INTERNATIONAL REPORT

Question A: What progress has been made, and is still to be made, in the compensation for harm caused by any infringement of competition law?

I. INTRODUCTION

It is generally accepted that private enforcement has an important role in increasing the effective functioning of competition regimes globally and that individuals and/or firms who suffer harm as a result of anti-competitive conduct should be entitled to compensation for their loss(es). Consequently, interest in, and the significance of, this aspect of the competition law 'toolkit' continues to grow.

There have been a number of initiatives in various jurisdictions to promote more private enforcement and provide the necessary legal and economic framework for this purpose. For example, in November 2014, the EU Damages Directive,[1] which harmonised certain procedural rules for competition damages actions across all EU Member States (including the United Kingdom at the time) and sought to establish a level playing field across the EU, entered into force. Together with the 2013 Recommendation on Collective Redress, the Damages Directive was intended to make it easier for victims of anti-competitive conduct to obtain compensation.

During the past decade, the use of private enforcement of competition law has increased throughout Europe and beyond. However, the intensity and experience of private enforcement is very mixed. Some jurisdictions have considerable experience in dealing with damages actions, however, in others private actions are rare.

Major differences still exist among jurisdictions, even between the EU Member States. For example, in a number of Member States, there have not yet been any court rulings applying the provisions of the Damages Directive and, for temporal application reasons, many rulings are still based on pre-existing national law.

The 10th Anniversary of the EU Damages Directive provides the LIDC with an opportunity to take a critical look at how private enforcement has evolved around the world, taking stock of the progress that has been made and what obstacles remain, considering how these might be overcome to ensure: effective redress; and a balance between public and private enforcement.

Although the questionnaire circulated to national chapters contained questions in relation to other private / civil law remedies available in national legal systems in case of an infringement of competition law, similarly to the EU Damages Directive, the international report focuses on damages actions (hence, the use of the term "antitrust damages" throughout the report to denominate the issue).

Based on the questionnaire circulated to national chapters, 13 national reports have been submitted: Germany, the United Kingdom, Czech Republic, Hungary, Spain, Singapore, France, Austria, Italy, Brazil, Belgium, China, Switzerland.

Similarly to the questionnaire, the international report is structured in three main sections: the first section looks at how antitrust damages is regulated and how many cases were reported; the second section looks at the regulation and application of substantive rules; the third section looks at the regulation and application of procedural rules. The conclusions of the report set out what are the main issues of antitrust damages and what are the plans to resolve these issues.

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Text with EEA relevance), OJ L 349, 5.12.2014, p. 1-19.

II. REGULATION AND CASES

1. Regulation

There are various questions in relation to the regulation of antitrust damages. The first question is whether there is a separate legal act regulating the issue, or the rules are incorporated among the rules of the national competition law. The second question is whether there is a separate legal procedure for antitrust damages claims, antitrust damages claims are governed by general rules, or antitrust damages claims are governed by a combination of general and special rules.

Only two jurisdictions have a separate act on antitrust damages (Czech Republic and Italy - both aimed at the transposition of the EU Damages Directive). None of the reporting jurisdictions have a completely separate procedure to deal with antitrust damages claims. Notably, in Brazil there is a separate type of claim for antitrust damages claims (ARDC), however, these also fall under general civil law rules.

Notwithstanding the above, there are several solutions nuancing the above picture. For example, in France, damages claims based on bid rigging i.e. antitrust infringements committed in the context of public procurement, are subject to separate rules and a separate procedure: administrative courts deal with litigation in relation to such claims governed by administrative law. In the United Kingdom, antitrust damages litigation before the High Court is governed by a combination of general and special rules, while antitrust damages litigation before the Competition Appeal Tribunal (CAT) is governed by a separate set of rules.

In relation to regulation of antitrust damages it is also important to note that in some EU Member States, special rules concerning antitrust damages were introduced before the EU Damages Directive. For example, in Germany, the legal basis of antitrust damages claims was introduced into the German Competition Act (GWB) before the EU Damages Directive. In Hungary, there were special rules introduced on the quantification of harm, in the form of an overcharge presumption, and on joint and several liability, by ranking leniency applicants as last to be subject to a claim.

