ICC COMPRENDIUM OF
ANTITRUST DAMAGES ACTIONS

BELGIUM

Court proceedings in key jurisdictions
This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conduct. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
In Belgium, private enforcement of competition law has been underdeveloped for a long time. The first relatively modern procedure was set out in the Law on Trade Practices of 14 July 1991 (Article 25). This procedure enabled claimants to obtain a cease-and-desist order against traders for acts of unfair competition. However, there was no specific legal basis for bringing actions for damages for breach of competition law. Damages claims were based on general provisions such as those for contractual claims for damages (Article 1142 and following of the Belgian Civil Code, “BCC”) and claims on the basis of tort (Article 1382 BCC). Since the adoption of the Act on Actions for Damages for infringements of the competition law provisions of 6 June 2017 (“Belgian Damages Act”),2 implementing Directive 2014/104/EU (“Damages Directive”), private enforcement of Belgian—and European—competition law before the Belgian national courts have become increasingly popular. The Belgian Damages Act entered into force on 22 June 2017 and introduced important changes to the Belgian system intended to encourage private enforcement actions. The Belgian Damages Act also contains a few rules that differ from the Damages Directive: (i) the voluntary compensation of damage by a cartel participant can be taken into account by the Belgian Competition Authority (“BCA”) when calculating the cartel fine, and (ii) the definition of a cartel which also covers hub-and-spoke cartels.

1. Jurisdiction

Under the Belgian competition law system, infringements of national or European competition law are handled by the BCA, which is the relevant authority for public enforcement of competition law, whereas the national courts are in charge of private enforcement.

There are no specialised competition law courts. Accordingly, the courts of first instance or the commercial courts have jurisdiction, in accordance with the general rules of civil procedure. This does not apply to class actions, for which the Courts of Brussels have exclusive jurisdiction.3

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1 “Wet betreffende de handelspraktijken, de voorlichting en bescherming van de consument/Loi sur les pratiques du commerce et sur l’information et la protection du consommateur”.
2 The Act was published in the Belgian Official Gazette on 12 June 2017, p. 63596.
3 Article XVII.35 of the Belgian Code of Economic Law (CEL).
2. Relevant legislation and legal grounds

In Belgium, natural or legal persons which have suffered harm as a result of a violation of competition law can claim damages before the national courts, on the basis of the general regime concerning contractual liability (Articles 1142 et seq BCC) and extra contractual liability (Articles 1382 et seq BCC).

To be valid, a claim for damages must be based both on an infringement of Belgian or European competition law (which constitutes irrefutable evidence of fault) as well as on the relevant tort law provisions. Under tort law, a person has to compensate for the damage caused by its fault (implying a tortious action) (Article 1382 BCC) or by its negligence (Article 1383 BCC). To obtain compensation, the claimant must demonstrate the existence of:

- a fault;
- a damage; and
- a causal link between the fault and the damage.

Fault is quite easy to demonstrate. Fault or negligence can lie (i) in the infringement of any statutory rule or (ii) in not complying with a duty of care. An infringement of Belgian or European competition law constitutes accordingly irrefutable evidence of fault. However, it is in principle not necessary that the BCA (or the European Commission) has previously adopted a decision establishing an infringement for the claim to be admitted. This is different for class actions, which can only be follow-on actions.

Prior to the adoption of the Belgian Damages Act, victims of competition law infringements could also bring private damage claims as a tort claim on the basis of Article 1382 BCC, i.e. the general provisions of Belgian law on tort liability. With the entry into force of the Belgian Damages Act a number of new procedural and substantive rules regarding actions for damages for competition law breaches were introduced.4 The main modifications include:

- a (rebuttable) presumption that cartels cause harm;
- the irrefutable establishment of infringement if such was held in a final decision of the BCA;
- the prima facie establishment of infringement if such was held in a final decision of other NCAs;
- new disclosure rules to facilitate access to evidence;
- the availability of passing-on defence;
- a rebuttable presumption of the passing-on of overcharges for indirect purchasers;
- the codification of joint and several liability and specific contribution rules; and
- a broader scope of the class actions regime.

