



**United Nations Conference  
on Trade and Development**

Distr.: Limited  
28 May 2021

Original: English

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**Trade and Development Board  
Trade and Development Commission  
Intergovernmental Group of Experts on  
Competition Law and Policy**

Nineteenth session

Geneva, 7–9 July 2021

Item 10 of the provisional agenda

**Review of chapter XIII of the Model Law  
on Competition, part 2: Commentaries**

**Model Law on Competition (2020), part 2,  
revised chapter XIII\***

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\* This is a revision of document TD/RBP/CONF.7/L.13.



*Actions for damages*

*To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.*

## **Commentary on chapter XIII and alternative approaches in existing legislation**

### **Introduction**

1. In several countries, competition laws are enforced both publicly through sanctions imposed by the administering or judicial authority and privately through actions for damages by individuals or enterprises that have suffered losses due to anticompetitive conduct. The proposed provision in the Model Law on Competition would give the right to an individual, enterprise or the State on their behalf to bring a suit to recover the amount of the loss or damage, including costs and interest accrued. Such civil action would normally be conducted through the appropriate judicial authority unless a State specifically empowered the administering authority in this regard.

#### *Efforts to promote private enforcement in well-established competition law regimes*

2. The European Union adopted directive 2014/104 on rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union and, by 2018, all member States had implemented the directive in their national legal systems. The directive specifies important substantive and procedural issues such as subject matter, disclosure of evidence, limitation period and mode of liability. Anyone such as a direct or indirect purchaser or supplier, including a consumer, that has suffered harm due to an infringement of competition law by an undertaking or an association of undertakings (articles 101 and 102 of the Treaty on the Functioning of the European Union or a national competition law predominantly pursuing the same objective) may claim full compensation. Compensation covers actual losses and the loss of profits, plus the payment of interest. Any participant in a cartel is responsible to the victims for the whole of the harm caused by the cartel and may pay compensation along with the other infringers. Notably, this does not apply to small or medium-sized enterprises or to companies that have been granted immunity for bringing the infringement to the attention of the competition authority. Such companies only need to compensate purchasers of their own products, unless the other infringers are unable to provide full compensation to the victims.<sup>1</sup>

#### *Forms of private actions for damages*

3. Competition law regimes vary with regard to the forms of private actions for damages. Individual actions need to be distinguished from class actions. In the former, each person and/or company that alleges harm must pursue its own independent action. That is, only the person who has suffered harm from anticompetitive conduct has standing to file a claim for damages. For example, following legislative reforms, Japan now allows for greater participation by qualified organizations in filing actions for damages caused by

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<sup>1</sup> For a recent assessment, see European Commission, 2020, Commission staff working document on the implementation of directive 2014/104, 14 December, available at <https://www.europeansources.info/record/staff-working-document-on-the-implementation-of-directive-2014-104-eu-on-certain-rules-governing-actions-for-damages-under-national-law-for-infringements-of-the-competition-law-provisions-of-the-membe/> (accessed 26 May 2021).

competition law infringement. In a class action, a single case may be initiated on behalf of many persons and/or companies alleging harm from the same infringement.

4. Depending on the procedural provisions in a country, persons who are entitled to commence a single action may also transfer their claims to another person, who then has standing to file the claim. Individual actions may be limited to follow-on actions. That is, plaintiffs must wait until a final decision states the anticompetitive conduct before filing a claim for damages resulting from such conduct. This limitation is based on considerations of procedural efficiency and, in a jurisdiction in which the competition authority is responsible for prosecuting and sanctioning anticompetitive conduct, ensures that civil courts do not assess the conduct in question differently from the competition authority. In addition, plaintiffs often prefer follow-on actions, as they need not pay the costs of proving the competition law infringement.

5. In representative or class actions, a group of plaintiffs collectively brings a claim for damages to court. The rationale for allowing such collective actions in competition matters is twofold. First, each individual claim may be too small to justify a separate action and a possibly lengthy court procedure. Second, the class action may significantly reduce the costs of the action for each plaintiff. A class action may be brought on behalf of a class of persons whose identity need not be ascertained when submitting the claim, yet the membership of the class must be ascertainable. For example, a class may consist of direct purchasers of cartelized products, while indirect purchasers and end consumers may form further classes.

