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 conducts. 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 a 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.
Private antitrust litigation is well-established in the United States where federal law has included a private right of action to enforce the antitrust laws for over 100 years. Case law explicitly recognizes the role of private lawsuits in effective antitrust enforcement. Today, hundreds of cases are filed each year seeking damages or other relief as a result of alleged antitrust violations. While many of these cases follow government enforcement actions, substantial numbers are based on alleged conduct that has not been the subject of a government inquiry. The sections below provide more detail on the procedures and key issues related to private antitrust claims in the United States.

1. Jurisdiction

At the federal level, the Antitrust Division of the United States Department of Justice ("Antitrust Division") and the Federal Trade Commission ("FTC") share responsibility for enforcing the antitrust laws. In addition, state attorneys general enforce state antitrust laws within their respective states. This memorandum focuses largely on federal antitrust law and notes differences with state law where applicable.

Private antitrust claims may be brought in state or federal courts. Generally speaking, a claimant has the choice of filing a claim in any forum that has jurisdiction over the antitrust claim and the defendant. Antitrust claims that allege a violation of any federal antitrust law may be filed in any federal district court where either (i) the defendant resides, (ii) substantial parts of the events arose, or (iii) the defendant can be served (if there is no other appropriate forum). A defendant must live in or have sufficient minimum contact with the state in which the federal district court sits for that court to have jurisdiction over the defendant.

Most state courts have jurisdiction to adjudicate the federal antitrust claims if the federal court in that state would also have jurisdiction. Through a process called “removal”, a defendant can transfer a case initially filed in state court to a federal court if the case otherwise meets the federal jurisdiction requirements.1

Both follow-on and stand-alone claims are available: private antitrust claims can (and often do) proceed in parallel to criminal investigations or adjudicatory proceedings. Additionally,

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1 A federal court has jurisdiction when (i) the case arises under the US Constitution or a federal statute, or (ii) the plaintiff(s) and defendant(s) are citizens of different states and/or countries and the amount in controversy is at least US$75,000. 28 U.S.C. §§ 1331-1332.
a private claimant need not wait for a civil or criminal government enforcement action to sue for damages. Although there is no general rule staying civil proceedings while a criminal case is pending, courts will sometimes stay or defer discovery in civil proceedings based on requests from the Antitrust Division related to ongoing criminal investigations or proceedings.

2. Relevant legislation and legal grounds

Section 4 of the Clayton Act (15 U.S.C. § 15(a)) provides a private cause of action for suits brought pursuant to “the antitrust laws”, which are set out in more detail below.

A claimant has standing to seek damages if (i) there is an actual case or controversy, the resolution of which directly impacts the claimant, (ii) the claimant is not too removed from the violation, and (iii) the claimant can demonstrate that it suffered an “antitrust injury” to have standing in federal court. Antitrust injury is “injury of the type the antitrust laws were intended to prevent.” Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990). Claimants who purchased products or services indirectly from the defendant(s) are not permitted to bring antitrust damages claims under federal law but can do so under many state laws.

The Clayton Act provides that final judgments entered against a defendant in a civil or criminal antitrust proceeding brought by the government may be used in a later private suit arising out of the same facts as prima facie evidence against the defendant. 15 U.S.C. § 16(a).

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


► Section 1 of the Sherman Act prohibits agreements in restraint of trade, including price-fixing agreements, group boycotts, market allocation, bid-rigging, and tying.

► Section 2 of the Sherman Act prohibits unlawful monopolisation.

► Section 7 of the Clayton Act prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly.

► The Robinson Patman Act prohibits price discrimination in the sale of products to similarly situated buyers.

Many states’ antitrust laws also provide for private rights of action.

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

Under section 4 of the Clayton Act (15 U.S.C. § 15(a)), claimants can obtain treble damages, i.e. three times the amount of damages sustained due to the claimant’s antitrust violation, plus costs of suit, reasonable attorney’s fees, and post-judgment interest.
Under section 16 of the Clayton Act (15 U.S.C. § 26), private claimants may obtain injunctional relief to prevent or terminate unlawful conduct or, in rare cases, divestiture. A claimant must establish that irreparable harm is likely unless injunctive relief is granted.

5. **Passing-on defence**

The passing-on defence, or the avoidance of antitrust liability through proof that a claimant passed on any antitrust injury to a third party, is not available in the US at the federal level, although some states do recognize it. For example, the pass-on defence is available in California when “multiple levels of purchasers have sued, or where a risk remains they may sue.”

Further, under Illinois Brick Co. v. Illinois, indirect purchasers do not have standing to sue for damages under the federal antitrust laws; only direct purchasers may bring such claims. However, 34 US states—including California and New York—as well as the District of Columbia permit indirect purchasers to sue under state antitrust laws.

