must be certain that there are no other compelling reasons why the case or issue should be disposed of at a trial.
Summary judgment may be given against a claimant in any type of proceedings. With regards to defendants, summary judgment may be given in all cases, except in proceedings for possession of residential premises against a mortgagor or a tenant and in proceedings for an admiralty claim in rem.
The court also has the power to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim (CPR r.. 3.4).

For Matters Governed by the Competition Rules:
Rule 41 of the CAT Rules allows the CAT to give summary judgment on its own initiative or on the application of a party. Summary judgment can be given on a particular issue or in the whole case if the CAT considers that:
1. The claimant has no real prospect of success; or
2. The defendant has no reasonable grounds for defending the claim.
The CAT must ensure that there are no other compelling reasons why the case or issue should be disposed of at a substantive hearing (CPR r. 41(1)(b)).

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Injunctive Relief

For Matters Governed by the CPR:
The Court has discretion to grant interim remedies (Part 25 CPR). These remedies include interim injunctions (both prohibitory injunctions where the defendant must refrain from certain conduct and mandatory injunctions where the defendant must actively take certain actions. *Quia timet* injunctions where the defendant is restrained from engaging in future conduct are also available).
Interim remedies can be granted by the court at any time, both before proceedings are started (as long as the matter is urgent or it is otherwise necessary in the interests of justice) and after judgment has been given.
In terms of interim injunctions, the applicant must prove that damages would be an inadequate remedy and that it has a good and arguable case (*American Cyanamid v Ethicon Ltd* [1975] AC 396). In addition, given the serious damage that

can be done to a respondent's business and reputation by an interim injunction, a cross-undertaking in damages must normally be offered by the applicant. Timing also plays an important role in the application for injunctive relief as can be seen from *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565. In this case, the High Court refused an application for an interim injunction on the basis that the application was brought "last-minute" and that the analysis required to establish whether Pfizer's actions were anticompetitive was complex.

In a claim in which a party acts as a representative party in a representative action (Rule 19.6), an interim injunction granted against that representative is binding on all persons represented in the claim, but may only be enforced against a person who is not a party to the claim with the permission of the court (19.6(4)). Such an injunction may not include a term enabling the applicant to enforce the injunction against unidentified persons represented by the representative without first obtaining such permission (*Smithkline Beecham Plc v Avery* [2007] EWHC 948 (QB), April 27, 2007, unrep. (Teare J.)); *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752 , June 29, 2011, CA, unrep.).

For Matters Governed by the Competition Rules:

The CAT currently does not have the power to grant interim injunctions in cases of collective redress.

Interim relief in the form of interim payments may be awarded by the CAT (Rule 46 CAT Rules). This measure requires the defendant to make a payment on account of any damages for which he may be held liable. The CAT must be satisfied that the defendant has admitted his liability to pay and that the claimant would obtain judgment for a substantial amount of money in damages, were the claim to be heard. Any interim payment must be limited to a reasonable amount of the likely final damages award (Rule 46(4) CAT Rules). In *Healthcare At Home v Genzyme Ltd* [2006] CAT 29, the CAT ordered an interim payment of £2 million in the context of a claim for damages based on an OFT decision that the defendant engaged in an illegal margin squeeze.

The CAT can also order security of costs (Rule 45, CAT Rules). It would appear that when deciding whether to grant such an order, the CAT will consider the likelihood of a cost order ultimately being made (*BCL Old Co v Aventis* [2005] CAT 2).

Reforms:
The Consumer Rights Bill will, if adopted, give the CAT the power to grant injunctions in the context of collective actions. Thus, whilst at present a party wishing to obtain an injunction would have to apply to the High Court, in future such measures might also be granted by the CAT.

Compensatory Relief
It is possible to recover monetary compensation for damage suffered, i.e. damages, in both the civil courts and the CAT. This is discussed further below.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In contract claims, damages are awarded to put the injured party back in the position it would have been had the contract been performed. Damages can be awarded for monetary loss (such as damage incurred to personal property), but can also be awarded for non-pecuniary losses (such as damages for death or personal injury) if it was within the parties' contemplation as not unlikely to arise from the breach of contract. Economic loss (such as loss of profit) can be recovered if it was a foreseeable consequence of the breach.
In negligence claims, damages aim to put the injured party back into the position it would have been in had the negligent act not occurred. Damages are recoverable for death or personal injury (including mental injury) and damage to property. Pure economic loss is not normally recoverable.
Additional caveats apply to recovery of damages for psychological injury. Damages are not available for mere anxiety or distress. In order to recover damages, it must be shown that the psychological injury is a recognised psychiatric injury (*AB v Tameside & Glossop Health Authority* [1997] 8 Med LR91).
Compensation claims can also be made under specific statutes which may impose additional restrictions on the types of damages available (e.g. employment legislation).
Actions brought in the High Court as a consequence of an infringement of competition law and follow-on actions brought in the CAT, are based on the tort of breach of statutory duty (i.e. of s.2(1) European Communities Act 1972 or of Chapters I or II of the Competition Act 1998) (*Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637). Damages are therefore awarded on a tortious basis, namely the amount of loss plus interest.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

In England and Wales, the general rule is that damages should be compensatory in nature. Exemplary damages are only available in exceptional and limited circumstances such as where the defendant is guilty of oppressive or unconstitutional action or has calculated that the money to be made from his wrongdoing will probably exceed the damages payable (see *Rookes v Barnard [1964] AC 1129*). While they may be awarded in cases involving deliberate torts, such as deceit and defamation, it is not clear whether they may be available in cases involving negligence and other inadvertent torts. Following *Addis v Gramophone Co. Ltd [1909] AC 488,* it is clear that they are not available for breach of contract.

In the context of follow-on competition damages claims, the High Court in *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 refused to award punitive or exemplary damages where the defendant had already been fined (or granted immunity from, or a reduction in, fines) by a regulatory authority in respect of the same behaviour. Note, however, the CAT's award of exemplary damages in *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 where the defendant had been granted immunity by the OFT on the basis of conduct of minor significance, rather than pursuant to a leniency regime. In contrast, in *Albion Water Limited v Dûr Cymru Cyfyngedig* [2013] CAT 6, the CAT stated that for it to award exemplary damages, evidence was required that the common carriage service knew that the way the price was calculated was unlawfully excessive or that it did not care whether that was the case.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

It is generally understood that the passing-on defence can be relied upon, provided that it has been sufficiently proven in fact. No definitive judgment has yet been made on this issue, but the ECJ judgment in *Manfredi v Lloyd Adriatico*

(Case C-295/04 [2006] ECR I-6619), leads to the conclusion that the passing-on defence should be permitted in the UK.

The CAT considered the passing-on defence in *BCL Old Co Ltd v Aventis SA* [2005] CAT 2. Although the standing of the indirect purchaser claimants was not disputed, the case reached settlement before the substantive hearing.

It is arguable that the passing-on defence does exist in English law, as damages have a compensatory function and the quantification thereof therefore takes passing-on into account (*Devenish Nutrition v Sanofi-Aventis SA* [2007] EWHC 2394).

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Generally, collective actions may be brought by any legal or natural person who has a claim.

For Matters Governed by the CPR:

As explained in more detail in response to question 1.1 above, representative actions can be brought "*by or against one or more persons that have the same interest*" – i.e. the claimant represents himself and other claimants, thus avoiding multiple claims being brought on the same issue. This mechanism is rarely used, however, as the courts have interpreted the term "same interest" very strictly (*Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch.)).

GLOs (CPR Part 19III) are also available in the High Court. They are made where parties have similar claims giving rise to "*common or related issues*" of fact or law, and have been ordered by the court to consolidate proceedings.

For Matters Governed by the Competition Rules:

The Competition Act also provides a mechanism for collective redress (s47B). This is a follow-on, opt-in procedure whereby a *specified* (state-approved) body brings a damages action for breach of competition law (both EU and UK) on be-

half of a group of named consumers who suffered loss as a result of the anti-competitive behaviour. .At present, only the consumer organisation *Which?* has been authorised to bring such actions.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

As specified above, when bringing a representative action before the High Court, the claimants must have the same interest. As regards GLOs, the requirement is that of establishing common or related issues.

When bringing a claim before the CAT, consumers which are being represented must have consented to the claim. The individual claims must also, of course, relate to the same infringement.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Pursuant to s47B of CA98, Competition Actions can be brought before the CAT by a specified body on behalf of consumers in follow-on claims stemming from breaches of competition law (UK and EU). The organisation must be approved by the Secretary of State, and meet certain conditions, which include being independent and impartial, and acting in the best interest of consumers (for more, see http://dti.gov.uk/files/file11957.pdf).

To date, only the consumer organisation Which? has been designated for the purposes of s. 47B.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

For Matters Governed by the CPR:

The court has the authority to strike out claims if it concludes that the normal requirements are not fulfilled by a particular case. The reasons could include, for example, that the case is not likely to succeed, that it is vexatious/opportunistic, oppressive or unfair vis-à-vis the defendants. In group actions, there is another

element which requires that the claim be viable. This is a cost and benefit criterion which is linked to CPR r.1.4(2)(h) which stipulates that active case management includes "*considering whether the likely benefits of taking a particular step justify the costs of taking it*".

For Matters Governed by the Competition Rules:

Once an appeal/application has been filed with the CAT, it will be checked in the Registry to ensure that the various formal requirements have been complied with. Documents that do not constitute appeals or applications, or which are out of time, will not be registered. Where a notice of appeal or application does not comply with one of the formal requirements, or is incomplete, the CAT may give directions for putting the document in order. Failure to comply with such a direction may lead to the appeal or application being rejected.

Furthermore, under r. 10(1) of the CAT Rules, the Tribunal has the power, after hearing the parties, to reject an appeal, or any part of one, if it discloses no valid ground of appeal, if the appellant is a vexatious litigant, or if the appellant fails to comply with a direction of the Tribunal. As regards claims for damages, the CAT has the power to reject a claim for damages in whole or in part at any stage of the proceedings on a number of grounds, i.e. where it considers that:

1. there are no reasonable grounds for making the claim;
2. in a claim under section 47B of CA98 the body bringing the proceedings is not entitled to do so or that an individual on whose behalf the proceedings are brought is not a consumer;
3. the claimant is a vexatious litigant; or
4. the claimant fails to comply with any rule, direction, practice direction or order of the CAT.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

The ECJ's judgment in the *Manfredi* case (Case C-295/04) provides that indirect claims should be permitted. As such, pursuant to s60 of CA98 which requires that the provisions of the Act must be consistent with EU law, it is generally understood that it is possible (i) to rely on the passing on defence and (ii) for indirect purchasers to bring actions.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

There is no minimum threshold for the aggregation of claims. However, it is commonly accepted that, in the context of a GLO, there must be at least 5 claims (purely by reason of the resources required to conduct group litigation).

Actions that constitute the group litigation remain *individual* claims which are managed *collectively*.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

A wide range of defences are available to the defendant prior to the examination of the merits. These include, but are not limited to:

- Lack of standing;
- Lack of jurisdiction;
- Expiry of limitation period (see the answer to question 4.4);
- In the case of collective actions, a failure to meet the requirements set out in the answer to question 1.1, above.