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4 Title 3 “The action for damages for infringements of competition law” of Book XVII of the CEL
These rules apply as a *lex specialis* to private enforcement actions. In a subsidiary order, the ordinary procedural rules on tort are applicable (Article XVII.71§2 Code of Economic Law: “CEL”).

Both direct and indirect customers are entitled to bring private enforcement actions.

**Temporal application**

The substantive rules of the Belgian Damages Act (i.e. regarding the presumption of harm and liability) apply to competition law infringements committed after 22 June 2017. The procedural rules (i.e. regarding the evidence and effect of decisions) apply to all actions introduced after 26 December 2014, even when they concern competition law infringements that occurred before 22 June 2017.

### 3. What types of anti-competitive conduct are damages actions available for?

Pursuant to Article I.22 CEL, the specific rules concerning private actions laid down in the Belgian Damages Act are applicable to private damages claims for infringements of the European antitrust provisions (i.e. articles 101 or 102 of the Treaty on the Functioning of the European Union (“TFEU”) and their equivalent under Belgian law (namely, Articles IV.1 or IV.2 CEL). Nevertheless, taking into account the limited scope of application of the *lex specialis*, claimants can still bring damages actions for competition law infringements under the common provisions of Belgian law as well. In that case the regular procedural and substantial (tort) rules will apply.

### 4. What forms of relief may a private claimant seek?

According to the Belgian Damages Act, the purpose of damage actions is for the victims to obtain compensation. Exemplary or punitive damages are, thus, not available in Belgium and cannot be awarded by Belgian courts.

In accordance with Belgian tort rules, compensatory damages cover the actual loss, including lost profits, plus interest. In other words, the victims must be restored into the situation in which they were before the infringement occurred or into the situation that would have existed without the infringement.

In principle, except for the (rebuttable) presumption of harm applicable in cartel cases, the extent of the loss has to be fully demonstrated by the applicant. This requires the application of theories of harm under competition law, such as the calculation of the “but-for prices”. Article 962 of the Belgian Judicial Code allows the courts to appoint experts. The courts can do so *ex officio* or with the consent of the parties. The parties can also produce their own expert reports. It is common that experts are used in complex damage litigations. Moreover, the courts can ask the BCA for assistance in the quantification of the damages. It still remains to be seen how keen the BCA will be to involve itself in disputes between private parties.

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5 *Supra.*

6 Article IV.77 CEL *juncto* Article 962 Judicial Code.
The fact that the infringers may have paid a fine in the context of public enforcement is not relevant to determine the damages. However, according to Article IV.70§1 CEL, introduced by the Belgian Damages Act, it is possible for the BCA to take into account financial compensation paid by an infringer in the context of a consensual settlement of private enforcement actions, as a mitigating circumstance in the calculation of the fine. In order to avoid abuse of this rule, such voluntary compensation should take place prior to the BCA's decision to impose a fine.

With respect to interests, Article XVII.72 CEL specifically entitles claimants to interest on the damages awarded in court. Compensatory interest accrues from the date the damages were incurred until the moment of final payment. As a general rule, courts apply the legal interest rate which is determined by governmental decree and published in the Belgian Official Gazette.7

Apart from damages actions, claimants can also seek the following remedies:

- Interim measures: a claimant may request the competent court to grant interim measures in summary proceedings when there is a risk of serious and irreparable damage. Such measure is temporary and is not binding on the court that will hear the case on the merits. The burden of proof is on the claimant, who must demonstrate that the requested interim measures are necessary, that he holds a prima facie claim and that the relief is appropriate in the situation at hand (articles 19§3 and 584 of the Judicial Code).

