Working Session

"Damage claims in competition matters: The dawn of a new era?"

Antitrust Commission
Litigation Commission

Munich, 2016

National Report of Belgium

Jan Blockx

Hogan Lovells International LLP
Wetenschapsstraat 23 Rue de la science
1040 Brussels
Belgium
+32 2505 0968
Jan.blockx@hoganlovells.com

General Reporters:

Sebastian Janka, Noerr LLP, Munich, Germany
Simone Gambuto, Macchi di Cellere Gangemi, Rome, Italy
Anouk Rosielle, Boekel N.V., Amsterdam, the Netherlands
Dina El-Gazzar, Stewarts Law LLP, Leeds, United Kingdom

27 November 2015

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

   There is a lot of private antitrust litigation in Belgium. In particular cease and desist proceedings are very often used by undertakings to obtain the termination of alleged anticompetitive practices. The cease and desist procedure is fast and efficient, although its popularity has waned somewhat in light of the increased use of interim measures by the Belgian Competition Authority.

   Antitrust damage claims also take place on occasion, recently resulting in a EUR 120 million settlement in a telecoms case. The appeal of damage actions is limited, however, by the relatively lengthy duration of proceedings and the absence of discovery (although the latter may be remedied by EU Directive 2014/104). A recently introduced collective damages procedure could also encourage antitrust damage claims by consumer organisations.

   a. Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?

      If yes, are they able to submit both stand alone and follow-on actions?

      Any person with an interest (in particular because she personally suffered harm from an antitrust infringement) can bring a damage claim either as a stand alone or as a follow-on action.

2. Has your country already implemented/started implementing the private enforcement Directive?
   - If No: Do you believe that your country will meet the deadline?
   - If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.

     At the moment [15 February 2016], the Belgian government has not yet issued a legislative proposal to implement the private enforcement Directive (EU Directive 2014/104). Since the deadline for implementing the directive is still more than 10 months away, it is still possible for the implementation to take place in time.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

   a) Is there a specialized court specifically for antitrust based claims?
   If No: are there specific chambers for antitrust claims within the civil/commercial courts?
   If Yes: is the court composed only by judges, also economic experts and/or other persons?

   There are no specialised courts for antitrust private enforcement in general. Claims against undertakings, including antitrust private enforcement claims and damage actions, can be brought before the territorially competent Commercial Courts (*rechtbank van koophandel/tribunal de commerce*) or, if the defendant does not object to this at the start of the proceedings, to the territorially competent Court of First Instance (*rechtbank van eerste aanleg/tribunal de première instance*). Collective damage actions can only be brought before the Commercial Court or Court of First Instance of Brussels. The different chambers of individual courts have specialisations, for example, in the Dutch speaking Commercial Court of Brussels the 5th chamber is specialised in competition law (and intellectual property).

   A particularly effective procedure under Belgian law is the cease and desist procedure before the President of the territorially competent Commercial Court. This is a fast track procedure to stop an undertaking from engaging in behaviour which is contrary to fair market practices (which includes antitrust rules). In this procedure, the President of the Commercial Court cannot order the payment of damages but he can make his order subject to periodic penalty payments. Because – contrary to many other procedures – the cease and desist procedure is so fast (judgments are often obtained in weeks or a few months), it is also often used in antitrust private enforcement. However, in recent years, the Belgian Competition Authority has increasingly issued interim measures in antitrust cases and has in this way taken over some of the case load of the President of the Commercial Court.

   b) May the court impose interim measures?

   Yes, although it is more common to bring separate cease and desist proceedings.

   c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
   If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

   The courts have so far ruled that nothing prevents a judicial action to be introduced and to proceed in parallel to an investigation of the Belgian

Competition Authority and that there is no legal basis to suspend a judicial action in those circumstances. In case the European Commission has initiated proceedings in a case, on the other hand, the Belgian courts must avoid taking a decision which would conflict with a decision contemplated by the Commission (Art. 16(1) of EU Regulation 1/2003).

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

Judgments of (the President of) the Commercial Court and the Court of First Instance on claims of more than EUR 2,500 can be appealed to the territorially competent Court of Appeal (*hof van beroep/cour d'appel*). A further appeal on points of law only is possible to the Supreme Court (*hof van cassatie/cour de cassation*).

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

EU Regulation 1215/2012 (the Brussels 1bis Regulation) is applicable in Belgium. Antitrust defendants can be sued in Belgium if they are based in Belgium (Art. 4 of the Brussels 1bis Regulation) or if the harmful event which they allegedly caused occurred in Belgium (Art. 7(2) of the Brussels 1bis Regulation).

In the case of multiple defendants, the Belgian courts have jurisdiction if one of them is based in Belgium and the claims against the defendants are so closely connected that it is expedient to hear and determine them together (Art. 8(1) of the Brussels 1bis Regulation). The Brussels Commercial Court has in the past ruled that claims against participants in a cartel in a different member state are not sufficient closely connected to claims against participants in another cartel in Belgium even if both cartels concerned the same products, the defendants belonged to the same corporate groups and they were fined in the same Commission decision to be able adjudicate them together (Commercial Court of Brussels, 18 April 2011).