The defendant may also apply to strike out the statement of case, pursuant to CPR r. 3.4, provided that one of the following grounds are met:

- It discloses no reasonable grounds for bringing or defending the claim (CPR r. 3.4(2)(a)).
- It is an abuse of the court's process (CPR r. 3.4(2)(b)).
- It is otherwise likely to obstruct the just disposal of the proceedings (CPR r. 3.4(2)(b)).
- There has been a failure to comply with a rule, practice direction or court order (CPR r. 3.4(2)(c)).

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Representative actions, GLOs and Competition Actions are based on the opt-in principle, requiring claimants to actively opt into the action to benefit from it.
The current situation in the UK might change with the adoption of the Consumer Rights Bill. If this Bill comes into force, it will introduce a limited opt-out collective actions regime. The CAT will be the forum for such claims enabling businesses and consumers to seek collective redress for competition law infringements in both follow-on and stand-alone cases.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

For Matters Governed by the CPR:
1. *Representative Actions:* The normal Civil Procedure Rules apply. Usually representative actions bind all those represented in the claim, but such orders can only be enforced by or against a person who is not a party with the permission of the court (CPR r. 19.6 (4)).
2. GLOs: unless the court orders otherwise, a judgment (or order) given in a claim that is on the group register in relation to one or more GLO issues is binding on the parties to all other claims that are on the group register at the time the judgment is given. The court may give directions as to the extent to which that judgment is binding on the parties to any claim which is subsequently entered on the group register. A party to a claim which was entered on the group register after a judgment was given may not apply for the judgment to be set aside, varied or stayed or appeal that judgment. This party may, however, apply to the court for an order that the judgment or order is not binding on him (CPR r. 19.12).

For Matters Governed by the Competition Rules:
The CAT's decision will be binding on all the parties to the proceedings. Damages must be awarded to the individuals, but the CAT can order that the sum be paid to the representative body.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

For Matters Governed by the CPR:

1. *Representative Actions:* in *Emerald Supplies Ltd v British Airways plc* ([2010] EWCA Civ 1284 the Court of Appeal held that (1) at all stages of the proceedings and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest" as each other, (2) the authorities show that the claimant and the class must all have "a common interest and a common grievance" and "the relief sought must in its nature be beneficial to all" of them, (3) if those conditions are satisfied, it matters not that the class of person represented may fluctuate.

2. *GLOs:* A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register. If the management court orders the claim to be removed from the register it may give directions about the future management of the claim (CPR r. 19.14).

For Matters Governed by the Competition Rules:

A claimant may withdraw his claim only with the consent of the defendant or with the permission of the CAT. Where a claim is withdrawn, the CAT may make any consequential order it thinks fit and no further claim may be brought by the claimant in respect of the same subject matter (CAT Rules 42).

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

For Matters Governed by the CPR:

1. *Representative Actions:* see above at 3.3.

2. *GLOs*: other cases commenced after the establishment of the GLO and raising the same issues may be added to the register and become subject to the GLO. An order for a case to be entered on the register may be made when the case raises at least one of the GLO issues. The fact that a case raises a GLO issue does not mean that the case will automatically be entered on the register, however.

The court has discretion to refuse a registration if it thinks that it cannot be managed conveniently with the other cases on the register or that its inclusion would adversely affect the other cases on the register. The management court may give directions that specify a date after which no more claims can be added to the GLO (unless the court gives special permission) (CPR r. 19.13 and PD19B13).

For Matters Governed by the Competition Rules:
The CAT may, after hearing the parties, grant permission for one or more parties to be joined in the proceedings in addition or in substitution to the existing parties (CAT Rules 35).

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

For Matters Governed by the CPR:
Once a GLO has been made, a copy of the order must be supplied to the Law Society and the Senior Master of the Queen's Bench Division (CPR PD 19B11). As mentioned above, all claims in a GLO are entered on a case register and a GLO will normally be publicised through the Law Society.

For Matters Governed by the Competition Rules:
On receiving a claim the CAT Registrar will send an acknowledgment of receipt to the claimant and send a copy of the claim form to the defendant. Within 7 days of receipt of the copy of the claim form, the defendant must then send an acknowledgment of service to the Registrar (CAT Rules 36).

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

CPR Rule 19.11(3)(c) and paragraph 11 of Practice Direction 13B covers the publication of a GLO. The intention is to enable the court to order the solicitors for the group to "advertise" the making of the order and any cut-off dates for joining the register to minimize the risk of individuals trying to start their own separate proceedings at a later date. Neither the rule nor the practice direction pro-

vide guidance on the form of any publicity, nor on who might be ordered to pay the costs of placing adequate advertisements.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

For Matters Governed by the CPR:
As mentioned above, all claims in a GLO are entered on a case register. A list of GLOs is available on HM Court Services archived page at http://webarchive. nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm
A link can be found on the Justice website at http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders).

For Matters Governed by the Competition Rules:
There has been only one case brought under s.47B at present so there is no register setting out the collective actions brought under this section. The case can be found on the CAT's website (http://www.catribunal.org.uk/237–640/*1078-7-9-07-The-Consumers-Association*.html)

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Competition claims can be brought before the High Court on a stand-alone basis. This means that the alleged breach of competition has not already been established by a decision of an EU or UK competition authority and that the claimant will have to prove that there was an infringement of competition law and that he suffered a loss as a result.

Stand-alone claims cannot be brought before the CAT in the context of collective redress actions. All such claims must therefore be brought before the High Court.
Follow-on actions can be heard in both the CAT and the ordinary courts - see above in response to Question 1.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Collective actions (whether stand-alone or follow-on) can be brought in relation to all infringements of UK or EU competition law. This includes bilateral antitrust infringements such as cartels (Chapter I prohibition (s.2 Competition Act 1998) or Article 101 TFEU) and unilateral antitrust infringements such as abuse of dominance (Chapter II prohibition (s.18 Competition Act 1998) or Article 102 TFEU).

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The Office of Fair Trading and the Competition Commission do not often disclose the documents obtained during their investigations to private claimants.1
Disclosure in the UK is governed by CPR Part 31. In larger cases, parties are required to submit a Disclosure Questionnaire before the disclosure procedure is commenced which enables all parties and the court to have an overview of the documents of the case. Three types of disclosure are available:
1. standard disclosure (where the parties have to disclose all documents in their control on which they rely, which adversely affects their case or another party's case and documents that support another party's case);
2. specific disclosure (where a party is required to disclosure specific documents or specific categories of documents (CPR r. 31.12) or non-parties are required to disclose certain documents (CPR r. 31.17)); and

[1] Note that as of 1 April 2014, the OFT and Competition Commission will cease to exist, and will be replaced by single agency – the Competition and Markets Authority.

3. pre-action disclosure (where a someone that is likely to become a party to a claim is asked to disclose certain documents (CPR r. 31.16).

The status of leniency documents has been the subject of much debate following the ECJ's judgment in *Pfleiderer v Bundeskartellamt* (Case C-360/09). In the UK, the High Court performed a "balancing exercise" in line with *Pfleiderer* in the case of *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869. This case involved an application by National Grid for disclosure of certain documents which might have contained information supplied during leniency applications (the confidential version of the Commission's decision, the leniency applicant's reply to the Commission's Statement of Objections and replies to requests for information made by the Commission). Initially, the claimant had requested that the High Court order the Commission to produce these documents itself, but in light of the ECJ's ruling in *Pfleiderer*, the claimant changed its request in favour of an order against the defendants.

The Court held that *Pfleiderer* applied to the Commission's leniency programme and was therefore applicable in the present case. The fact and circumstances of the case meant that there were no other means available for National Grid to derive the requested information and the court held that the relevance of the materials being sought had to be determined on a document by document basis. In this case, only very limited disclosure of the documents requested was ordered by the court.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

For Matters Governed by the CPR:

For cases brought in the High Court the limitation period is six years from the date on which the infringement of competition law ceased. An important caveat is that in claims involving deliberate concealment (such as cartel cases), the limitation period will only start to run from the time the claimant discovered or ought reasonably to have discovered the concealment (s.32 Limitation Act 1980). This means that in practice, limitation periods in cartel cases may only start to run when the cartel activity was announced publicly.

If an action for collective redress is brought as a follow-on claim in the High Court and it is based on an infringement decision relating to conduct more than six years old, it will therefore be time-barred.

For Matters Governed by the Competition Rules:
Follow-on damages actions in the Competition Appeal Tribunal must be brought within two years from the latest of:
1. the date on which the period for appealing against the infringement decision relied upon expires and the decision therefore becomes final;
2. the date on which any appeal has been determined; or
3. if the claimant does not suffer loss until after this date, two years from when the loss is sustained.
(s.47A(7),(8) Competition Act 1998).
Although the limitation period will not start to run if there is an appeal on substance, the same is not the case if the appeal is merely one relating to the fine (here the limitation period will start to run when the decision becomes final regardless of the ongoing appeal – *BCL Old Co v BASF* [2009] EWCA Civ 434).

Reform:
The Consumer Rights Bill will, if adopted, bring the time limits for claims brought before the CAT into line with the time limits in the High Court (as well as the Court of Session in Scotland (five years) and the High Court in Northern Ireland (six years)).

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

In the UK, damages actions following on from a public infringement decision, where only causation and quantum fall to be determined, can be brought in the CAT on the basis of an infringement decision by the OFT or the Commission. All other damages actions are to be brought in the ordinary courts. The provision for the bringing of an action in the CAT is without prejudice to the right to bring any action before the ordinary courts.
In damages proceedings before the ordinary courts in the UK, a decision of the OFT that either national competition law or EU competition law has been violated, or a decision of the CAT on appeal from a decision of the OFT to either of these two effects, binds the court (s. 58 of the Competition Act 1998). Similarly, in damages actions for breach of competition law brought before it, the CAT is bound by a decision of the OFT that either national competition law or EU com-

petition law has been violated, a decision of the CAT on appeal from a decision of the OFT to either of these two effects, or an infringement decision by the Commission (s. 47A of the Competition Act 1998).

5. Funding of the class actions / collective redress actions, attorney's fees

On 1 April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) took effect, implementing Jackson LJ's recommendations. This has introduced substantive changes to procedure in England and Wales, perhaps most notably in relation to costs. Therefore, where relevant, both the costs regime which applies to agreements entered into prior to April 1, 2013, and the regime as it applies post-April 1, 2013 will be discussed.

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

English law traditionally refused to recognize arrangements whereby litigation was funded by third parties, under the doctrines of maintenance and champerty. However, since the abolition of the crimes and torts of maintenance and champerty under sections 13 and 14 of the Criminal Law Act 1967, third party funding has become increasingly prevalent in England and Wales.

Leading cases on third party funding include:

- *Giles v Thompson* [1993] UKHL 2, in which the House of Lords upheld the validity of funding arrangements provided by car hire companies.
- *R (Factortame and others) v Secretary of State for Transports* [2002] EWCA Civ 932, in which the Court of Appeal upheld an agreement by a firm of accounts to support the Claimants in return for 8% of the damages.
- *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, in which the Court of Appeal held the losing party's funders should be liable to pay the costs of the opposing party to the extent of funding provided. However, the court noted that other third party funding arrangements could amount to champerty.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

There is generally no obligation to disclose to an opponent the existence or detail of any third party funding arrangement.