- Actions for a cease-and-desist order (Articles XVII.1 to XVII.13 and XVII.27 CEL). These rules deal with a specific procedure to obtain cease-and-desist orders from the president of the commercial court that has jurisdiction in cases relating to unfair trade practices. Under Belgian law, competition law infringements are considered unfair trade practices in the sense of Article VI.104 CEL.

- Nullity of contractual clauses (Article 1108 BCC). Under this provision, parties do no longer have to comply with the invalidated clauses or contract and will be entitled to damages from the other party.

- Declaratory judgment (Article 18 Belgian Judicial Code). This is a declaration that a given practice does not constitute a competition law infringement. The alleged infringer must establish that its rights are seriously jeopardised and that a declaratory judgment would eliminate the threat.

The general Belgian tort law rules provide that all persons that contributed to the wrongdoing and the harm caused by that wrongdoing, are jointly and severally liable. Article XVII.86§1 CEL as inserted by the Belgian Damages Act, reiterates this view. According to this provision, companies that have infringed competition law shall be jointly and severally liable for the harm caused, although two types of parties cannot be held jointly and severally liable:

- (Effective) immunity recipients (Article XVII.86§3 CEL).
- Small—and medium-sized enterprises (SMEs), which only have to pay damages for the harm caused to their own (direct or indirect) customers.

7 In 2019 and 2018 the legal interest rate was 2%.
SMEs must satisfy a number of (cumulative) conditions:

- The SME had a market share below 5M (at any time during the infringement).
- The application of the normal rules of joint and several liability would permanently jeopardise the economic viability of the SME and cause its assets to lose all their value.
- The SME was not a leader or cocerer of the anti-competitive activity and it is not a persistent offender (Article XVII.86§2 CEL).

Still, if a claimant is unable to obtain full compensation from the other infringers (for example, due to insolvency), the immunity recipient or SME will still be fully liable in accordance with Article XVII.86§2 and Article XVII.86§3 CEL.

5. Passing-on defence

The Belgian Damages Act introduced the passing-on defence in Articles XVII.83 et seq ELC. This principle accepts the defendant’s right to demonstrate that the claimant has reduced its actual loss, by passing-on (in whole or in part) the overcharge\(^8\) to subsequent clients. The burden of proving that the overcharge was passed on, will be on the defendant that invokes the defence. Article XVII.84 CEL clarifies that the passing-on defence can obviously not be invoked against end customer. In addition, the passing-on defence is not available in the context of class actions.

The Damages Act also introduces a rebuttable presumption that suppliers pass on overcharges—at least partially. Indirect purchasers can rely on this presumption if three conditions are met:

- The defendant infringed competition law.
- The infringement resulted in an overcharge for the direct purchaser.
- The indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

As this presumption is rebuttable, the burden of proof shifts back to the indirect purchaser if the defendant brings credible evidence that the overcharge was not or was only partially passed on to the indirect purchaser (Article XVII.84 CEL).

\(^8\) The overcharge is defined as the difference between the price actually paid and the price which would otherwise have been paid in the absence of the infringement of competition law (Article I.22, § 17, CEL).
6. Pre-trial discovery and disclosure, treatment of confidential information

Pre-trial discovery

Belgian procedural law does not provide for a specific discovery procedure for competition law cases. Hence, there is no pre-trial discovery process and the general rules of the judicial code apply.

Evidence held by other parties or third parties

Parties may request Belgian courts to order the production of documents (Articles 877 to 882-bis of the Judicial Code) at any stage of the proceedings. Under certain conditions, the courts may order a party to produce a document. To this end, the claimant must demonstrate:

- that a party to the proceedings or a third party is in possession of a document that could prove a fact that is decisive for the dispute or for the final decision.
- that there are serious, precise and concurring reasons to suspect that the third party in question has the document.

However, even if these conditions are fulfilled, the courts still have discretion to decide whether or not the document has to be produced. In this context, they have to find a balance between various factors, including the relevance of the evidence, the legality of a refusal based on confidentiality reasons and the arguments in favour of delivering an “order to produce evidence”. In practice, courts apply the conditions to produce documents in a strict way in order to protect business confidentiality.