6. In most jurisdictions, damages to be obtained by a plaintiff are limited to full compensation for the amount of the loss suffered due to the anticompetitive conduct, including the costs of the legal proceedings and interest. In the United States of America, however, a plaintiff may benefit from treble damages for antitrust violations; this is intended as both an incentive to private action and as an additional deterrent to conduct that violates antitrust laws.<sup>2</sup>

#### **Alternative approaches in existing legislation: Private actions for damages**

*Country, group or region*

##### **Individual actions only**

Belgium	European Union Directive 2014/104 was implemented in 2017 through an act inserting the core provisions in title 3, book XVII of the Code of Economic Law. <sup>3</sup>
China	<p>Article 50 of the Antimonopoly Law states that undertakings that carry out monopolistic conduct and cause losses to others shall bear civil liabilities according to law.<sup>4</sup></p> <p>The provisions of the Supreme People's Court Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Cases Arising from Monopolistic Conducts (Antimonopoly Judicial Interpretation), adopted in 2012, specify the subject matter and scope of coverage, jurisdiction, standing to sue, burden of proof, liability, statute of limitations, etc.</p> <p>Article 1 of the Antimonopoly Judicial Interpretation states that the scope of coverage is monopolistic conduct, including monopoly agreements, the abuse of a dominant market position and the concentration of undertakings. However, abuse of administrative power to eliminate or restrict competition is excluded, since the nature of such litigation is administrative proceedings, and the abuse of administrative power to eliminate or restrict competition is</p>

<sup>2</sup> Contribution from the Antitrust Division of the Federal Trade Commission.

<sup>3</sup> Contribution from the Competition Authority of Belgium.

<sup>4</sup> China, Ministry of Commerce, 2008, Antimonopoly Law, available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtm> (accessed 26 May 2021).

not monopolistic conduct as listed in article 3 of the Antimonopoly Law. With regard to standing to sue, article 1 stipulates that natural persons, legal persons and other organizations may file civil lawsuits with the people's courts with regard to disputes over losses caused by monopolistic conduct or violations of the Antimonopoly Law through contractual provisions, bylaws of industry associations, etc. In the light of article 108 of the Civil Procedure Law, plaintiffs shall have a direct interest in the case. An important test of direct interest is whether immediate losses have been caused by monopolistic conduct.

Article 7 states that in a case of an alleged monopolistic agreement as described in article 13.1 of the Antimonopoly Law, the defendant shall assume the burden to prove that the agreement does not have the effect of eliminating or restricting competition.

Article 8 states that in a case of the abuse of a dominant market position as described in article 17.1 of the Antimonopoly Law, the defendant shall assume the burden to prove a justification of its conduct.

Article 14 states that where the defendant's monopolistic conduct has caused any losses to the plaintiff, the people's court may, in the light of the plaintiff's claims and the finding of facts, order the defendant to cease infringement and compensate for losses. In addition, according to the plaintiff's claim, the people's court may include the plaintiff's reasonable expenses for the investigation and prevention of the monopolistic conduct in the scope of the compensation for losses.

#### Georgia

The competition law does not contain specific provisions on actions for damages, but a person or an enterprise that suffers losses or damages by an act of omission by any person in contravention of the competition law is entitled to recover the amount of the loss or damage by legal action before the courts. This right derives from the general provisions in civil legislation on the right to claim damages.<sup>5</sup>

According to the competition law, the Competition Authority and Tbilisi City Court are the only administrative and judicial bodies for assessing actions within the scope of the competition law. Since a person can claim damages through a separate civil action before the appropriate judicial authority when there is a decision on the infringement of the competition law issued by either the Authority or the Court, private individual actions are limited to follow-on actions.

#### Greece

European Union directive 2014/104 was implemented in 2018 through Law No. 4529, which systematizes the provisions of the directive and transposes them into the domestic legal order. Overall, the level of private competition litigation in Greece is moderate, with the majority of cases constituting ordinary commercial stand-alone actions concerning franchising and distribution agreements.<sup>6</sup>

#### Japan

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade: Chapter VII on injunctions and damage

Article 25 states:

<sup>5</sup> Contribution from the Competition Authority of Georgia.