Under CPR r.44.15 as it applied prior to agreements entered into prior to April 1, 2013, a party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order. The rule does not apply to agreements entered into since that date.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Under CPR r.3.1(2)(f) the court has an inherent jurisdiction, under its general powers of management, to stay the whole or any part of the proceedings. Therefore, the court may opt to stay the proceedings in any of the aforementioned circumstances.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

Yes, under the Legal Aid scheme, eligible group actions may be supported by public funds.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

With effect from 1 April 2013, contingency fee agreements, referred to as damages-based agreements (DBAs), became legal in all contentious business, other than criminal and family proceedings. Section 45 of LASPO 2012, with effect from 1 April 2013, amended section 58AA of the CLSA 1990 to allow DBAs in all civil litigation and not just in employment matters.

Section 58AA of the Courts and Legal Services Act 1990 (CLSA 1990) explains that a DBA is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services. "Advocacy services" are defined in section 119(1) of the CLSA 1990 as "*[a]ny services which it would be reasonable to expect a person who is exercising,*

or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide". "Litigation services" are defined in section 119(1) of the CLSA 1990 as "*[a]ny services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide*". "Claims management services" is defined in section 58AA(7) of the CLSA 1990 and section 4(2) of the Compensation Act 2006 as "*advice or other services in relation to the making of the claim*".

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

For Matters Governed by the CPR:

The rules on costs are set out in CPR Parts 43 to 48 and the accompanying practice directions (which contain versions that apply both prior to and post-April 1, 2013). The general rule, as formulated in CPR r.44.2 of the post-April 1, 2013 rules (although the same rule applied prior to April 1, 2013), is that the unsuccessful party pays the costs of the successful party. However, courts retain a general discretion in awarding costs and will have regard to all the circumstances of the case.

It bears note that in certain situations, the winning party may recover costs against the third-party funder (*see Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, above).

CPR r.46.6 (formerly CPR r. 48.6A) provides that where the court has made aGLO, unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs. The general rule is that a group litigant who is the paying party will, in addition to any liability to pay the receiving party, be liable for the individual costs of that group litigant's claim; and an equal proportion, together with all the other group litigants, of the common costs.

For Matters Governed by the Competition rules:

Rule 55 of the CAT Rules and paragraph 17 of the CAT Guide provide that the Tribunal has a discretion to make any order it thinks fit in relation to the payment of the costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Under CPR r. 3.1, the court has various general powers of management in conducting a case. R. 3.1(2) provides that: "Except where these Rules provide otherwise, the court may:

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

(c) require a party or a party's legal representative to attend the court;

(d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(g) consolidate proceedings;

(h) try two or more claims on the same occasion;

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

(k) exclude an issue from consideration;

(l) dismiss or give judgment on a claim after a decision on a preliminary issue;

(ll) order any party to file and exchange a costs budget;

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

The court also has a wide discretion in relation to costs under CPR r. 44.3, which it may use as a disincentive to abuse of the collective redress system.

In relation to GLOs, under Practice Direction 19A, the court may, of its own initiative or on application of either an existing party or a party who wishes to become a party, remove, add or substitute an existing party.

5.8 Are the parties to an action able to insure against the cost risks?

Yes. Both before-the-event (BTE) insurance and after-the-event (ATE) insurance are available in England and Wales.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Yes. CPR r. 25.12(1) provides that "*[a]defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings*". CPR r. 25.13 states that:

(1) The court may make an order for security for costs under CPR r. 25.12 if-

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) [omitted]

(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are-

(a) the claimant is-

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 ;

(b) [omitted]

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

Chapter 3 of the Solicitor's Regulation Authority's Code of Conduct contains safeguards against conflicts of interest (http://www.sra.org.uk/solicitors/handbook/code/content.page). Similarly, Part C of the Bar Standards Board Code of Conduct contains safeguards against conflicts of interest (see http://handbook.barstandardsboard.org.uk/handbook/part-2/).

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific international private law rules that apply to collective redress actions in England and Wales. Therefore the general international private law rules apply to such actions. Following the decision of the House of the Lords in *Connelly v RTZ Corp Plc (No.2)* [1998] A.C. 584, it is now clear that proceedings, including group actions, can be brought in England and Wales against UK-based parent companies of multinational corporations, arising from the actions of their subsidiaries in other jurisdictions, on *forum conveniens* grounds. In *Lubbe v Cape plc* [2000 1 W.L.R. 1545, the House of Lords similarly applied ordinary principles of conflict of laws to decide an argument of *forum non conveniens*. The House of Lords has appeared to limit this to situations when the claimants could be denied justice in their own jurisdiction because of the non-availability of funding, legal representation and expert advice and established court procedures for group litigation.

The ordinary rules may be divided into two categories:

(a) International agreements

Questions of jurisdiction and the recognition and enforcement of judgments rendered by the courts of Member States of the European are governed by Council Regulation 44/2001, 2001 O.J. (L 12), 1 (EC) (the "Brussels Regulation").

Questions of jurisdiction and the recognition and enforcement of judgments rendered from the courts of Iceland, Norway and Switzerland are subject to the provisions of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Sept. 16, 1988, 20 I.L.M. 620 (the "Lugano Convention"), with applications being made under section 4 of the Civil Jurisdiction and Judgments Act, 1982.

(The Administration of Justice Act 1920 governs the recognition and enforcement of judgments from various Commonwealth countries, including Malaysia, Singapore, Nigeria and New Zealand. Judgments from Australia, Canada, Guernsey, Jersey, India, the Isle of Man, Israel, Pakistan, Surinam and Tonga are governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933).

(b) Common law rules

The ordinary common law rules apply to all jurisdictional issues and judgments not governed by one of the statutory rules. These are discussed in answer to question 6.4.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

There are no special rules prohibiting a single collective action from taking place in a single forum. It follows that the ordinary conflict of laws principles will apply.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

There are no special rules governing whether a representative designated by a foreign country may have legal standing to bring representative actions in England and Wales. It follows that the ordinary rules governing representative actions apply. Note: currently *Which*? (a UK organisation) is the only specified body designated to bring follow-on competition claims before the CAT .

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Under the Regulation/Convention

Articles 27 to 29 of the Brussels Regulation and of the Lugano Convention deal, respectively, with the relationship between actions pending in different Member and Convention States, both where the proceedings involve "the same cause of action" and where the actions are related (*lis pendens*). In the former case any court other than the court first seised shall not exercise jurisdiction. In the latter scenario, any court, other than the court first seised, may, while the actions are pending in both courts, stay its proceedings or may dismiss them for consolidation with the proceedings which are pending at first instance in the court first seised, or may choose to do neither.

In relation to bringing a claim against a parent company domiciled outside of the jurisdiction in which the claim is brought, the High Court in *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 found that it had jurisdiction to hear damages claims following on from the Commission's findings, despite the fact that some of the defendants were domiciled outside the UK (one claimant was also a German company). The Court considered that it had jurisdiction as the claims against the various defendants were so closely connected to those of the English defendant that it was more expedient to hear them together. Similarly, in *Cooper Tire & Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others* [2010] EWCA Civ 864, the Court of Appeal held that the English courts had jurisdiction to hear EU-wide cartel damages claims where the pleadings allege that an English-domiciled subsidiary of a cartelist implemented the cartel and was either aware or a party to the anti-competitive practice.

At Common law

At common law, the leading case of *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460*,* made it clear that the test was one of *forum non conveniens*: "*[t]he basic principle is that a stay will only be granted on the ground of* forum non conveniens *where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action,* i.e. *in which the case may be tried more suitably for the interests of all the parties and the ends of justice*" (at p.476).

It is possible to bring an action against a company and/or individual outside of the jurisdiction which has a subsidiary within the jurisdiction. In such circumstances, the ordinary principles of *forum non conveniens* would apply if the matter were to be decided by a court in England and Wales, while the foreign jurisdiction's rules of conflict of laws would apply if the matter were to be decided by a foreign court. In England and Wales, the court in *Berkeley Administration Inc v McClelland* [1995] I.L.Pr. 201 (CA) held that a wholly-owned subsidiary may be regarded as the same party as its parent. In such circumstances, the aforementioned rules would apply in relation to *lis pendens*.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so,

are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

In the High Court

There is no specific mechanism of collective alternative dispute resolution (ADR) allowing the settlement of class actions / collective redress actions. The usual provisions for ADR therefore apply.

Competition law cases may thus be resolved by arbitration providing the claim falls within the ambit of the ADR clause. In *ET Plus SA v Welter* [2005] EWHC 2115, Gross J held, at paragraph 50, that "*[t]here is no realistic doubt that such "competition" or "anti-trust" claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction*". In the Court of Appeal case of *Atheraces Limited v British Horseracing Board* [2007] EWCA Civ 38 Mummery LJ considered, at paragraph 7, whether "*[t]he nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation*".

Courts cannot compel the parties to use ADR procedures, as was made clear in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. However, failure to follow the pre-action protocols, which often provide for making efforts to resolve the dispute through ADR, may result in a cost sanction. In *Dunnett v Railtrack plc* [2002] EWCA Civ 303, the court refused to award costs to a successful party as it considered that the winning party had unreasonably refused to mediate.

In the CAT

Similarly there is no specific mechanism for collective ADR in the CAT. However, in contrast to the courts, the CAT appears more cautious with regard to the arbitrability of certain competition law issues. In *Claymore Dairies v OFT* (200 CAT 3), the tribunal emphasised the public interest importance of competition cases, and the importance of preserving the OFT and the Tribunal's position to safe-

guard such public interest (at paragraph 88). Parties in the CAT who wish to withdraw their dispute and transfer it to private arbitration must generally obtain the Tribunal's consent to a stay of the proceedings. Proceedings may only be withdrawn without the Tribunal's permission where the defendant gives consent (according to paragraph 14.5 of the CAT Guide to Proceedings).

Reform

Consistent with the European Commission's Proposal for a Directive on antitrust damages, the UK Government has manifested strong support for the use of ADR in competition cases. In its "Private Actions in Competition Law: A consultation on options for reform – government response" (January 2013), it has manifested an intention to align the CAT Rules governing formal settlement offers with those of the High Court.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Court proceedings

In terms of case management, CPR r.1.4(2)(e) specifically refers to ADR, and requires the court to further the overriding objective by encouraging the parties to use ADR procedures "*if the court considers that appropriate*".

Further manifestation may be gleaned from the mechanisms of Part 36 of the CPR Rules. Part 36 contains provisions for adverse cost consequences to follow where an offer to settle is rejected and then not beaten by the rejector at trial. As recently as last year, Lewison L.J. in *Jopling v Leavesley & Another* [2013] EWCA Civ 1605 explained that "*the whole point of Part 36 is to encourage settlement and to minimise costs*".

CAT proceedings

Rule 20 of the CAT Rules 2003 (Statutory Instrument 2003 No. 1372) governs the case management conference. One of the stated purposes of a case management conference or pre-hearing review shall be, according to rule 20(4)(e), "*to facilitate the settlement of the proceedings*".

Reform

On 10 March 2014, the Competition Appeal Tribunal published draft procedural rules for collective proceedings and collective settlements in the CAT, to cater for Schedule 8 of the Consumer Rights Bill 2013–14, if adopted. An entire sec-

tion is devoted to collective settlement and sets out the two procedures by which the CAT may approve the terms of a collective settlement: where a collective proceedings order has been made, and where a collective proceedings order has not been made. It provides that where a collective proceedings order has already been made; the parties would have to apply to the Tribunal for a collective settlement approval order, which the Tribunal would approve provided certain conditions are met (notably that the Tribunal is satisfied that the terms are just and reasonable). Where a collective proceedings order has not been made, then the parties would have to apply for a collective settlement order *and* a collective settlement approval order.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

A claim must be issued within the applicable time limit. Negotiations will not have the effect of suspending the limitation period unless there is a clear agreement to suspend the limitation period and such an agreement does not conflict with a relevant rule or practice direction which prohibits any variation of time limits.