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

Cease and desist proceedings before the President of the Commercial Court often take only a few weeks or months. Ordinary proceedings before the Commercial Court or the Court of First Instance (e.g. for antitrust damages) often take several years.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

The party (or parties) that loses (lose) the procedure will also be required to pay the costs to the winning party (or parties). This includes the procedural fees (eg costs of serving a writ of summons, court fees, etc.) as well as an amount to compensate for the representation costs of the winning party. However, pursuant to the Royal Decree of 26 October 2011, the compensation for representation costs is limited to EUR 33,000 per party (the exact amount depends on the value of the claim).

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?

   Belgian bar rules prohibit making legal fees entirely dependent on the outcome of the proceedings but it is possible to agree a success fee in addition to a fee determined in another way (e.g. a lump sum or an hourly fee).

   In the case of the procedure for collective damages introduced in 2014, the compensation for the class representative cannot exceed the actual costs spent by the representative (to the exclusion of any profit).

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?
   - If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?
   - Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?
   - How is it coordinated with the individual actions' framework?

   By law of 28 March 2014 a collective damage procedure was introduced in Belgian law (now title 2 of book XVII of the Code of Economic Law). This procedure is also available for antitrust infringements. A collective damage action can only be introduced by a recognised consumer organisation, a recognised association which has an objective which is related to the collective damage, or an autonomous public body. So far, two collective damage actions have been introduced, both by consumer organisation Test Aankoop / Test Achat. Neither case is related to antitrust infringements.

   In the case of collective damage actions for antitrust infringements, the law foresees that the court will determine whether an opt-in or opt-out system is used. The law does not foresee how the collective damage class will be defined.

   An individual damage action can be introduced by a member of the class in parallel to a collective damage action but, once the court has declared the collective damage action admissible, the individual damage action lapses.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular
    - as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)
    - in terms of the *quantum* of the compensation?
    - for the limitation period?
    - else?

    Based on Article 16 of EU Regulation 1/2003 the Belgian courts cannot take decisions running counter to any decision adopted by the European Commission on an antitrust infringement. There is no explicit provision under Belgian law equivalent to Article 16 of Regulation 1/2003 but many legal scholars believe that decisions of the Belgian Competition Authority at least constitute rebuttable proof of an infringement.

    A decision of the Commission does not bind the national courts as far as the amount of damage and the causal link between the infringement and the damage is concerned (Case C-199/11 Otis). The same could be argued for decisions of the Belgian competition authority.

    Belgian law currently does not foresee that the limitation period to bring an action for damages is affected by an investigation of the Belgian Competition Authority or the European Commission although such an investigation can affect the knowledge a victim has of the damage and the identity of the person liable for the damage (see question 10). Directive 2014/104 foresees that the limitation period to bring damage actions will need to be suspended until one year after the infringement decision has become final.

10. What are the relevant limitation periods (taking into account question 9 above)?

    Article 2262bis of the Civil Code foresees that tortious claims are time barred after five years after the victims has become aware of the damage or the identity of the person who is liable for the damage but in any event after twenty years after the fact causing the damage (the infringement). Claims based on contractual liability are time barred after 10 years.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

    Liability for damages is in principle personal and entities in a corporate group are not liable for infringement committed by other entities in the same group simply

because they are part of the same group (Commercial Court of Brussels, 24 April 2015).

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

    Undertakings which have jointly committed or contributed to an infringement are jointly and severally liable for the damages resulting from it. This differs from their liability towards the Belgian Competition Authority or the European Commission where each of them is only liable for their own fine.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

    - Is there any pre-trial discovery procedure available?
    - Is there any evidence protected by legal privilege?

    There is no pre-trial discovery procedure under Belgian law as it stands. In principle, each party needs to adduce evidence of the facts it alleges. Although courts can order discovery of evidence, this is rare (see question 14)

    Legal privilege extends in Belgium to correspondence between external lawyers and their clients as well as to advice from in-house lawyers registered with the Institute of In-house Lawyers.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

    Based on Article 877 of the judicial code, if there are serious, precise and consistent suspicions that a party or a third party has relevant evidence in its position, a court can order the production of this evidence, subject to a penalty. In practice, it is rare for courts to order such disclosure.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

    On the basis of Article 877 of the judicial code, the Belgian courts can also order the production of documents held by third parties, such as the Belgian Competition Authority or the European Commission. Article 15 of EU Regulation 1/2003 also allows the courts to request the Commission to transmit to it information in its possession.

The European courts have confirmed that access to documents can be refused (by the European Commission or national competition authorities) if this would jeopardise investigations or harm the rights of third parties (see case C-2/88 Imm. Zwartveld), but this harm has to be weighed against the right of claimants to obtain compensation (see case C-360/09 Pfleiderer). Scholars in Belgium have argued that the Belgian Competition Authority can refuse to produce documents from pending investigations because of the risk that this would damage their investigation.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

    Whether indirect purchasers can claim compensation for antitrust damages is disputed by legal scholars.