<sup>6</sup> See V Brisimi and M Ioannidou, 2012, Greece: Report, prepared for Competition Law: Comparative Private Enforcement and Collective Redress in the European Union, available at <https://www.clcpecreu.co.uk/> (accessed 26 May 2021); V Brisimi and M Ioannidou, 2013, Stand-alone damages actions: Insights from Greece and Cyprus, *European Competition Law Review*, 34(12):654–657; M Ioannidou, 2018, The member State reports on the transposition of the directive: Greece, in B Rodger, MS Ferro and F Marcos, eds, *The European Union Antitrust Damages Directive*, Oxford University Press, Oxford.

(1) An enterprise that has committed an act in violation of the provisions of articles 3, 6 or 19 (for enterprises that have committed acts in violation of the provisions of article 6, limited to enterprises that have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of article 8 is liable for damages suffered by another party.

(2) No enterprise or trade association may be exempted from the liability provided in the preceding paragraph by proving the non-existence of intention or negligence on its part.

Article 26 states:

(1) The right to claim damages under the provisions of the preceding article may not be asserted in court until the cease and desist order provided for in the provisions of article 49 (if no such order has been issued, the payment order provided in article 62, paragraph (1) (excluding those issued against an enterprise that constitutes a trade association that has committed an act in violation of the provisions of article 8, item (i) or (ii))) has become final and binding.

(2) The right set forth in the preceding paragraph shall expire by prescription after a lapse of three years from the date on which the cease and desist order or the payment order set forth in the said paragraph became final and binding.

South Africa

Section 65 of Competition Act No. 89 states:

(6) A person who has suffered loss or damage as a result of a prohibited practice: (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49 D (1); or (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the chairperson of the Competition Tribunal, or the judge president of the Competition Appeal Court, in the prescribed form: (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act; (ii) stating the date of the Tribunal or Competition Appeal Court finding; and (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6) (b) is conclusive proof of its contents and is binding on a civil court.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.

(9) A person's right to bring a claim for damages arising out of a prohibited practice comes into existence: (a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(10) For the purposes of section 2A (2) (a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).

The Act does not make any specific provision for class actions. However, in 2013, the Constitutional Court handed down a judgment, overturning the judgments of both the High Court and the Supreme Court of Appeal, which effectively refused to allow an applicant harmed by a bread cartel to bring a class action. This case has the potential to set a precedent for class actions.

Tunisia	<p>The civil law complements the competition law by allowing for those who have suffered loss from anticompetitive conduct to file an action for damages with the civil courts.</p>
United Kingdom of Great Britain and Northern Ireland	<p>Companies or individuals who have suffered loss as a result of a breach of competition law may bring an action for damages against the party or parties engaged in the anticompetitive conduct. Such actions may be either stand-alone actions or follow on from the decision of a regulator and can be brought before either the High Court or the Competition Appeal Tribunal.</p> <p>In order to facilitate follow-on actions for damages in competition cases by addressing the difficulties faced by claimants, the Government has proposed a bill on consumer rights, which provides for significant changes, including an extension of the jurisdiction of the Competition Appeal Tribunal, the establishment of opt-in collective action and the introduction of voluntary redress schemes.</p>
European Union	<p>Articles 1 and 3 of directive 2014/104 stipulate the subject matter and scope of the directive and state that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm, which shall not lead to overcompensation. Full compensation shall cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.</p> <p>Articles 5, 6, 7 and 8 set out the rules for the disclosure of evidence and penalties. Member States shall ensure that national courts are able to order the defendant or a third party to disclose relevant evidence upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages. There are several conditions and limitations concerning the disclosure of evidence, as follows: evidence has to be specified either by item or category and national courts may only grant requests to disclose information that are proportionate; national courts cannot at any time order a party or a third party to disclose evidence of leniency statements and settlement submissions; and national courts may order the disclosure of evidence prepared specifically for the proceedings of a competition authority only after the competition authority has closed its proceedings.</p> <p>Article 9 states the effect of national decisions. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established. Final decisions taken in other member States may be presented before national courts as at least prima facie evidence that an infringement of competition law has occurred.</p> <p>Article 10 states that member States shall ensure that the limitation period for bringing actions for damages is at least five years. The limitation period shall not begin to run before the infringement of competition law has ceased and the claimant knows or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement, of the fact that the infringement of competition law caused harm to it and the identity of the infringer.</p> <p>Article 11 states that the mode of liability is joint and several. There are two derogations, as follows: a small or medium-sized enterprise is liable only to its own purchasers where its market share in the relevant market was below 5 per cent and the application of the normal rules of joint and several liability would jeopardize its economic viability; and an immunity recipient is liable only to its purchasers or providers and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement. The amount of contribution of an infringer which has been granted immunity from fines under a leniency</p>

programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

Article 20 states that the Commission shall review the directive and submit a report to the European Parliament and the Council. However, late implementation, the temporal scope of application of national implementing rules and the limited number of judgments in which national courts have applied them to date mean that there is currently insufficient experience in the application of the directive.<sup>7</sup>

Latin America

Limitations on private cartel enforcement range from a lack of private right to action to challenges related to administration, procedures, evidence and cultural aspects. Three areas that require enhancement are claim aggregation, access to information and judicial or administrative competence.