Rule 2.11 of the CPR provides that "*[u]nless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties. (Rules 3.8 (sanctions have effect unless defaulting party obtains relief), 28.4 (variation of case management timetable-fast track) and 29.5 (variation of case management timetable-multi-track), provide for time limits that cannot be varied by agreement between the parties)*".

In *Gold Shipping Navigation Co SA v Lulu Maritime Ltd* [2009] EWHC 1365 (Admlty), the court emphasised the need for clarity, finding that the standstill agreement, which had been drafted by one of the parties, was not effective to stop time running. It follows that negotiations between the parties both before and after a limitation period has expired will not constitute a waiver or estoppel unless the defendant has made his intention unequivocally clear.

Once a claim is issued, CPR r.26.4 provides for stays to allow for settlement of the case. A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by ADR or other means. If the court considers that a stay would be appropriate, the court will direct that the proceedings, either in whole or in part,

be stayed for one month or such other period as it considers appropriate. A stay at the request of all the parties will be granted for one month.
It bears note that section 33 of the Limitation Act 1980 provides a discretionary exclusion of time limit for actions in respect of personal injury or death.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999/2083, which apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer, provides that a "*contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*". Schedule 2 of the Regulations provides an indicative and non-exhaustive list of terms which may be regarded as unfair. Section 1(q) of Schedule 2 includes terms "*excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract*".
In *Zealander & Zealander v Laing Homes [2000] TCLR*, the phrase "*not covered by legal provisions*" was held not to mean that arbitrations under the Act could be excluded from the ambit of paragraph 1(q), but rather to mean those covered by a special statutory scheme. Applying this section, in *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 (TCC), Ramsey J found that an arbitration clause in a party's standard terms was not binding on his customer because it was unfair as it caused a significant imbalance in the parties' rights and obligations, to the detriment of the customer, by preventing the customer from taking legal action other than arbitration.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are

such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

In the High Court

Rule 19.12 of the CPR provides that where a judgment or order is given or made in a claim on the group register in relation to one or more group litigation order issues, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and the court may give directions to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

Rule 19.11(3)(c) and paragraph 11 of Practice Direction 13B cover the publication of a GLO. The intention is to enable the court to order the solicitors for the group to "advertise" the making of the order and any cut-off dates for joining the register to minimize the risk of individuals trying to start their own separate proceedings at a later date. Neither the rule nor the practice direction give guidance on the form of any publicity, nor on who might be ordered to pay the costs of placing adequate advertisements.

In the CAT

Rule 54 of the CAT rules provides that the decision of the Tribunal shall be delivered in public on the date fixed for that purpose. The registrar shall send a copy of the document recording the decision to each party and shall enter it on the register. The decision of the Tribunal shall be treated as having been notified on the date on which a copy of the document recording it is sent to the parties. The president shall arrange for the decision of the Tribunal to be published in such manner as he considers appropriate.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

In the High Court

General rules about the enforcement of decisions are to be found in CPR Part 70 and Practice Direction 70.

CPR r.70.2(2) provides that "*[a] judgment creditor may, except where an enactment, rule or practice direction provides otherwise (a) use any method of enforcement which is available; and (b) use more than one method of enforcement, either at the same time or one after another*". The judgment creditor is therefore effectively "in charge" of the enforcement.
CPR r.70.4 provides that "*[i]f a judgment or order is given or made in favour of or against a person who is not a party to proceedings, it may be enforced by or against that person by the same methods as if he were a party*".

In the CAT
Paragraph 2 of schedule 4 of the Enterprise Act 2002 provides that if a decision of the Tribunal is registered in England and Wales in accordance with rules of court or any practice direction, the following may be enforced by the High Court as if the damages, costs or expenses were an amount due in pursuance of a judgment or order of the High Court, or as if the direction were an order of the High Court: (a) payment of damages which are awarded by the decision, (b)costs or expenses awarded by the decision and (c) any direction given as a result of the decision.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

If an injunctive order is disobeyed, then the party against whom it is made would be in contempt of court, which is punishable by imprisonment, a fine or sequestration of assets (CPR r.81.4). The penal notice accompanying the order puts the party against whom an order is made on notice of the consequences of failing to abide by it (CPR r.81.9(1)). This is generally enforced by committal proceedings.

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Yes. The Federal Rules of Civil Procedure govern civil actions in U.S. federal courts. Many state courts follow broadly similar rules at the state level. Federal Rule 23 authorizes class actions. A class action is usually defined as a lawsuit brought (or, rarely, defended) by one party on behalf of himself or herself and all others similarly situated, in which the representative party litigates common claims of a class of individuals or entities too numerous to effectively join the lawsuit themselves.

Class actions are exceptions to the rule that litigation is conducted by and on behalf of the named parties only, who must be the real parties in interest with respect to the claims before the court. Because class members not personally before the court will nevertheless be bound by the judgment in the case and unable to re-litigate the same claims or issues in future cases they might bring in their own names, class actions (and all representative litigation) implicate constitutional due process concerns (the maxim that a person may not be deprived of rights or property without due process of law). As a result, many of the procedural requirements imposed on class actions serve the interest of protecting the rights of the absent class members. Federal Rule 23 sets forth those requirements, effectively establishing the circumstances in which a class action may be brought.

Rule 23 is fundamentally procedural. It does not expand the jurisdiction of courts or confer, limit, or modify substantive rights provided by other laws. But in creating a procedural mechanism for class actions, Rule 23 has profound practical effects on the enforcement of rights and the contours of litigation in the United States.

Rule 23(a) identifies four characteristics required for all class actions: (1) the class must be of such a size that joinder of each member as an individual party is impracticable; (2) questions of fact or law common to the class exist and are material to the class's claims or opposing party's defense; (3) a member of the class is joined as a named party to the action and may act as class representative to litigate claims or defenses typical of the class; (4) the class representative will adequately represent the interests of the entire class. Those four requirements for

class certification are often summarized as (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Though the contested issues naturally vary from case to case, commonality and its close relative typicality often garner the most attention.

If all four of the requirements in Rule 23(a) are satisfied, a class action may proceed under any one (or more) of the three alternatives appearing in Rule 23(b): (1) a situation in which individual litigation runs the risk of creating a different standard of action for the party adverse to the class (this is very rarely used) or where an individual action would practically, though not technically, have the effect of binding class members anyway under the principles of *res judicata* (issue preclusion or claim preclusion); (2) a situation in which a party has taken or refused to take action with respect to a class as a whole, and final injunctive or corresponding declaratory relief having the effect of an injunction would be appropriate with respect to the entire class; and (3) any other circumstance in which the court determines that questions of fact or law predominate over any issues affecting class members on an individualized basis and a class action is a superior alternative to the other available methods for fair and efficient adjudication of the controversy. Class certification under Rule 23(b)(2) happens most often when the legality of an ongoing uniform policy or practice is disputed, such as in discrimination cases. Class certification under Rule 23(b)(3) happens most often when the class was subjected to the same alleged wrong (past or present) but the class members may have suffered in varying ways, most notably with respect to the extent of the damages suffered.

Two unwritten additional requirements for class actions have developed in case law: (A) the class must be clearly defined and objectively identifiable, so parties know with a high degree of certainty who is in the class and hence bound by the judgment in the case, and (B) litigating the action to judgment must be manageable by the court. When a class is not defined by an immutable characteristic (e.g., women who worked for Wal-Mart), ascertainability can present a problem unless the adverse party's business records establish with reasonable certainty who was affected by the challenged practice or product. Manageability may pose a problem when the party urging class-action treatment cannot propose a realistic way in which the case will be tried to verdict and judgment.

Certification of a class action lies within the discretion of the trial court, provided the party proposing the class carries its burden of satisfying the requisites of Rule 23(a) and one of the Rule 23(b) alternatives. But the district court's discretion is constrained by the requirements of Rule 23. Under Rule 23(f), interlocuto-

ry appellate review of class-certification orders is available (in the discretion of the appellate court) to correct legal errors or address a manifest abuse of the district court's discretion. Unusually for the adversarial system in the United States, judges presiding over a class action have a duty to look out for the interest of the absent class members and ensure that the named plaintiffs and defendants are not conducting the case in a fashion that prejudices the rights or harms the interests of absent class members.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

In *theory*, the class action procedure may be applied to any civil action, regardless of the legal claims asserted or the general area of law, unless a given statute expressly forbids class actions for some policy reason. Nothing in Rule 23 limits its application to certain legal subjects. But the class-action requirements may effectively make the procedure unavailable for certain kinds of claims. If resolving a given claim requires a plaintiff to prove some fact specific to the circumstances of the plaintiff, or a defendant raises a defense that applies uniquely to each plaintiff's claim, then individualized issues may predominate over common issues and make the class action device unsuitable. Those principles make equitable claims such as unjust enrichment ill-suited to class-wide adjudication. In the United States, the fields of law seeing the most class action activity of late are products liability, consumer protection, securities fraud, antitrust, and unlawful discrimination (on grounds of race, gender, sexual orientation, religion, etc.).
Some substantive laws forbid using class actions to redress alleged wrongs but leave open other procedural avenues. Most famously, the Fair Labor Standards Act (regulating the work day and week and requiring overtime pay at certain rates) does not permit class actions but does allow a "mass action" or "collective action," in which one party starts the case by purporting to represent the common interests of others, then individuals similarly situated to the plaintiff are given notice of the action and an opportunity to join as a named plaintiff.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action

on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Unless expressly forbidden (such as by a provision of law making class actions unavailable for redress of wrongs under certain statutes), class actions may be grounded in any substantive provision of law, whether statutory or common law. Claims under multiple legal theories, grounded in one or more statutes, may be combined in a single class action, subject to the usual rules on joinder of parties and claims. Adding claims may make a mandatory class action under Rule 23(b)(2) unsuitable or change the balance of the predominance/superiority analysis under Rule 23(b)(3), so practitioners must take care when deciding which claims to join in a single case. At the same time, leaving out of a case claims that the class members would otherwise have (known as claim-splitting) may reflect poorly on a putative class representative's adequacy, if the representative is putting his personal interest in getting a class certified over the interest of all class members in having their claims adjudicated economically.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Yes. Emergency motions for injunctive relief, including preliminary injunctions designed to remain in place during the pendency of the action before the parties' rights have been finally determined, are permitted in class actions, subject to the usual rules governing the propriety of injunctions. There is some open question as to whether a preliminary injunction may burden one party for the benefit of a putative class before the class has been formally certified in accordance with the requirements of Rule 23. After a class has been certified, a preliminary injunction certainly may be entered for the protection of the class.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes, both forms of relief are available in class actions. Rule 23(b)(2) is most often invoked as the basis for certifying a class seeking an injunction, because the rule is tailored for cases addressing whether a party's action or inaction toward a class as a whole should be enjoined. Rule 23(b)(3) is most often invoked as the basis for certifying a class seeking damages (an injunction or declaratory judgment may be requested as well in the same case), as that rule allows for resolution of claims that do have individualized issues—damages most often are indi-

vidualized—as long as the individualized issues do not predominate over the issues of fact or law common to the class. The last few years has seen extensive litigation over whether damages may be recovered by a class proceeding under Rule 23(b)(2). In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the United States Supreme Court decided that claims for individualized damages must be litigated under Rule 23(b)(3), though the Court left open the possibility that damages affecting the class as a whole (such as a group remedy or possibly automatic statutory damages) could still proceed under Rule 23(b)(2). A hotly contested issue at present is whether "formulaic" damages may be pursued by a class under Rule 23(b)(2). As the Supreme Court observed in *Dukes*, substantial due process concerns militate in favor of damages claims proceeding under Rule 23(b)(3), in which class members have a right to receive notice of the action and opt-out of the class.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In theory, all types of damages may be recovered in a class action. But the more individualized the damages, and the more specific evidence necessary to prove or contest the damages, the more likely it is that common class issues will not predominate over individualized ones, so the class action may not satisfy the predominance test of Rule 23(b)(3). For example, in a products-liability case, issues surrounding whether the product was defective might be susceptible to determination as a class-wide issue in a class action, but the dollars recoverable by a given class member might need to be reserved for separate adjudication on an individualized basis.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