    Like all claimants, indirect purchaser would need to establish that they have been harmed by an antitrust infringement (see also question 20 below). As far as causality between the infringement and the harm is concerned, Belgian law applies the theory of "equivalence" meaning that damages can be obtained for any infringement that was a necessary condition for the damage (even if other factors also contributed to the damage). In case it is established that an antitrust infringement led to a price increase which was passed on by direct purchasers to indirect purchasers, it could be argued that the latter can claim damages even if their damage was also caused by the direct purchaser's decision to pass on the price increase. In those circumstances, a critical question will be what is the amount of the damage resulting from the infringement.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

    Compensation for "umbrella damages" has been claimed but has so far not been awarded in Belgium. Based on the theory of "equivalence", some legal scholars have argued that, if the "umbrella damages" are indeed caused by the infringement, compensation can be obtained for them from the infringer.

18. Is the passing-on defence allowed?

    It is disputed by legal scholars whether the passing-on defence is allowed. Damages can only be awarded to compensate the victim. This implies that the court will take into account factors which reduce the amount of damages, which may include the passing on of a price increase.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

Victims of antitrust infringements are entitled to full compensation of their damages, comprising both actual loss and loss of profit (Case C-295/04 Manfredi). Also the loss of a chance (e.g. the chance to win a contract) can be the subject of compensation. Compensation will also include interest since the moment the damage arose.

Awarded damages have an exclusively compensatory function. No punitive or treble damages can be awarded.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The burden of proof in principle lies with the claimant. Although parties to a proceeding have an obligation to cooperate to the evidence collection, this has been interpreted restrictively by the courts. There is no pre-trial discovery under Belgian law.

In order to obtain damages, the claimant needs to adduce evidence of (i) a fault of the defendant (which can be the breach of a legal provision), (ii) the amount of damages of the claimant and (iii) a causal link between the two.

21. Is there a difference between stand alone and follow-on actions?

No, except that in the case of follow-on claims the evidence of the existence of an infringement will already be available (see question 9).

22. How is damage quantified?

Actions for antitrust damages are normally brought as tort cases. Under Belgian tort rules, the amount of damages should be determined by reference to the counterfactual, ie the (financial) situation of the claimant in the absence of the fault (infringement).

In the absence of clear evidence as to the amount of the damage, a judge can determine an amount that is fair and equitable (*ex aequo et bono*).

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

Defendants can invoke both procedural defences (jurisdiction, statute of limitation, etc.) as well as substantive defences (in particular that the three conditions for the victim to obtain damages are not fulfilled).

24. What is the role of economic experts, if any?

Both claimants and defendants can use economic experts to support their claims and the court can also appoint an expert (including an economic expert) on the basis of Article 962 of the Judicial Code.

25. What other types of experts are typically engaged in your jurisdiction?

Accountants are also often appointed in antitrust cases to verify accounts and payment information of the parties.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

The law does not foresee that fines imposed by competition authorities are taken into account in the quantification of damages.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Part IV of the Judicial Code contains the Belgian rules governing arbitration. Arbitration has been used in the past to settle antitrust disputes. Since the antitrust rules are of public order, arbitral awards in relation to antitrust infringements are reviewable by the Belgian courts and the courts even have to raise antitrust aspects which are of relevance to an arbitral awards they review out of their own motion .

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:
    - settlements requiring court approval;
    - settlements outside of proceedings;
    - timing of settlement;
    - etc.

Based on Article 2044 of the Civil Code disputes between parties can be settled by agreement. Settlement can take place before court proceedings are initiated or during court proceedings (whether facilitated by the court or not).

The parties can request that the settlement is confirmed by court order in which case it is directly enforceable.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

Probably the most high profile case dealt with by the Belgian courts in recent years concerns the damage proceedings for the lift cartel. Following the infringement decision of the European Commission in 2007 (case COMP/38.823), the Commission itself brought proceedings before the Brussels Commercial Court on behalf of the European Union for damages it suffered as a result of elevators and escalators installed in buildings used by the European institutions in Belgium and Luxembourg. Several Belgian government bodies also brought a damage claim.

On 24 November 2014 the Brussels Commercial Court dismissed the action of the European Commission on the ground that it had failed to demonstrated that it had suffered damages from the cartel in Belgium (in 2011 the Court had already rejected jurisdiction over the Luxembourg claims of the Commission). On 24 April 2015 the Brussels Commercial Court also dismissed the action of the Belgian government bodies on similar grounds.

Another recent high profile case concerns the proceedings brought by mobile operators Base and Mobistar against their competitor Proximus for the allegedly abusive termination rates charged by Proximus. The Brussels Commercial Court found in 2007 that Proximus had indeed abused its dominant position and appointed experts to estimate the damage suffered by Base and Mobistar. By judgment of the Brussels Court of Appeal the expert's mission was further extended but before the Court of Appeal could finally rule on the case, the parties settled the proceedings in October 2015 (Proximus agreed to pay Base EUR 66 million and Mobistar EUR 54 million under this settlement).