UKRAINE

Court proceedings in key jurisdictions
Introduction

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.
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.
The number of private antitrust damages actions in Ukraine is quite limited. This is due mostly to the lack of a specific regulation in this area. While Ukraine’s Antimonopoly Committee (the “AMC”) has been successful in promoting fair competition in Ukraine since 2015, national competition legislation is still under reconstruction. Particularly, further harmonisation of the Ukrainian competition regulation with that of the European Union is anticipated as stipulated by the Ukraine-EU Association Agreement.

1. Jurisdiction

Although it has exclusive jurisdiction to enforce competition law in Ukraine, the AMC is not competent to resolve private antitrust damages actions.

Victims of anti-competitive practices may however seek compensation before commercial courts. In particular, the Protection of Economic Competition Law (the “Competition Law”) entitles a person who suffered damages as a result of concerted practices, abuse of dominance, merger control violations or any other violations provided by this law to file a claim for the compensation for such damages with a commercial court.

Also, some violations, for instance, illegal use of business entity’s reputation, illegal collection and disclosure of business secrets, inducing to boycott, and so forth, qualify as anti-competitive practices under the Protection from Unfair Competition Law (the “Unfair Competition Law”). Victims of such violations are also entitled to seek compensation for damages before the Ukrainian court. While the Unfair Competition Law does not provide that commercial courts have exclusive jurisdiction over damages actions resulting from a breach of this law, such claims are heard by commercial courts as well.

Ukrainian law does not expressly establish that the AMC findings of antitrust violations serve as a pre-requisite to pursuing antitrust damages action (follow-on actions). However, the existence of relevant AMC decision is implied. This is due to the exclusive authority of the Ukrainian antitrust authority in establishing antitrust violations. In other words, the Ukrainian court lacks jurisdiction to establish a fact of the antitrust violation.

For instance, in case Nibulon v. Ukrzaliznytsya No 910/4425/16 dated 3 July 2018, the Supreme Court rendered a landmark decision (the “Nibulon Case”) setting further principles, including in relation to potential inadmissibility of stand-alone actions under Ukrainian law.

In the Nibulon Case, the Supreme Court concluded that the AMC has exclusive authority to decide whether an undertaking violated the Competition Law. Therefore, a victim that allegedly suffered damage is entitled to seek compensation for antitrust damages before the Ukrainian court, provided that a relevant AMC decision has been rendered. The
court has no jurisdiction to decide whether certain actions shall qualify as a violation of the Competition Law. Although the Supreme Court did not consider the issue of stand-alone actions specifically, considering the reasoning of the court in terms of the exclusive competence of the AMC, stand-alone claims may be regarded by Ukrainian courts inadmissible.

Therefore, in Ukraine, only follow-on actions are available to victims of antitrust violations.

2. Relevant legislation and legal grounds

To be valid, a claim for damages must be based on both:

i. civil liability legislation:
   - the Civil Code of Ukraine (Articles 22, 1166, 1167 and 1190 of the Civil Code of Ukraine); and / or
   - the Commercial Code of Ukraine (Articles 224-227, 255 of the Commercial Code of Ukraine);

ii. and the relevant antitrust legislation: the Competition Law (Article 55) or the Unfair Competition Law (Article 24) which, from a procedural point of view, is subject to the same enforcement regime.

As stated above, private antitrust damages actions are considered by commercial courts. Therefore, the proceedings are regulated by the Commercial Procedure Code of Ukraine.

There are four component elements of any tort claim (including antitrust damages actions), in particular:

i. unlawful behaviour, i.e. the anti-competitive behaviour by an undertaking held liable for competition law infringement (the relevant decision of the AMC, which has a preclusive effect);

ii. the damage (actual (direct) damages, loss of profit\(^1\), moral damages\(^2\));

iii. causation between the unlawful behaviour and damages such claimant has suffered. Damages shall serve as a direct and objective consequence of relevant violation; and

iv. fault. Under Ukrainian law fault is presumed. Fault in this context means an intention to cause harm or negligence.

The above criteria are cumulative. The burden of proving damages, unlawful behaviour and causal link between the same rests on the claimant, while the defendant has to prove the absence of its fault.

---

1. Ukrainian law provides that claims for compensation for damages in the form of loss of profit shall be duly substantiated with specific calculations and evidence confirming real opportunity of obtaining such income. Presence of theoretical opportunity of receipt of the income does not constitute a ground for its recovery.

2. Compensation for moral damages is available under the Commercial Code of Ukraine.
As stated above, any person who suffered damage as a result of a violation of either the Competition Law or Unfair Competition Law is entitled to bring a claim for recovery of damages. Therefore, indirect purchasers and ultimate customers potentially may also bring actions for damages.

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

Damages actions are not limited to certain types of Competition Law or Unfair Competition Law violations.

In turn, the Competition Law provides that double damages are available for the following types of violations:

i. concerted practices;

ii. abuse of dominance;

iii. implementation of a notifiable transaction failing to obtain merger clearance;

iv. implementation of a conditionally approved merger or concerted practices failing to comply with conditions imposed by the AMC; and

v. imposition of restrictions on business activity of an undertaking following its application to the AMC with a complaint regarding an alleged antitrust violation.

Double damages are not available in actions resulting from so-called informational violations, illegal use of business entity’s reputation, illegal collection and disclosure of business secrets, inducing to boycott, and so forth.

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

Neither the Competition Law nor the Unfair Competition limits forms of relief available to potential claimants in addition to compensation for damage suffered. There exist different forms of relief that are potentially available to victims of antitrust violations:

i) Compensation for damage suffered.

The effective law does not establish any mechanism for calculation of antitrust damages.