Despite the intense dispute regarding how general or special rules are to be applied to antitrust damages claims, only a few jurisdictions have adopted soft law on the interpretation of these rules. The national report for Singapore mentioned that there is soft law on directions and remedies, however, it does not provide guidance on antitrust damages claims. Some national reports for EU Member States mentioned that there are no national guidelines, but the national courts consider EU guidelines[2] applicable. Some national reports also mentioned the guidance provided by existing case-law. In China and Brazil, there are collections of guiding cases prepared explicitly for this purpose.

In France, a report on the law implementing the EU Damages Directive and a circular of the Ministry of Justice was adopted at the same time and provide guidance. Similarly, in Italy, the illustrative report to the law implementing the EU Damages Directive is considered important guidance. Also, in France, the Paris Court of Appeal issued a methodology notice on this topic. In China, the Beijing High People's Court adopted guidelines.

In the United Kingdom, due to the specific operation of the CAT, there are a number of guidelines available regarding antitrust damages claims. Apart from the CAT Guide to Proceedings, there

[2] These are the following:

- Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (Text with EEA relevance) OJ C 167, 13.6.2013, p. 19;
- Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser OJ C 267, 9.8.2019, p. 4;
- Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law OJ C 242, 22.7.2020, p. 1.

are 9 practice directions on various topics like disclosure, confidentiality, argumentation and collective claims.

Most guidelines seem to apply to procedural issues. As a rare example, in Spain, the national competition authority adopted guidelines on the quantification of damages.[3]

2. Statistics

Most jurisdictions reported that there is no systematic collection of antitrust damages cases or statistics on such cases. Due to the difference in judicial systems, there will always be an inherent difficulty in tracking trends of antitrust damages cases. This, in turn, also makes it difficult to assess on an international level, the development of private enforcement.

In the national reports, the following number of cases were reported for the time period 2014-2024:

	Number of cases	**Number of awarded damages**
Germany	1982	not available (estimated success rate: 11%)
UK	319 (only CAT)	3 (two High Court, one CAT)
Czech Republic	not available	1 (abuse of dominance)
Hungary	22	1 (commitment decision)
Spain	1219 (judgments)	not available (success rate: 89%)
Singapore	not available	not available
France	52	22 (success rate: 42%)
Austria	not available	not available
Italy	274 (judgments)	83 (success rate: 30%)
Brazil	39 (judgments)	3 (success rate: 8%)
Belgium	14	3 (success rate: 21%)
China	342+	not available
Switzerland	13 (judgments)	0

Based on the national reports, which provided an annual breakdown, a clear trend cannot be identified. In Germany, there were twice as many cases in 2017-2018 than in any other year. In the United Kingdom, the cases doubled in 2019, but in 2022 four times as many cases were lodged as in any other year. In China, the cases multiplied in 2017, with the peak year being 2020 with twice as many cases as in any other year.

III. SUBSTANTIVE ISSUES

3. Scope

As far as the scope of the rules applicable to antitrust damages is concerned, the first question was whether EU Member States extended the regime of the EU Damages Directive - originally applicable only to infringements of EU competition law (Article 101 and 102 TFEU) - to national

[3] English version available here: https://www.cnmc.es/sites/default/files/4968354.pdf.

competition law. Based on the national reports for EU Member States, this can be answered in the affirmative.

The second question was whether the infringement of any other rules - in addition to the prohibition of anticompetitive agreements and the abuse of dominance - can also trigger the same kind of procedure. The national report for Germany mentioned that the infringement of Article 5, 6 or 7 of the DMA[4] falls under the same regime. Damages caused by a violation of the decision of the national competition authority (e.g., cease and desist order) can be claimed under the same regime.

The national report for Hungary mentioned that misleading business partners and unlawful comparative advertising may give rise to damages claims, however, it is unclear if the special rules to antitrust damages apply. The national report for Italy mentioned the infringement of the DMA, EU state aid rules and national rules on the prohibition of abuse of economic dependence to possibly give rise to damages claims, however, it is unclear if the special rules to antitrust damages apply.

The national report for Austria mentioned retaliatory measures as a third type of antitrust infringements i.e., the retaliation against a victim of an abuse of dominance. The national reports for China and Singapore mentioned concentrations having an anticompetitive effect as a third type of antitrust infringements. Interestingly, the national report for Switzerland explicitly excluded damages claims based on an infringement of merger control rules.