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

Discovery in US antitrust cases is extensive and may include the production of documents, depositions, interrogatories, and requests for admissions. Discovery must be of non-privileged matters that are relevant to any party’s claim or defence and proportional to the needs of the case, and is usually limited to a period of time before the earliest date of alleged wrongdoing through a date after the alleged wrongdoing ended. The number of depositions, interrogatories, and admissions is limited by the Federal Rules of Civil Procedure and state procedures (although such limitations are sometimes altered by agreement or court order).

Discovery of non-parties is also allowed; however, courts regularly narrow the scope of discovery when it is sought from non-parties.

Confidential information, if not otherwise subject to a legal privilege preventing disclosure, must be produced in response to appropriate discovery requests. Parties may protect such information from public disclosure through the use of protective orders that are either stipulated to by the parties or ordered by the court when the need for confidentiality of the information is shown “for good cause.” Evidence introduced at trial is generally subject to the public’s right of access to the courtroom and will not be blocked absent a compelling need.

If a criminal investigation is pending, investigators can seek a discovery stay in any pending damages actions sharing common questions of fact or law (e.g. follow-on actions). The judge presiding over the damages action has discretion as to whether to grant the stay. The files of a competition authority are often deemed protected by various exceptions to the discovery rules and as a result, are typically not accessible in private lawsuits. Additionally,

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3 Clayworth v. Pfizer, Inc., 233 P.3d 1066, 1086 (Cal. 2010).
documents submitted to the Antitrust Division in response to a Grand Jury subpoena are protected from disclosure by federal law.

7. Statute of Limitation

The statute of limitations for federal private antitrust claims is four years from the date the cause of action accrued, which is defined as the date the claimant suffered injury. How to define the date the cause of action accrued and whether the injury is ongoing or not is regularly the subject of dispute within antitrust litigation matters. Individual US states may have statutes of limitations that differ from the federal rule; these statutes apply to any claims brought under the law of the particular state.

The statute of limitations period is considered procedural law. If the statute of limitations expires before a claimant files a case and no basis for suspension of the period exists, the claim will be dismissed with prejudice.

A statute of limitations may be suspended in the event of any one or more of the following situations: a pending government investigation or class action derived from the same facts as the claimant’s case; fraudulent concealment; duress; or estoppel. A statute of limitations period may also be modified by contract between the parties, in what is often referred to as a “tolling” agreement.

8. Appeal

Unsuccessful claimants and defendants in private federal antitrust suits have the right to appeal a final decision of a federal district court.

In a private action, either side may appeal a final, unfavourable decision on the grounds of legal error that prejudiced the losing party. Appellate courts do not re-weigh the evidence; rather, they examine whether the trier of fact correctly applied the law to the facts as it (the trier of fact) found them.

For most competition cases, appeals from a federal district court are heard by the court of appeals in the circuit in which the district court is located. Further appeal to the United States Supreme Court—the country’s highest court—is allowed, but the Supreme Court has discretion as to whether it will hear such an appeal.

State cases are appealed to the state appellate court in the state where the case was heard. Many states have two layers of appellate courts like the federal system. Under certain circumstances, a decision by the highest court in a state can be appealed to the United States Supreme Court.

9. Class actions and collective representation

Most U.S. antitrust class actions are filed in federal courts whether the claims arise under federal or state law. Rule 23 of the Federal Rules of Civil Procedure sets out the requirements for class actions, including antitrust class actions.
Rule 23(a) of the Federal Rules of Civil Procedure requires the class representative to establish (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy.

- Numerosity ensures that the size of the putative class is such that joining all members is impractical making class action a useful way to bring claims.

- Commonality requires that the class members have at least one question of law or fact in common.

- Typicality means that the claims or defences of the class representative are typical of those of the other class members.

- Finally, the adequacy requirement ensures that the class representative is capable of fairly and adequately protecting the interests of the class.

A class representative also must satisfy one of three criteria set forth in Rule 23(b) of the Federal Rules of Civil Procedure:

- Trying individual actions would expose the defendant to the risk of inconsistent and incompatible judgments or would dispose of or harm the interests of non-parties;

- The defendant's conduct is such that injunctive or declaratory relief on behalf of the whole class is appropriate; or

- For damages actions, questions of law or fact common to the class predominate over questions affecting individual members.