The class action procedure does not itself, as a legal matter, increase the exposure to the defendant or the potential recovery by the plaintiff or class members. Class actions do not automatically put punitive damages or recovery of attorney's fees into play when the underlying substantive law would not. As a

practical matter, however, the class action may increase the exposure by aggregating claims not worth pursuing into a single large claim worth pursuing, thus converting zero practical liability into meaningful actual exposure. Punitive damages, treble damages (in the antitrust field, for example), and attorney's fees may be pursued in class actions if the underlying substantive law provides for recovery on that basis. One of the economic rationales for punitive damages may have some diminished vitality in class actions, insofar as extracting from the defendant and giving to the plaintiff money in recognition of all the other claims not brought by other victims doesn't apply if all the "other victims" are in the case by virtue of being members of the class.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

In the antitrust field, the passing-on defense was rejected by the United States Supreme Court in *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 88 S. Ct. 2224 (1968). On the other side of the coin, an indirect purchaser who paid the marked-up price charged by someone passing on the illegally high price has no claim against the anti-competitive manufacturer who sold to the middleman. *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977). So too an indirect seller cannot recover an undercharge resulting from the indirect buyer's anticompetitive activities. The plaintiff and defendant in an antitrust suit must have dealt with one another directly. *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981). For a discussion of how passing on can make a proposed class representative inadequate because he may have benefited from anticompetitive activity while other class members may have lost, see *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003).

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of

two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Anyone can bring a putative class action lawsuit, provided that the relevant underlying substantive law allows for the party's claims to be adjudicated on a class action basis and the party has satisfied the procedural requirements for a class action. Whether a party can serve as a class representative (the lead plaintiff) in a federal class action lawsuit is governed by Federal Rule 23. A class representative and the class members he or she purports to represent must have similar claims that share common questions of law or fact that are material to the class's claims or the opposing party's defenses. In effect, that requirement typically means that the class members and class representative must have suffered similar injuries arising out of the same conduct, occurrence, policy, or practice. To the extent that individual questions of law or fact (including calculation or apportionment of damages) predominate over common class issues, the class cannot be certified. Additionally, the named class representative must have claims that are typical of the class's claims and adequately represent the interests of the entire class. (*See* Section 2.3, *infra*, for further discussion about the requirements for class representative.)

Class actions are usually brought as private actions; however, governmental agencies and regulators can participate in class actions as either class representatives or class members to the extent they have suffered the same injuries or have claims typical of the class's claims. Additionally, state governments may bring representative actions—as distinguished from class actions—in which the state represents the interests of its citizens but itself does not share the same injury or claims. The state acts in such cases as *parens patriae*; that is, as the legal representative of the state to vindicate the state's sovereign and quasi-sovereign interests, as well as the individual interests of the state's citizens. *Parens patriae* actions often include cases where a state has sought to enjoin a public nuisance or ensure the economic well-being of its citizenry. Examples include seeking an injunction to prevent the defendants from discharging sewage in a way that polluted a local river, cases where a state sought to maintain access to natural resources for its citizens, and cases where a state sought redress against retail pharmacies for alleged violations of state laws regarding generic-drug pricing.

Federal regulators, such as the Equal Employment Opportunity Commission and the Environmental Protection Agency, may also bring similar representative actions—that are not governed by class action rules—on behalf of certain catego-

ries of people (employees, for example) or large segments of the public. Additionally, the Fair Labor Standards Act (the "FLSA") authorizes employees to recover unpaid minimum wages and overtime wages and seek redress for retaliatory discharge against employers through mass actions on the employee's own behalf and on behalf of any "similarly situated" employees. Collective/representative actions under the FLSA differ from traditional class actions in that employees who wish to be part of a claim must opt-in by filing a written consent, and courts generally hold that FLSA collective actions need not comply with the class action requirements of Rule 23.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Federal Rule 23 applies to class actions in the federal court system, whereas representative or mass actions that are not class actions will be governed by the specific statutes authorizing such actions, under either state and/or federal law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Federal Rule 23 requires that the class representative in a federal class action adequately protect the interests of absent class members he or she purports to represent. The adequacy of a class representative is a question of fact that will depend on the circumstances of each case and typically involves inquiry into two issues: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representative will adequately prosecute the action. Courts may also consider the qualifications of class counsel in connection with an examination of the adequacy of the class representatives. Courts should resolve issues of adequate class representation as early as possible in the litigation, and often do so in connection with class certification.

Only fundamental or substantial conflicts can render a named representative inadequate. Fundamental conflicts arise where, for example, some class members claim to have been harmed by the same conduct that benefitted other members of the class such that the class representative cannot vigorously prosecute the interests of the entire class because their interests are actually or potentially in

conflict with the interests and objectives of other class members. Minor conflicts or differences among class members and the named representatives will ordinarily not support a finding of inadequacy so long as their shared common goals for the litigation predominate over any such differences.

In some cases, there can be considerable jockeying and competition among class members to be class representative. This can occur for many reasons unrelated to representative adequacy, including the potential for large attorney fees and enhanced damage awards for named plaintiffs, as well as control of the litigation. In the context of securities-fraud class actions, Congress addressed these concerns and other abuses through the Private Securities Litigation Reform Act of 1995 ("PLSRA"). Among other things, the PLSRA requires the court to identify and designate a lead plaintiff who the court determines to be the best representative for the other class members. That is a departure from the requirements generally applicable to class actions.

There are a number of actions a court can take if it determines that a named class representative is inadequate and/or finds substantial conflicts of interest among the class. The court can refuse to certify a party as a named representative. It can also either dismiss the case or refuse class certification, thereby allowing the case to continue only for the benefit of (or against) the named parties. Other options for the court include certifying subclasses, limiting the class to individuals whose interests would be adequately protected by the named representatives, or requiring the joinder (addition) of other representatives to ensure adequate representation for the entire class.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

Admissibility of a class action (whether the claims may be litigated on a class basis), known as class certification in the United States, is one of the most heavily litigated issues and most important rulings—if not the most important ruling—in a putative class action. Rule 23(c)(1)(A) provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." While either the plaintiffs or defendants may move for class certification, the court has an independent obligation to assess the appropriateness of the purported class action if neither party raises the issue.

In theory, the decision whether to certify a class is separate from a determination of the merits of the underlying claims. The court's focus at class certification is whether the action satisfies the Rule 23(a) requirements of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. (*See* the answer to Question 1.1, *supra*.) Certification is proper if the court "is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011). If the court determines that one or more of these requirements are not met, the action cannot continue as a class action and certification will be denied—thereby leaving the class members to pursue their claims on an individual basis, if at all. The court has broad discretion in deciding whether to certify a class; and, if certification is denied for the entire class, the court may still allow the case to proceed as a partial class action.

Although evaluation of the merits of the underlying claims is an improper consideration at class certification, the court's inquiry into the Rule 23(a) factors, particularly commonality, will often require the court to consider what the class will have to prove at trial to succeed on the merits and whether those elements can be established by common proof (making class action treatment appropriate) or individual proof (perhaps making class action treatment inappropriate). While such an inquiry at the class certification stage involves analysis of the elements of the parties' claims and defenses, it does not cross the line into improper evaluation of the merits so long as the court does not engage in a determination of the class's probability of success on the merits. Yet, as the U.S. Supreme Court explained, the required "rigorous analysis" of class certification issues "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal-Mart*, 131 S. Ct. at 2551–52.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Whether a particular party, or parties, may assert a certain claim—as a class action or otherwise—will depend on the substantive law governing that claim rather than the procedural rules applicable to the maintenance of class action cases. Class action rules and procedure cannot confer standing on a party that would not otherwise not have legally recognized claim. See the answer to Question 1.8, *supra*, for a discussion of suits by indirect purchasers.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Class actions, by definition, are intended as a mechanism for multiple plaintiffs to resolve claims that could not be practicably joined or litigated on an individual basis. There are no set numerosity limits, and the number of claims that can be aggregated in a class action depends on the facts and circumstances of each case. Class actions have been certified with hundreds of thousands, and even millions, of class members and as few as thirteen class members. Some courts have held that the impracticability of joinder requirement is presumed at a level of forty class members. However, class size is not the sole consideration and courts will also assess other factors, including the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute. At class certification, the plaintif is not required to allege the exact number of class members, but the plaintiff must provide facts or demonstrate circumstances showing a reasonable estimate of class size. Courts will not certify a class based on speculation.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

Broadly, there are a number of procedural opportunities for a class action defendant to defeat the class claim prior to a trial on the merits. The first opportunity is at the pleading stage where the defendant can move to dismiss the claim on the basis that the plaintiff has failed to state a cause of action against the defendant. Such a motion is often called a "so what" defense, in that the defendant argues that the plaintiff has no claim even if everything the plaintiff has alleged is true. A defendant can also challenge the court's jurisdiction and/or ague that another venue or forum would be more appropriate for the resolution of the class claim. And, as discussed in response to Question 7.4, *infra*, defendants have had some success dismissing consumer class actions on the basis of mandatory arbitration clauses in the underlying service or product agreements.

After the motion to dismiss stage, a defendant's next (and best) procedural opportunity to defeat a class action is at class certification. Class certification is often dispositive because the case cannot continue as a class action if certification is denied.

Should a defendant lose at the motion to dismiss stage and fail to block class certification, the next procedural opportunity to prevail before trial is at summary judgment, which typically occurs after the parties have completed fact and

expert discovery. Summary judgment is akin to a trial on paper, and is only appropriate where there are no genuine, disputed issues of material fact and the moving party is entitled to judgment in its favor as a matter of law.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express consent of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

This varies by the basis on which the mass action proceeds or the class representative seeks class certification. As a general rule, a mass action initiated by a lead plaintiff on behalf of others, such as (most commonly) for violations of the wage-and-hour rules in the Fair Labor Standards Act, proceeds as an opt-in class, with only those plaintiffs who receive notice of the action and take an affirmative step to join the litigation being treated as plaintiffs / part of the class. For an ordinary class action under Rule 23(b)(3), the class is formed on an opt-out basis. Potential members of the class have a right to notice of the class action and the class claims to be litigated and have some period of time to opt-out of the class. Opt-outs most commonly happen when a class member wants to proceed in its own name and control its own destiny by filing a separate individual claim.