As stated under Section 3, the Competition Law provides that double damages are available for certain types of Competition Law violations. However, punitive damages are not available under Ukrainian law.

Damages, which resemble a monetary value of harm, may, pursuant to Article 22(2) of the Civil Code of Ukraine, consist of:

For instance, untimely provision of information in response to the AMC request, provision of untrue, incomplete data or failure to provide information.
1) actual (direct) damages (i.e., losses incurred by a person as well as expenses, which a person has incurred or should incur in order to restore its violated rights;

2) loss of profit.

Ukrainian law provides that claims for compensation for damages in the form of loss of profit shall be duly substantiated with specific calculations and evidence confirming real opportunity of obtaining such income. Presence of theoretical opportunity of receipt of the income does not constitute a ground for its recovery. Moral damages are also available and may be awarded both to individuals and legal entities.4

The fine imposed by the AMC does not influence the amount of damages that may be awarded to a successful claimant.

The highest amount of antitrust damages that have ever been awarded in Ukraine is circa US$ 4,500,000 in the Nibulon Case.

ii) Other forms of relief

A claimant may also ask the court to invalidate an agreement (certain provision of an agreement). Such relief is available if such an agreement was made in violation of the Competition Law or the Unfair Competition Law and, as a result, affected the rights of a claimant.

Further, suppose an antitrust violation involves the publication of false and/or inaccurate, or incomplete information regarding a business entity. In that case, such entity may claim for a public refutation of such information. So far, we have not identified any such case.

In addition to the above mentioned forms of relief, a claimant may also apply for interim relief. For instance, a court may issue a freezing injunction over the defendant’s assets or prohibit the defendant or third parties to take certain actions.

The court may grant interim relief on an ex parte basis. Before granting interim relief, the court will weigh up the interests of parties and consider:

1) the potential harm for either of parties resulting from the granting or non-granting of such interim relief, and

2) whether the rights and interests of third parties will be (are likely to be) infringed by such interim relief.

Accordingly, a party seeking interim relief should convince the court that it would suffer irreparable harm if interim relief is not granted.

Importantly, the court may order a party applying for interim relief to provide a cross-undertaking (security) in the form of a deposit lodged on the account of the court, a bank guarantee, security, etc.

4 Compensation for moral damages is available under the Commercial Code of Ukraine.
5. Passing-on defence

The passing-on defence is not yet regulated under Ukrainian law. While there is no court practice involving passing-on defence, such defence (if appropriate) may be raised. Considering that there is no specific rule regulating the issue either prohibiting or allowing the passing-on defence, there is no statutory limitation with respect to its availability. Under Ukrainian law, there is no presumption that a direct or indirect purchaser is deemed to have passed on the surcharge to its own customers.

Considering the requirements of the Commercial Procedure Code that each party should prove those circumstances to which it refers to support its claim or defence, it is for the defendant to prove that the claimant in fact passed on the surcharge to its own customers.

6. Pre-trial discovery and disclosure, treatment of confidential information

Ukrainian law does not provide for a discovery procedure. However, a claimant is entitled to request the disclosure of documents (or any other evidence) by the defendant if:

i. the claimant cannot obtain such documents; and

ii. such documents are considered as necessary to prove the alleged facts relevant to the case.

The judge may also order the production of documents from third parties, including from the AMC. As a matter of practice, the AMC is reluctant to disclose its case files even when its own decisions are being challenged. In addition, the AMC usually applies for closed court proceedings relying on confidentiality of materials submitted by parties to the AMC investigation. Confidentiality does not apply automatically to materials submitted by parties to relevant AMC investigation. First, such documents shall be marked as confidential. Second, parties shall provide justification when applying for confidentiality.

Furthermore, a leniency applicant is entitled to apply for non-disclosure of its identity. Such application may be allowed by the AMC if the applicant provided justification that such non-disclosure will be beneficial for the AMC investigation. Notably, the effective Competition Law envisages that only first leniency applicant may enjoy benefits of the leniency programme.

7. Statute of Limitation

A general limitation period of three years is applicable. The limitation period starts when the claimant learned or could have learned of the violation upon its rights or when the claimant learned who violated its rights.

In the Nibulon Case, the Supreme Court confirmed that the limitation period starts from the day on which the AMC’s decision is issued.
8. **Appeal**

A decision of the court of first instance may be appealed to the court of appeal on the grounds of:

i. failure to fully identify the circumstances relevant to the case;

ii. lack of evidence with respect to circumstances relevant to the case;

iii. inconsistency of the conclusions set forth in the first instance court’s decision with the established circumstances of the case;

iv. breach of material law or procedural law (if the latter resulted in an improper court decision).

A cassation appeal against the decision of the Court of Appeal (on limited grounds) may be filed with the Supreme Court (Commercial Cassation Court of the Supreme Court). In exceptional circumstances, the Supreme Court may transfer a case to the Grand Chamber of the Supreme Court, if it considers that it is necessary to deviate from the finding on an issue of law made in similar circumstances, or if the case concerns an exceptional legal problem and such transfer is required to ensure formation of the consistent court practice.

A case shall be transferred to the Grand Chamber if parties to such proceedings challenge jurisdiction: either the subject matter jurisdiction rules or subjective jurisdiction rules.

9. **Class actions and collective representation**

Ukrainian law does not provide for class actions. However, several claimants may file a joint action against the same defendant(s) if:

i. the subject matter of the dispute is related to the claimants’ / defendants’ common rights or obligations;

ii. the rights or obligations of several claimants or defendants arose from the same reasons;

iii. the subject matter of the dispute is the similar rights and obligations.

The criteria mentioned above are cumulative.

Each of the claimants or defendants shall however act independently in the court proceedings.
ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC’s core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.