10. Key issues

Standing of Direct and Indirect Purchasers

The US Supreme Court recently ruled that iPhone users who purchased apps through Apple's App Store are considered direct purchasers of Apple’s products, and therefore had standing to bring claims against Apple for alleged monopolisation of the market for iPhone apps. In *Apple v. Pepper* (2019), the Court rejected Apple’s argument that longstanding Supreme Court precedent established in the *Illinois Brick* case—holding that indirect purchasers do not have standing to sue under federal antitrust law—should apply because iPhone users purchase apps from third-party developers, not from Apple. In rejecting this argument, the Court found that iPhone users should be considered direct purchasers with standing to bring claims for private damages under the antitrust laws because “the iPhone owners bought the apps directly from Apple and therefore are direct purchasers under Illinois Brick.” The Court’s decision in this case may expose other companies offering platform services for third-party vendors to antitrust claims brought by consumers of goods and services purchased from third parties through those platforms.

Evolving Class Action Certification Standards

US courts have been providing evolving standards with respect to certification of antitrust class actions. For example, there is a split among the circuit courts as to whether a
class containing uninjured members may be certified. Six circuits hold that Rule 23(b)(3)’s predominance requirement forbids certification where the proposed class contains uninjured members that cannot be identified and removed without individualised inquiries. One court, however, takes a different approach, allowing certification as long as the class does not contain “a great many” uninjured members. This issue is consistently litigated in antitrust class action cases and will likely continue to be addressed by the courts.

**Growth of Consumer Class Actions Unrelated to Government Enforcement Investigations**

There has been an increase in antitrust class actions brought by consumers across a number of different industries that are particularly noteworthy for the fact that they were not preceded by government enforcement investigations or enforcement actions against the defendants. This increased activity by the antitrust claimant’s bar should serve as notice that, even in the absence of prior scrutiny from the FTC and DOJ antitrust authorities, companies may still be vulnerable to costly and time-consuming private antitrust litigation from consumers. Below are some examples of recent private antitrust class action cases brought against companies that were not previously subject to government scrutiny.

**Agriculture**

A number of antitrust class actions have been filed in the food industry, including cases against major producers of broiler chickens alleging a conspiracy to fix prices, and a case against pork producers alleging collusion to limit production with the intent to increase prices. These cases pre-dated the beginning of an investigation by the government with respect to antitrust violations in these industries. This pattern of private litigation preceding government action was also evident in the salmon industry, where a private antitrust class action alleging collusion to fix prices was filed in May 2019 against salmon producers in the United States, preceding by six months issuance of subpoenas by the US Department of Justice.

**Financial Services**

Claimants’ lawyers have followed the government’s lead in pursuing private actions alleging antitrust violations in the financial services sector. However, these cases are not limited to the financial products, instruments and markets that have been the focus of government inquiry (including LIBOR and foreign currency exchange). In August 2017, public pension funds filed a class action against six large banks alleging that the banks illegally colluded with each other to overcharge investors and maintain their control over the stock loan market. In June 2017, a small trading exchange filed an antitrust suit against a number of banks alleging that the banks conspired to exclude the firm from the credit default swap market. These cases demonstrate the willingness of the claimants’ bar to pursue antitrust cases related to lines of business in the financial services sector that have not previously been subject to government inquiry.

**Wage Fixing and No-Poach Litigation**

A series of class actions cases have followed the increased interest from the Department of Justice and state attorneys general in reviewing “no-poach” agreements—agreements
between competitors not to compete for employees—for antitrust violations. A key issue in these private actions is whether the alleged “no-poach” agreement should be analysed under the *per se* or rule of reason standard. The *per se* standard would allow claimants to argue that a “no-poach” agreement is *per se* illegal under the antitrust laws, while applying the rule of reason would require a court to evaluate the pro-competitive features of the “no-poach” agreement against its anti-competitive effects. The Department of Justice has filed Statements of Interest in a number of these private actions, citing its “strong interest in the “correct application” of the antitrust laws. The Department takes the position that because the agreeing parties are in a vertical relationship, these agreements should be analysed under the rule of reason.

**Multi-sided Platforms**

In a 2018 Supreme Court case, *Ohio v. American Express*, the Court held that the anti-steering provisions in American Express's merchant contracts do not violate federal antitrust law. The anti-steering provisions prohibit merchants who accept American Express credit card payments from offering customers an incentive to use another credit card—such as Visa or MasterCard—at the point of sale to avoid American Express's comparatively higher merchant fees. In its decision, the Court found that the credit-card market should be considered a single market—rather than two separate markets for merchants and cardholders—because “credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant.” The court found that in this single market context, the claimants had not adequately met their burden of proving that the anti-steering provisions had anti-competitive effects because they focused their argument on just one side of the market. The court found that “evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anti-competitive exercise of market power.” In order for their claim to be successful, claimants would have had to prove that the anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of transactions, or otherwise stifled competition in the two-sided credit card market.
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