The federal rules authorize a third option not presented by this question: a mandatory class. A class certified under Rule 23(b)(2) may proceed as a mandatory class with no right of class members to opt out, on the theory that the outcome of the litigation will by its very nature benefit or burden everyone in the class regardless of a personal wish to not be so benefited or burdened, such that opting out would be meaningless. An example of this would be a discrimination case: if a class representative sues the public bus operator in Birmingham, Alabama for an injunction against requiring African-American passengers to sit at the back of the bus as a condition of receiving service, all African-American members of the community will benefit from the injunction if granted, so there is no point to giving notice and affording a particular citizen an opportunity to opt-out of a lawsuit that will benefit him anyway; the potential burden

on the absent class member is the risk of losing, and forbidding opt-outs in this situation protects successful defendants from having to defend the same case a second time when brought by a party who opted out.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

A judgment entered in an opt-in mass action will directly bind only those who opted in. Only such opt-ins will have a right to receive proceeds from the lawsuit or benefit from an injunction. Individuals who could have opted in but did not for some reason may, however, get some indirect benefit from a successful outcome in that the losing adverse party may be precluded from re-litigating in a follow-on case brought by bystanders an issue lost in the first case against the opt-ins. The opt-in system has some attractiveness for defendants because it starts with the smallest class possible—i.e., the named plaintiffs only—and grows in number and potential liability only as claimants take affirmative steps to join the class. That lower potential liability comes at the price of less preclusive effect of the judgment: the defendant can always expect someone who elected not to opt-in to suddenly appear and want money once liability is determined or a settlement is reached.

A judgment entered in an opt-out case will directly bind only those members of the class who did not opt out. Opt-outs will not be bound and will have no right to receive any proceeds of the lawsuit. Here again, though, opt-outs may get an indirect benefit from a successful class action, in that the losing defendant will be precluded from re-litigating an issue lost in the first case. For this reason, an opt-out system benefits a defendant by resolving a greater number of claims and resulting in a judgment (or settlement) binding on the greatest number of claimants. At the same time, an opt-out system benefits the plaintiff's side by starting with the maximum size of the class (and hence the largest potential damages amount) and reducing it only by those who take affirmative steps to opt out.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Generally, no. Once the time to opt-out of the class has expired, the size of the class should be fairly fixed. It would work great prejudice on a defendant if a class member could participate in a case until something goes wrong—such as

the defendant prevailing on a defense—only to opt-out at that stage and re-litigate the matter in a subsequent lawsuit. This is known as one-way (outbound, of course) intervention, and it is best avoided. The same holds true for opt-in claimants: once they have chosen to cast their lot with the representative party, it would be unfair to the defendant to allow them to back out and bring a separate lawsuit. In mandatory classes, members cannot opt out at all, unless for some reason the court allows it.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

A court is required to grant a timely motion for intervention if a statute allows for it or if someone who is not adequately represented has an interest in the litigation and: (1) files a timely application; (2) proves his interest in the litigation; (3) demonstrates that the interest may be impaired by the disposition of the action; and (4) shows that the interest is not adequately protected by the parties to the action (this inadequacy standard is not as stringent as the initial adequacy requirement in Rule 23(a)). The court will usually set a time for parties to intervene as party of a scheduling order in the case. A scheduling order may be modified in the discretion of the court upon a showing of good cause.

A court has discretion to permit intervention upon a showing that the applicant has a claim or defense that shares a common question or fact or law with the principal claims in the case. Since a party qualified to intervene would ordinarily be a member of the class whose interests are presumably being represented by the class representatives and their counsel, intervention in this fashion would be unusual, unless the applicant is attempting to get his or her own lawyers directly involved in the case for some reason.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Absolutely—it is essential. The class action complaint (the case-initiating document) should give some indication of the contours of the proposed class. The class-certification order must clearly define the class by some objective characteristics. And, as mentioned in response to Question 1.1, *supra*, the class must be ascertainable: the parties must be able to determine in some fashion who the members of the class are, in order to know who is bound by the judgment.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

Class actions involve four kinds of notice to the absent class members: certification of the class and class claims, proposed and actual settlement, proceedings for an award of attorney's fees, and any other matter in the discretion of the trial judge. Except in cases proceeding under Rule 23(b)(1) and (b)(2) and for notices issued in the discretion of the trial judge, notice to absent class members is mandatory, to be delivered by the best practicable means, with the first notice to be issued promptly upon certification of the class. The cost is typically borne by the class representative or class counsel.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No. But the class action plaintiff's bar is well networked, so information about pending class actions and settlements may be obtained from contacts active in the specialty. Additionally, the default rule in the United States is that court proceedings and records are generally open and public, such that information about class actions generally can be obtained with little difficulty.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

There is no requirement that class actions have to follow decisions adopted by public authorities. Private litigants may bring any claims to the extent such claims exist under applicable substantive law or the parties premise their claims on a good-faith argument for the extension of existing law.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Generally, yes—so long as the asserted claims have a basis in existing substantive law or a good faith argument for the extension of existing law. In fact, it is quite common for class action litigation—particularly securities fraud, antitrust, and consumer protection cases—to be initiated immediately after a governmental agency has merely announced that it is investigating a business or product for potential violations. Adverse administrative action or unfavorable court rulings against a business often serve as a clarion call for the initiation of putative class actions.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The full range of broad pre-trial American discovery is available in class action litigation, either under the Federal Rules of Civil Procedure or analogous state court rules. In the U.S., private litigants control discovery with only limited court oversight. Each party to a lawsuit has the right to demand that its opponent produce all documents in the opponent's possession, custody or control that relate to claims at issue in the case. Litigants also have the right to demand written answers to questions (interrogatories), sworn admission of certain facts related to the case, and answers to oral questions relating to the claims (depositions). Litigants are also entitled to similar access to third party companies and individuals that might have information related to the case. The only exception in class action litigation is that discovery from absent, unnamed class members is disfavored and not typically permitted.

Whether a class action litigant (or any litigant) may obtain documents directly from a public authority or government agency—typically through a Freedom of Information Act ("FOIA") request—will depend upon whether that authority is involved in an ongoing investigation, whether the authority has deemed the requested documents "public" or "confidential," whether the requested documents have already been publicly released (in which case a formal FOIA request may be unnecessary) and whether the authority is required by law to disclose the requested information or maintain its confidentiality.

To the extent a party is seeking documents or information from a public authority that the authority obtained from a private party in the lawsuit or a third party, discovery of that same information should be sought directly (and can generally be obtained) from the source under applicable discovery rules. The fact that an individual or entity provided certain information to the government does not usually allow that individual or entity to resist production of the information during discovery.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

The procedural rules regarding class actions do not toll or extend the substantive limitations periods, and the fact that a public authority might be investigating a class action defendant will not alone suffice to toll any limitations period for private litigants. Conversely, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again. A party considering whether to bring a class action lawsuit (or any kind of lawsuit), is well advised to consult the applicable limitations periods for the contemplated claims as early in the pre-filing investigation as possible.

Parties can, and often do, enter private tolling agreements that toll the applicable limitations period for filing a claim in order to discuss settlement, investigate the underlying facts or law, or allow some other related process or event to occur. Courts also have broad powers in many instances to stay proceedings in the interest of efficiency and justice, particularly where parallel or related proceedings are underway.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

A judgment in a criminal case or a civil enforcement action may be submitted as evidence, though the affected party may attempt to explain the circumstances. Statements made in court one case may be introduced in another as judicial admissions. But the precise contours of the judgment or admission are of paramount importance. In one significant cross-border case recently, a corporation

pled guilty to attempting to bribe foreign officials. In subsequent civil litigation by a competitor claiming to have been aggrieved by the attempted bribery, the corporation defended on the basis that the bribes were merely attempted not actually paid, in that an agent had kept the money, as the supposed bribes were fake, a way for the agent to get more from the corporation. To show causation, the competitor thus had to prove more than could be derived from the guilty plea and judgment of conviction.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Yes. Financing of litigation in the United States is largely unregulated, except to the extent that bar ethics rules impose limits on what financing lawyers may provide to clients and to the extent that the adequacy requirement of Rule 23(a) forbids a class representative from having an interest adverse to that of the class members.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

Typically not, unless the party opposing class certification makes an adequacy issue out of the proposed class representative's ability to prosecute the case to judgment (including by paying the costs of litigation). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). American Bar Association Model Rule of Professional Conduct 1.8(E) permits attorneys to advance costs in all cases, including class actions, with repayment by the class representative or the class contingent upon the outcome of the lawsuit. (This model rule has not been adopted in all jurisdictions; some, such as New York, still follow a rule mandating that clients remain ultimately liable for advanced costs and expenses.) In practice, then, a well-financed plaintiff's law firm is more important to the funding of the costs of litigation than the class representative's personal means. And because the named plaintiff's lawyers and putative class counsel may agree to make payment of attorney's fees contingent upon the outcome of the case, the expenses requiring funding during the litigation may be limited to third-party expenses, such as court reporters, travel, expert fees, etc.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

These issues would not typically result in a stay of the proceedings but rather a decision not to certify the class, or not to certify a given named plaintiff as class representative, on the grounds that the class representative is not adequate to the task of representing the interests of the absent class members.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No. Potential plaintiffs may seek charitable support. But the most ready source of financial support for potential plaintiffs is the class action plaintiff's bar, subject to the usual ethical limitations on lawyers providing financial assistance to clients. If a potential claimant has a meritorious case but cannot fund it himself, all he has to do is find a plaintiff's lawyer willing to take the matter on a contingency basis.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Yes, subject to court approval as to the reasonableness of legal fees paid from the proceeds of the litigation.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

If taken to judgment, the losing party in a case is usually required to pay the winning side's "costs." In most instances, such reimburseable "costs" are rather limited: filing fees, court reporter fees, fees for service of process, witness fees, photocopying and printing/binding charges, that sort of thing. "Costs" typically do not include fees payable to experts or attorney's fees. The loser in a class action

has no obligation to pay the winner's general expenses of litigation, including expert's and attorney's fees, unless the underlying substantive law provides for such cost-shifting. Unless the statute sued under provides for an aggrieved party's recovery of attorney's fees, or the law for some other reason permits an award of attorney's fees in the winning party's favor, then attorney's fees may be recovered from the common fund awarded to the class, subject to court approval.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

In 2005, Congress passed the Class Action Fairness Act ("CAFA"). The objective of CAFA was to curb two forms of abuses: forum-shopping by plaintiffs and the class-action plaintiff's bar that was resulting in an unusual number of class action cases being filed in certain forums considered more favorable to plaintiffs ("class action hell" in the eyes of some defendants), and settlements engineered by named plaintiffs, class counsel, and defendants in a way to ensure handsome payouts to class counsel (who may have been perceived as driving the litigation anyway) and paltry or valueless awards to absent class members. CAFA created additional grounds, unique to putative class actions, for removing lawsuits from state courts to federal courts (in the eyes of some, state courts—particularly those having to stand for election—could be more subject to flattery from or influence by the class action plaintiff's bar than federal judges appointed for life). CAFA also required additional scrutiny of settlements, including by giving state attorney's general a right to receive notice of and an opportunity to object to a settlement affecting class members from their states. Settlements involving coupons for class members enjoy special judicial scrutiny, and CAFA requires attorney's fees awarded on the basis of coupons to consider the amount actually redeemed, not the value available.