The Belgian Damages Act also offers the possibility for a court to order document production and specifies under which circumstances a private party could obtain access to evidence from another party. The requesting party must describe the (categories of) documents as precisely and narrowly as possible and the court must, then, balance the legitimate interests of the parties (including, for instance, the right to obtain compensation, the costs of disclosure or the existence of commercially sensitive information in the requested documents) (Article XVII.74 CEL).

Evidence held by the BCA

Finally, the Belgian Damages Act introduced the possibility to request and obtain evidence from the file of the BCA. This possibility is subject to two main conditions. First, courts must confirm that no (third) party is reasonably able to provide the requested evidence (Article XVII.77§2, juncto IV.45§2, Article IV.46 CEL) and secondly, that the request satisfies the proportionality principle. Regarding the latter, they must take into account:

- whether the disclosure request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to the competition authority or held in the file thereof.
- whether the disclosure request is related to an action for damages.
the need to guarantee the effectiveness of public competition law enforcement (Article XVII.78§1 CEL).

Confidentiality of the evidence in the BCA’s file

Certain categories of evidence from the BCA’s file enjoy additional protection against discovery.

1) Belgian Courts may only order the disclosure of so-called “grey-list” information, after the BCA has issued a decision or alternatively, has terminated the proceedings. “Grey-list information” includes:

   • information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
   
   • information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
   
   • settlement submissions that have been withdrawn. (Article XVII.79§1 CEL, Belgian courts may only order the disclosure of this information). Such submissions may contain information that is useful for third parties that want to substantiate a claim for damages.

2) Belgian courts cannot order the disclosure of so-called “black-list information”, namely:

   • leniency corporate statements; and
   
   • settlement submissions (Article XVII.79§2).

Evidence covered by the blacklist, obtained only through access to the file of the BCA, cannot be included in the file of an action for damages. Following a similar reasoning, evidence included in the grey list can only be used from the moment the BCA has closed its proceedings. If these rules are violated and such evidence is submitted, the documentation in question will be considered inadmissible (Article XVII.80§1 and Article XVII.80§2 CEL).

Evidence which is not covered by the black or the grey list but has been obtained solely through access to the file of a competition authority, can only be validly submitted in private damage claims by the person who succeeded in obtaining the evidence (Article XVII.80§3 CEL).

The disclosure of other categories of evidence is in principle allowed, although the national judge retains discretion and determines on a case-by-case basis whether a certain document has to be submitted.

Finally, from a more general perspective, under the Belgian Damages Act, courts are required to take appropriate measures to ensure the protection of confidential information (for instance by removing commercially sensitive passages in documents, restricting the persons allowed to get access to information and publishing summarised/non-confidential versions of decisions).
7. **Limitation Periods**

In Belgium, Articles 2262 et seq BCC set out the principles concerning limitation periods which apply before the national courts.

The BCC provides that claims in tort are time-barred:

- Five years after the day on which the claimant became (or should reasonably have become) aware of the damage and the identity of the person responsible for this damage (i.e. the relative limitation period).
- Twenty years after the date on which the fact, action or negligence that caused the damage occurred (i.e. the absolute limitation period).

Article XVII.90§1 CEL refers to the common limitation periods provided in the BCC and specifies that the relative limitation period of five years starts to run after the competition law violation has ceased and the claimant is aware (or should reasonably have been aware) of the infringement, the harm that was suffered and the identity of the party which caused the damage.

The limitation period is interrupted if the competition authority starts investigations or proceedings concerning the infringement in question. The interruption ends when the authority adopts a final infringement decision or terminates the investigations or proceedings in any other way the BCA (Article XVII.90§2 CEL).

The limitation period is suspended during any proceedings aiming at the amicable resolutions of disputes (excluding arbitration). This suspension applies to parties involved in the amicable dispute resolution. The suspension is limited to a maximum two-year period since the beginning of the proceedings (Article XVII.91 CEL).