#### **Individual actions and class actions**

Argentina

Antitrust Law No. 27.442: Chapter IX on compensation for damages

Article 62 states that individuals or legal entities injured as a consequence of activities sanctioned by the law may file a claim for damages in accordance with the legislation before the competent judge in that matter.

Article 63 states that the resolution of the antitrust court in relation to a violation of this law, once it becomes final, shall have the force of res judicata. The claims for damages that may arise as a result of the final resolution issued by the antitrust court shall be filed through the expedited summary proceedings established in chapter II, title III, book II of the Code of Civil and Commercial Procedure. The competent judge, when deciding on the reparation of damages and losses, will base its ruling on the conduct, facts and legal qualification thereof, established in the resolution of the antitrust court, issued on the occasion of the application of this law.

Article 64 states that individuals who violate the provisions of this law, at the request of the injured party, will be liable to a civil fine in favour of the injured party that will be determined by the competent judge and based on the seriousness of the fact and other circumstances of the case, regardless of other corresponding compensation.

Article 65 states that if more than one person was responsible for the breach, all individuals will be jointly and severally liable to the injured party, notwithstanding the recovery actions that may be applicable. If applicable, the individuals or legal entities mentioned in this chapter may be entitled to an exemption or reduction of the sanction and be exempt from liability for damages if they avail of the clemency programme provided for under chapter VIII of this law, upon resolution of the antitrust court that the individuals or legal entities comply with the terms of the provisions in chapter VIII. As an exception to this rule, the beneficiary of the leniency programme provided for under chapter VIII will be jointly and severally liable to its direct or indirect purchasers or suppliers and other injured parties, if it is impossible to obtain full redress for the damage caused by the other companies that were involved in the same violation of the provisions of the law.

Australia

The Competition and Consumer Act states that a person who suffers loss or damage as a result of cartel conduct can recover the amount of the loss or damage in a private action. Private litigants may also obtain declarations, injunctions and ancillary orders. The Competition and Consumer

<sup>7</sup> European Commission, 2020, Antitrust: Commission publishes report on implementation of damages directive, Press release, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2413](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2413) (accessed 26 May 2021).

Commission also has the power to commence representative proceedings on behalf of a group that has suffered loss or damage as a result of cartel conduct. The Federal Court of Australia Act provides for a class action regime for private litigants to claim for damages resulting from a contravention of the provisions of the Competition and Consumer Act on anticompetitive conduct. Once a class has been described, every person in that class is assumed to be part of the class unless they opt out of the representative proceeding by written notice given under the rules of court. Section 87 (1B) of the Competition and Consumer Act states that the Commission may make an application on behalf of third parties who have suffered damages resulting from a contravention of the provisions of the Act on anticompetitive conduct and who have, before the application is made, consented in writing to the making of the application.

#### Brazil

Article 47 of the competition law provides for the right to bring a civil action to recover damages resulting from a breach of the law and states that injured parties shall be entitled to file an action to, in the protection of their individual or homogeneous individual interests, obtain the cessation of practices that constitute infringement of the economic order, as well as the receipt of indemnification for the damages sustained, regardless of the inquiry or administrative proceeding, which shall not be stayed by virtue of the filing of the lawsuit. A prior finding by the competition authority that an infringement has occurred is not required to bring a claim and such findings do not bind the courts. Private enforcement action is independent of public enforcement and claims may be brought even where no investigation into the conduct in question has been initiated. The Public Prosecutor's Office may file a public class action on behalf of an injured class to obtain compensation for any infringement of the competition law, based on the public class action law. The same type of lawsuit may be brought by duly organized associations on behalf of their members. Any association bringing a claim in the general public interest must be at least one year old and have in its institutional objectives the protection of the environment, the consumer, economic order, free competition or touristic, aesthetic, historical and landscape heritage. If the Public Prosecutor's Office or an association brings a class action, then the injured parties themselves will not be directly involved in the conduct of the litigation. However, if a party that suffered damages brings its own separate claim for compensation, the actions will be consolidated and addressed as part of the same proceedings.