5.8 Are the parties to an action able to insure against the cost risks?

Usually not directly, but possibly indirectly. A corporation usually indemnifies its directors and officers and buy directors-and-officers insurance that typically provides coverage for the costs of defending a claim, including a class action lawsuit, alleging securities fraud or other malfeasance. Professionals such as accountants and lawyers typically have errors-and-omissions coverage that may provide a defense and even pay claims brought as a class action. That sort of coverage may be come into play when, for example, investors in a fraudulent

scheme bring class claims against accountants and lawyers for not having uncovered the scheme.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Such orders are very rarely granted in the United States, largely because of the "American Rule" that each side pays its own expenses of litigation. Because the costs subject to shifting as a "costs" charged to the losing party are most often fairly small, the expense of obtaining such an order usually makes it not worthwhile to pursue.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

The ethical rules that have particular relevancy to class actions concern lawyers advancing the costs of the litigation and receiving payment of attorney's fees as part of the judgment or settlement. As mentioned above, American Bar Association Model Rule of Professional Conduct 1.8(E) permits attorneys to advance costs in all cases, including class actions, with repayment contingent upon the outcome of the lawsuit, which basically means that repayment will come from the proceeds of a settlement or collection of a favorable judgment. Awards of attorney's fees to class counsel are subject to approval by the court, and a great deal of litigation has flowed from controversies over fee awards. If authorized by the underlying substantive provision of law, class counsel may seek an award of attorney's fees from the opposing party. In other circumstances, the attorney's fees will be paid from, perhaps as a share of, the common fund generated for the class by the work of the attorneys. Methods of calculating the fee award vary, including a "lodestar" calculated by the number of hours reasonably worked times the hourly rate reasonably payable for similar non-contingent work, then adjusted up or down based on certain factors known as multipliers, such as the risk of the contingency and the quality of the work performed. Another approach considers twelve factors regarding the work performed. And yet another approach allows class counsel to take a percentage of the common fund, usually something in the range of 20–25% of the fund (as compared to 33% - 40% in other contingency cases, such as personal-injury work). For a primer on the various approaches, *see Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991).

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific conflict of laws or jurisdictional rules in the United States relating to cross-border issues that apply solely to class actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, to the contrary, public policy in the United States seeks—where possible—to protect parties from needless multiple litigation and inconsistent obligations. That is often accomplished through the class action mechanism by allowing cases involving many claims and parties to be resolved in a single forum. That said, the same forum and venue rules and practices that apply to non-class action cross border cases also apply in class actions.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

A foreign plaintiff can bring a putative class action in the United States, so long as the foreign plaintiff satisfies the usual jurisdictional, due process, and standing requirements under American law—including the requirements of the particular substantive law at issue. An American court is not bound to certify a class representative solely on the basis that a foreign country has designated that entity as a party representative. The court may, however, consider that fact as part of its inquiry into the adequacy of the class representative and/or class certification.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

There are no rules unique to class actions that apply in situations where there are several actions proceeding in different jurisdictions at the same time that in-

volve the same parties and the facts and issues. Generally speaking, a court faced with that situation may (upon its own initiative or in response to a request from one or more parties): (1) stay the litigation until common issues of law or fact are resolved in one or more of the related proceedings; (2) transfer or consolidate one or more of various proceedings to the extent it has jurisdiction and authority to do so; or (3) dismiss the case pending before it under the doctrine of *forum non conveniens* (inconvenient forum) so that the parties are forced to litigate the dispute in an alternative jurisdiction where one or more of the related cases is pending.

Whether a party can bring suit against a foreign entity with a subsidiary domiciled in the relevant jurisdiction will depend upon substantive rules of due process and personal jurisdiction that are separate and apart from the rules governing class actions. Filing a lawsuit as a putative class action will not confer jurisdiction over a foreign party where jurisdiction would not otherwise exist. Broadly speaking, before a foreign (or out of state) defendant may be required to defend a case in the forum state, it must have "minimum contacts" with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. There must be some act by which the defendant "purposefully avails" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

There are two different theories for personal jurisdiction in the United States: specific and general jurisdiction, both of which are heavily dependent on specific facts. Specific jurisdiction turns on only those facts concerning the actual dispute alleged in the lawsuit. In a contract dispute, for example, a court will consider several factors to determine whether the defendant should have reasonably expected that its actions would lead it to have to answer to a lawsuit in the forum state. These factors include the places of contract negotiation, execution and performance, as well as the location of any alleged breaches. The court will also consider where the plaintiff suffered the alleged harm. Even if some factors do not favour exercising jurisdiction, the court may nonetheless conclude that jurisdiction is appropriate. If the requirements for specific jurisdiction are met, the court will exercise jurisdiction over the defendant for that one specific case.

In contrast, a court that has general jurisdiction over a defendant can hear any lawsuit against that defendant—regardless of whether the court would otherwise exercise specific jurisdiction over the dispute. To determine whether it has general jurisdiction over a defendant, a court will look at the totality of the defendant's activities within the forum state and decide whether these contacts are sufficient in

number and consistency to justify the court resolving any and all disputes involving that defendant. For example, the court will consider whether the defendant has employees in the state, whether it has offices within the state, the frequency of the defendant's advertising within the state, and any other activity that connects the defendant to the state. Additionally, a court always has personal jurisdiction to hear lawsuits against citizens of the state in which the court sits. Once a court determines that it has general jurisdiction over a defendant, it may hear any case against that defendant—including class actions claims.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are there implications for refusing?

The United States does not have any ADR methods specific to class action / mass action cases. The court may in its discretion order parties to participate in ADR, such as mediation or a facilitated settlement conference, but the court has no power to order parties to settle or to fashion a settlement for the parties. Other than contempt for refusing to comply with a court order regarding settlement discussions or mediation, refusing to participate in settlement discussions or ADR methods such as mediation has limited consequences. From a tactical standpoint, however, parties generally want to appear to the trial judge as amenable to settlement, not recalcitrant. So expressing willingness to engage in settlement or ADR, and notifying the court that a client is undertaking efforts in good faith to settle the case (the fact that efforts are being made, not what happened in the discussions), is perceived by many as likely to curry favor with the judge or at least to avoid creating an unfavorable impression.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

This varies from court to court, even from judge to judge. Some judges take a more active role, engaging with the parties to foment settlement talks, others never inquire about or comment on the possibility of settlement. As a reflection of the fundamentally adversarial nature of the U.S. legal system, many lawyers and parties are quite uncomfortable with the judge presiding over a case taking

any interest at all or expressing any views on the possibility of settlement, never mind the terms, even though the court will ultimately be called upon to rule on the fairness of the settlement of a class action. Many lawyers and parties view settlement as a matter strictly among themselves for the judge to become involved in only when approving or rejecting the settlement as a whole.

Nevertheless, it is relatively commonplace for courts to refer or even order parties to non-binding mediation in an effort to foster settlement. Depending on the judge's practice and the groundrules followed by the mediator, the judge may or may not learn about the events at the mediation, including whether one party was more or less reasonable in approaching the settlement discussions. In cases large and small, resorting to non-binding mediation is now a tool routinely used in an effort to get the parties to settle. The amounts at stake in many class-action cases make them particularly suited to mediation.

While a variety of other ADR methods are available, they are used far less often than mediation, particularly for class action cases, as class action plaintiffs and counsel have a strong aversion to forums other than courts.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

No, not unless the limitations period is tolled for some other reason, such as by the pendency of the class action itself. Generally, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

Yes. Arbitration agreements are generally enforceable under federal law (and any contrary state law is preempted) and are often seen as a way to escape class action litigation. Arbitration agreements may include a class-action waiver that would prevent class treatment of claims that could otherwise be brought on a class-wide basis. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). And courts may not force parties to arbitrate on a class-wide basis unless the parties agreed

to do so. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The principal exception to the strong federal policy in favor of enforcing arbitration agreements would be specific statutes that make arbitration agreements unenforceable as between certain parties or for certain kinds of claims. *See, e.g.,* 10 U.S.C. § 987(f)(4) (Military Lending Act provision rendering arbitration agreements between creditors and borrowers covered by the Act unenforceable).

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Yes, the requirements and procedures for notice to absent class members in class actions are discussed in the answer to Question 1.2, *supra*.

8.2 Are there any provisions regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

Court orders and judgments entered in a class action proceeding are enforced in the same manner as orders in non-class actions are enforced, with the exception that disbursement of the litigation proceeds to the class and payment of attorneys' fees to class counsel are administered in a process that is overseen and approved by the court. The available compensation to the class and class counsel will depend upon the remedies allowed by the underlying statute or common law rule that gave rise to the class claims.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Yes. Courts have authority and discretion—both inherent and by statute—to encourage and ensure compliance with court rulings granting both injunctive and monetary relief. These rules are not specific to class actions, but can include contempt of court proceedings, escalating fines for non-compliance or delayed compliance, and other sanctions that comport with due process.

National Report of Turkey

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Historically Turkish law has allowed only for multi-party litigation. However, litigation that is similar to a class action and called "collective action" is now available for legal persons and associations under the new Code Of Civil Procedure numbered 6100 which came into force in 2011.

According to article 113 of Turkish Code Of Civil Procedure :
Associations and other legal entities may, within the framework of their statute and on their behalf, initiate a collective action in order to protect the interests of its members or of its associates or of the groups they represent, to determine the rights of the related parties or to remedy the unlawful situation or to prevent the future violation of their rights.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

As Article 113 of Civil Procedure Code is a general provision, if there is no restrictive provision in the other Turkish Codes, collective action is applicable to any legal action. Due to collective action is stated under the new code of civil procedure, in practice it is rare to encounter some cases. Presently in practice, we see examples of this new type of action mostly in Consumer Law.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Due to the jurisdiction organization of Turkish Law, all disputes are not resolved at the same branches of judiciary, there are several branches of judiciary. For this reason disputes which belong to different branches of judiciary have to be resolved separately at their own official court. For instance, disputes regarding

competition law have to be resolved at Commercial Court and disputes related to consumer law have to be resolved at Consumer Court.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In Turkish Law System, there is no such regulation which allows to initiate summary/emergency proceedings in class actions/collective redress actions.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

As per article 113 of the Civil Procedure Law, associations and other legal entities may commence civil proceedings with respect to their status and on behalf of themselves in order to protect their members' and associates' rights. The protection involves claims to establish a right or legal status, to cease unlawful acts and to prevent unlawful acts. Therefore, through class actions/collective redress actions it is possible to claim cessation of unlawful practices/behaviors but it is not possible for the associations or other legal entities to claim compensation for damages suffered by their members or associates.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

As it is not possible to claim compensation, any type of damage suffered by the victims cannot be compensated.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

As in Turkish Law System, through a class action/collective redress, compensation cannot be awarded to the victims, the victim has to claim his/her damages by means of individual actions.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

It is not found in our jurisdiction.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

In our jurisdiction, the class actions/collective redress actions may not be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement. Class actions/collective redress may be brought by an authorized representative or public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice. But according to the article 113 of Code of Civil Procedure, associations and other legal entities may only bring such actions with respect to their status which means that they may only initiate a collective action in accordance with their establishment and operation.