8. **Appeal**

The judgment of the court of first instance and of the commercial court in private enforcement actions can be appealed before the relevant Court of Appeal, on both factual and legal grounds, according to the general principles of procedural law. As a general principle, judgments rendered in first instance are immediately enforceable.

Decisions of the Court of Appeal can be appealed on questions of law and formal requirements before the Supreme Court.

9. **Class actions and collective representation**

In Belgium, there are three types of collective proceedings:

- actions for collective redress (class actions);
- actions of collective interest; and
- collective (related) actions.
Actions for collective redress (class actions)

The possibility to bring an action for collective redress for a number of violations of Belgian and EU rules was introduced in March 2014 and entered into force on 1 September 2014. Actions for collective redress are only admitted for alleged infringements by a company of its contractual obligations or of specifically enumerated Belgian and European provisions (Article XVII.36\(1^\circ\) and Article XVII.37 CEL). The common element of these provisions is that they concern consumer protection. The list of contractual obligations includes provisions relating to inter alia credit services, (retail) market practices, product safety and intellectual property.

On 6 June 2017, the Belgian legislature extended the scope of application of actions for collective redress in order to cover violations of competition law (Article XVII.36.1° CEL juncto Article XVII.37.1° (a) and 33° CEL). On the basis of these provisions, groups of consumers (and since 1 June 2018 also groups of SMEs) represented by non-profit organisations or public bodies, are entitled to bring class actions. In order to exercise this right, consumer associations and public interest groups have to comply with all legal conditions to act as a group representative (Article XVII.39 CEL). A group representative can be:

- an association for the defence of consumer interests that has legal personality and is represented on the Consumer Council; or
- an association of at least three years’ standing which is approved by the Minister for the Economy and is not permanently operated for the purpose of financial gain; or
- the Consumer Mediation Service where it (the Mediation Service) is seeking to negotiate a collective redress agreement with the defendant businesses.

The group representative bringing the action must specify in the request for collective redress its choice for an opt-in or opt-out system and the reasons for this choice, within two months from the submission of the request (Section 1, Article XVII.42 CEL). As a general rule, the courts take a decision on the admissibility of the action within two months from its submission and its decision will indicate whether the applicable system will be “opt-in” or “opt-out”, as well as the period within which consumers must exercise their option rights (from thirty days to three months) (Section 2, Article XVII.43 CEL). However, opt-in systems are compulsory for:

- consumers who have no habitual residence in Belgium (Section 2, Article XVII.48 CEL); and
- actions for physical or moral collective damage (Section 2, Article XVII.43 CEL).

When an opt-out system has been admitted, claimants who have not exercised their right to opt-out can still opt-out of a settlement if they can demonstrate that they were not reasonably aware of the court’s decision on the admissibility of the collective redress action as brought by the group representative (Section 4, Article XVII.49 CEL).

Actions for collective redress are generally regulated by the same provisions of Book XVII, Title 3 CEL, as individual damage actions. There are, however, two exceptions:

- Defendants cannot invoke the passing-on defence.
The usual rule that the court can suspend the proceedings for a period of two years in case the parties engage in consensual dispute resolution, is not applicable. (Article XVII.70 CEL juncto Articles XVII.83 and XVII.89 CEL).

**Actions of collective interest**

On the basis of specific legislation, an organisation or a group of people, may seek injunctive relief against practices that harm the general interests of consumers or of the members of such organisation. While these organisations cannot claim damages for their members, they may seek compensation for their own damage to the extent that their own personal interests were harmed.

**Collective (related) actions**

If different private enforcement actions are started by different claimants but concerning a comparable body of facts, the Belgian courts can join such individual claims in order to save resources. In other words, the related actions are handled by the court jointly, although formally they remain individual actions (Articles 30 and 701 of the Judicial Code).
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