The Administrative Council for Economic Defence has adopted a cooperative posture to make information accessible to those harmed by anticompetitive conduct.<sup>8</sup> In 2018, the Council issued Resolution 21, which grants permanent confidentiality to some documents (self-incriminating leniency documents and secrets established by law) and specifies the date on which the remaining evidence should be disclosed to the public (usually together with the decision on a case). The resolution also states that when the Council calculates a penalty, compensations awarded in civil actions may be considered mitigating factors. Further, the current statutes allow the Council to intervene in civil actions for damages to protect anticompetitive conduct investigations from the leakage of sensitive information and to inform the judiciary about the potential implications of disclosing information.

#### Germany

Section 33 of the Act Against Restraints of Competition states that whoever violates a provision of the Act or of articles 101 or 102 of the Treaty on the Functioning of the European Union or a decision taken by the competition authority shall be obliged to the person affected to rectify the harm and, where there is a risk of recurrence, to desist from further infringements. A

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<sup>8</sup> Contribution from the Competition Authority of Brazil.



right to apply for an injunction already exists if an infringement is impending. Affected persons are competitors or other market participants impaired by the infringement.

Section 33a states:

(1) Whoever intentionally or negligently commits an infringement pursuant to section 33 (1) shall be liable for any damages arising from the infringement.

(2) It shall be rebuttably presumed that a cartel results in harm. A cartel within the meaning of this section is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition. Such agreements or concerted practices include:

1. The fixing or coordination of purchase or selling prices or other trading conditions;
2. The allocation of production or sales quotas;
3. The sharing of markets and customers, including bid-rigging, restrictions of imports or exports; or
4. Anticompetitive actions against other competitors.

(3) Article 287 of the German Code of Civil Procedure [Zivilprozessordnung] shall apply to quantify the harm caused by the infringement. In quantifying the harm, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement under paragraph 1.

(4) The infringer shall pay interest on its pecuniary debts pursuant to paragraph 1 from the time the harm occurred.

Section 33b states that where damages are claimed for an infringement of a provision of this part or of articles 101 or 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, as made in a final decision by the competition authority, the European Commission or the competition authority – or court acting as such – in another member State of the European Union. The same applies to such findings in final court judgments on appeals against decisions pursuant to sentence 1. This obligation applies without prejudice to the rights and obligations under article 267 of the Treaty on the Functioning of the European Union.

The eighth amendment to the Act in 2013 permitted industry associations to bring actions requesting that an infringer cease and desist on behalf of customers and suppliers of a defendant. The amendment also enabled consumer protection associations to bring actions for injunctions or to request that a defendant pay economic benefits gained through the infringement to the federal budget. The ninth amendment in 2015 implemented European Union directive 2014/104 in national law. The amendments were intended to increase the prospect of success of actions for damages by persons injured by a cartel. The tenth amendment in 2021 provided that it shall be rebuttably presumed that a cartel results in harm (section 33a (2)) and simplified the collection of relevant evidence for the injured party and alleged infringer (section 33g).

United States

Federal Rule of Civil Procedure No. 23 provides the governing framework for class actions and states:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defences of the representative parties are typical of the claims or defences of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23 (b) states that questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods of adjudicating the matter.

Rule 23 (c) states the certification order. The court must determine by order whether to certify the action as a class action and must define the class and the class claims, issues or defences and must appoint class counsel.

Rule 23 (e) states that the matter may be settled, voluntarily dismissed or compromised only with the court's approval and that the court must direct notice in a reasonable manner to all class members. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable and adequate. Any class member may object to the proposal if it requires court approval.

Rule 23 (f) states that a court of appeals may permit an appeal from an order granting or denying class action certification.

Rule 23 (g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel who must fairly and adequately represent the interests of the class. In appointing class counsel, the court must consider the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; counsel's knowledge of the applicable law; and the resources that counsel will commit to representing the class.

Rule 23 (h) states that in a certified class action, the court may award reasonable attorney's fees. A claim for an award must be made by motion at a time the court sets. A class member may object to the motion and the court may hold a hearing on the matter.

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