There are some Turkish law regulations that can create an instance of the class actions and which determine authorized representative entity or public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims.

According to the article 56 of Turkish Commercial Code numbered 6102;

Chambers of industry and trade, chambers of artisans, exchange markets and other professional and economical unions, non-governmental organizations and public organizations which are authorized to protect economic interests of their customers pursuant to their bylaws can also bring actions for determination of unfair competition or for prevention of unfair competition or for eliminating the

factual situation upon an unfair competition act or if the unfair competition made by false and misleading statements, for correction of those statements.

According to the article 23/4 and the article 24/1 of Turkish Code on Consumer Protection numbered 4077;

The Ministry or consumer organizations can file lawsuits, before consumer courts, relating to issues which are not considered individual consumer problems but are, in general, concern to consumers, in order to eliminate the situation violating this Law.

In the event that a series of goods offered for sale are defective, the Ministry, consumers or consumer organizations can file a lawsuit seeking the production and sale of the defective good to be suspended, and recalled from those who are holding such goods for sale.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

There is no specific regulation which states any criteria/rule defining the cases where one or another kind of actions referred to in 2.1 could apply.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

As per article 113 of Code of Civil Procedure, the entities which can file a case on behalf of their members or persons that they represent are associations and all other legal entities. In addition, it is also regulated that legal entities may only initiate within the frame of their statute. The article regulated in Code on Consumer Protection also states the entities which are able to file a case on behalf of consumers. If the conditions are not complied, the case will be rejected due to lack of procedure.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

In Turkish Law System, the admissibility of a lawsuit is examined by the court at the first stage of the proceedings named preliminary examination. If the lawsuit does not meet the conditions required by the law, the court will not proceed to the investigation stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

According to the Turkish Code of Civil Procedure, only parties whose interests are violated are entitled to bring an action. However in a limited number of circumstances which are stated by the law, third parties may be allowed to file an action in respect of violation of an interest belonging to a third party. (such as in Code on Consumer Protection allows consumers' associations to file lawsuits in respect of the consumer)

On the other hand, the Civil Procedure Law No. 6100 introduced a new provision which, under certain circumstances and conditions, allows third party legal entities such as associations to file lawsuits, on behalf of themselves, but for the protection of the interests of their members and associates.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

In Turkish civil procedure law, it is possible to voluntarily bundle individual claims by way of assignment. In such cases, the claims of the different claimants will still continue to exist as individual claims; to the extent that they depend on common factual circumstances. In the event these individual claims are bundled, they can be litigated together. The courts are also entitled to request the mandatory bundling of individual claims if a specific right arising from substantive law is exercised by more than one claimant.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

It is not found in our jurisdiction.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

In our jurisdiction the natural or legal person claiming to have been harmed cannot become the claimant party without expressing their claim. The claimant party is formed on the basis of express content. In Turkish Law system opt-out principle exist in certain circumstances (such as consumer law disputes), the claim is brought on the opt-out basis.

In Turkish Code of Civil Procedure, there is a procedural mechanism named ''intervention to case'' that allows third parties who will have an effect at the end of the case, to participate in the case by submitting a petition of intervention. However, they do not become a party of the case.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

The judgment of a collective action will have an effect on the victims claiming to have been harmed. They will benefit from the judgment, which means, they do not have to bring a several action. However, the collective action brought for instance by a consumer organization, will not constitute an obstacle to bring another action by a consumer for compensation of damages. The judgment may then be used in lawsuits which will be brought by the victims. If there is no more need to file a several action within the frame of the result obtained at the end of the collective action, this kind of case brought after the judgment shall be rejected due to lack of legal benefit. In summary, not only the legal person but also all individuals within this collective group shall benefit from and shall be influenced by the result of the lawsuit. The decision rendered in the end of collective action shall also be used as a precedent judgment in future individual lawsuits that may be taken.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is

rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

As per article 307 of Code of Civil Procedure, the claimant party may withdraw the lawsuit until the order is finalized. The waiver has to be unconditional. In our jurisdiction, there is a procedural mechanism named '' joinder of parties''. In discretionary joinder of parties, each member acts separately, therefore a member may waive separately from others until the order is finalized. However, in the compulsory joinder of parties, each member act together, which means they may not waive separately.

Articles 57–59 of Code Civil of Procedure

Discretionary joinder of parties:

Article 57- Under following circumstances, more than one party can file a suit or become defendants together:

a) If the privilege or debt between co-plaintiffs or codefendants, is common due to a reason out of tenure.

b) If a privilege arisen for multiple person by common transaction or, with this manner, they enter into obligation themselves.

c) If the legal facts and legal reasons which are the basis of the lawsuit are same or similar.

The status of voluntary joinder of parties during the lawsuit :

Article 58- In the discretionary joinder of parties, lawsuits are independent. Each one of the discretionary joinder of parties act independently.

Compulsory joinder of parties:

Article 59- According to substantive law, if a privilege is used together by many persons or used against to many persons and, in circumstances in which it needs to decide for fullest extent , it is mandatory to be joinder of parties.

The status of mandatory joinder of parties during the lawsuit:

Article 60- Compulsory joinder of parties, they can only bring a lawsuit together or a lawsuit can only be brought against them together. In this type of joinder of parties, it is mandatory for joinders to act together.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the

claimant party at any time before the judgment is rendered or the case is otherwise settled?

According to the article 66 of Turkish Code of Civil Procedure which states the mechanism of ''intervention to case'';

A third person, may participate in the proceedings next to the defendant or claimant party until the expiry of the investigation as an intervening party.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

As in our legal system, the claimant party is the one who submits a lawsuit petition, there is no need to inform the defendant about the composition of the claimant party. The victims who will benefit from the decision do not become a party of the case. If a natural or legal person requires to participate in the proceedings, it is obligatory to submit a petition regarding the procedural mechanism of ''intervention to case''. When a lawsuit petition or petition of intervention is submitted, it is notified to the defendant. Therefore, the defendant will automatically be informed about the composition without any other operation.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There is not such provision in our jurisdiction.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, in our jurisdiction there is no registry of class actions/collective redress actions.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like

competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In our jurisdiction, class actions/collective redress actions do not have to follow on from infringement decisions, it is possible to start a stand-alone action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

It is not found in our jurisdiction.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In our jurisdiction, the investigation is executed by court not by a public authority. Besides, all documents used in case are brought by parties, and notified to the parties. Therefore, the claimant and defendant party of the case may access all documents obtained for the case.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There is no such rule in our jurisdiction.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

A decision of the national competition authority or national court may constitute a precedent but it is not binding, which means the other national authorities may not follow the precedent decision, however it may be used in several cases.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Turkish law does not provide any specific regulations regarding third-party funding. It must be noted that third parties may be allowed in a limited number of circumstances, which are specifically provided by the law, to file an action in respect of violation of an interest belonging to a third party. (such as Code on Consumer Protection which allows consumers' associations to file lawsuits in respect of the consumer but it should be noted that in this situation consumers' association become the claimant party) Claimants may receive funding from third parties as long as the third parties do not participate to the lawsuit as claimants.

Besides, in Turkey there is a legal aid which provides all trial expenses be paid by the State. The victim who cannot afford to finance the proceedings may request a legal aid from The Turkish Bar Association .But in this situation also, in case the victim lose the case, he/she will be asked to pay those amounts.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No, the claimant is not required to declare to the court, the origin of the funds that it is going to use to support the legal action.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Article 120 of the New Procedural Law introduces a new institution, named the advance expense fee. As per the relevant article, the plaintiff has to pay the litigation fees and the amount as stipulated annually by the Ministry of Justice, while initiating a lawsuit. In case it is seen that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted with a two-week term to

realize the payment. If the amount is not paid until the expiry of the term, The Court decides the file as non filed.

Besides, for instance, if a party of the lawsuit request the file to be sent to an expert examining, it is obligatory to pay expenses. Nonpayment of a legal fee(such as witnesses, experts, investigation etc.) arising from the parties claims during the trial, shall be deemed a waiver of such claim.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

In Turkish Law system, there is no specific regulation regarding public funds.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Yes.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Turkish procedural legislation accepts the main principle where the loser pays for the legal costs of all parties, and other types of costs. Therefore the defeated party must bear all costs arising from trial including the court costs and attorney fees. This principle is preserved within Article 326 of the New Procedural Law. It should be noted that there is a tariff setting a cap on the attorney fees which is annually issued by the Union of Turkish Bar Associations and the defeated parties are not responsible to cover any attorney fees above the tariff.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

There is not such regulation under Turkish Law.

5.8 Are the parties to an action able to insure against the cost risks?

There is not such regulation under Turkish Law.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

There is not such regulation under Turkish Law.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

There is not ethical of Bar rules in our country.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

In our jurisdiction, there is no specific international private law rules applicable to class actions/collective redress actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

In our jurisdiction, there is no rule regarding prohibition of a single collective action to take place in a single forum.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

The entities which may initiate a collective action are determined in the law, therefore a representative entity designated by a foreign country do not have legal standing to bring such actions.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The Foreign Court Orders shall not be binding Turkish Courts unless they are dully recognized and enforced under Turkish International Private Law.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

In our jurisdiction, there is not such a specific mechanism of collective alternative dispute resolution allowing the settlement of class actions/collective redress actions. In general, in our jurisdiction there are arbitration and mediation procedure as alternative dispute resolution.

Parties in a dispute can freely decide whether to mediate or to arbitrate or litigate the dispute in question. According to the Law, parties may apply mediation during or before the legal proceedings. Parties can always freely withdraw from mediation process at any time. Although it is at the complete discretion of parties to decide on how to settle their disputes, during the litigation process the judge may encourage and guide parties to try mediation.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Alternative dispute resolution does not form part of court procedures and applies only if the parties voluntarily agree to settle a dispute through ADR methods. The courts do, however, encourage parties to resolve their disputes through settlement.

As per article 35/A of Attorney's ACT.

In actions and cases that have been entrusted to them, attorneys, together with their clients, may invite the other party to conciliation before a suit has been filed or before hearings have commenced for an already filed suit, provided that such conciliation pertains exclusively to matters that the parties may elicit of their own will.

Therefore mediation cannot be executed by persons who did not receive a law education, settlement which is stipulated under Article 35/A of the Attorney Law already fulfills the need for mediation.

Mediation and Arbitration are not a usual practice in our jurisdiction.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

Limitation periods applicable to the claims are not suspended during the period when the parties try and negotiate a settlement.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

With the new code on consumer protection, consumers are widely protected. Therefore, clauses which restrict rights of consumers are deemed as invalid.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

There are not any provision regulating the way the victims of the practice are informed about decision. The court decision is notified only to the parties of the case.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

As the collective action are brought as a declaratory action and not as an action for performance, the decisions are not subject to the enforcement proceedings. In our jurisdiction, after the court order, the defeated party is in charge of the enforcement, notably of the payment of the damages. The prevailing party of the case has to start the enforcement proceedings with an order issued by an enforcement office.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Injunctive order differs regarding the subject of the case. In some circumstances, it is not possible to have an injunctive order. The court is free to give any injunctive order. However, there is no rule regarding ensuring their effective compliance by the losing defendant. The article 398 of code civil of procedure, prescribes a penalty in case a person does not comply with the injunctive order.

Article 398

A person who does not comply with the order of the application of injunctive order or who contravenes the injunctive order, shall be punished with imprisonment from one month up to 6 months.