4. Type of liability

The type of liability determines the conditions, which need to be met for a successful claim. None of the reporting jurisdictions have a *sui generis* type of liability created explicitly for antitrust damages. Most jurisdictions qualify antitrust damages to be a type of tortious / delictual / non-contractual / extracontractual liability. Minor variations to this qualification can be identified. In Germany, the Czech Republic and Singapore there is a special legal provision on liability for antitrust damages. In Spain and Brazil liability for antitrust damages is based on general civil law rules. In Switzerland and Hungary national competition law simply refers to general civil law rules as a basis for liability for antitrust damages.

The national report for Spain mentioned that courts explicitly clarified that antitrust damages is not based on contractual liability. The national report for Hungary mentioned that even if the parties were in a contractual relationship, antitrust damages can be claimed under non-contractual liability. The national report for Belgium and China mentioned that contractual liability is not excluded in case of an antitrust infringement. In the United Kingdom, liability for antitrust damages is based on the tort of breach of statutory duty. The national report also mentioned the possibility to base liability on the tort of conspiracy, at the same time highlighting that under this tort it would be necessary to prove an intent to injure, which makes it more difficult for claimants relying on this tort to succeed.

Based on the above, the conditions for establishing liability for antitrust damages is typically: (i) unlawful conduct; (ii) suffered harm; and (iii) causal link between unlawful conduct and suffered harm.

The European Commission originally wanted to There are a number of jurisdictions, which also have a subjective element to liability. There is a fault requirement (damage caused intentionally or negligently) in Germany, Switzerland and Spain. In Hungary, there is an exculpatory system i.e. fault is implied and the defendant can prove that it has acted diligently. In the Czech Republic, fault is not required. In the United Kingdom, liability is not fault-based i.e. the claimant needs

[4] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance) OJ L 265, 12.10.2022, p. 1.

proof of the infringement. In Singapore and China, fault requirement is not included in the law and has not been established by case-law. The national report for Belgium mentioned that the fault requirement is not met simply by proof of the infringement. The national report for Switzerland emphasized that any type of fault is sufficient for antitrust damages claims and fault can be easily established if the company's conduct differs from the expected average diligent behaviour in a similar situation. The national report for Spain raised the possibility of a general presumption of fault in case of hardcore cartels due to their clearly fraudulent nature (an interpretation not yet confirmed by courts). The national report for Hungary mentioned that in case of a restriction by object exculpation from fault is unlikely. The national report for France and Italy raised that in case of follow-on actions, fault can be presumed. Also, the national report for Italy mentioned that in case of stand-alone actions, a simple knowledge of anticompetitive nature of the conduct is sufficient to meet the fault requirement and there is no need to prove intention or negligence. The national report for Brazil mentioned that in case of damages suffered by a competitor, it is easier to claim damages under the rules applicable to unfair competition instead of antitrust rules, because of an absence of a fault requirement.

In Germany, the causality requirement is met if the unlawful conduct is capable of causing harm. In Hungary and Switzerland, the causality requirement is met if the conduct, in the normal course of events, is capable of producing harm, based on common life experience. In Spain and Belgium, the causality requirement is a subject to a *conditio sine qua non* test i.e. the requirement is met if without the conduct that harm would not have occurred. In Brazil, the causality requirement is met if there is a clear and plausible link between the conduct and the harm. In China, the causality requirement is met if there is an inevitable connection between the conduct and the harm. The national report for Germany, the United Kingdom, the Czech Republic, Spain and Italy mentioned the presumption of harm in case of cartels introduced by the EU Damages Directive as a provision lowering the standard of causality. Both the national report for Spain and Austria mentioned the *Kone* case[5] of the CJEU, however, seemingly in a different context: the national report for Spain emphasized that the CJEU established the criteria of sufficiently direct causation in the case, while the national report for Austria considered the case to lower the standard of causality (overcharge due to umbrella effect has a causal link). Both the national report for Hungary and Belgium mentioned that a foreseeability requirement limits the standard of causality i.e. in case of harm unforeseeable for the claimant under the normal course of events the causality requirement is not met. The national report for Brazil emphasized that a causal link must be demonstrated by documentation, witnesses or economic analysis. Notably, in France there have been a few cases, where the antitrust damages claims have been dismissed, because the claimant failed to provide sufficient evidence on a causal link. Also, in Italy, courts clarified that antitrust damages claims will be dismissed, where the claimant makes no effort to demonstrate a causal link.

5. Joint and several liability

The EU Damages Directive uses the institution of joint and several liability of cartel participants for antitrust damages to provide benefits for immunity recipients in the context of private enforcement. Therefore, it is worth examining how joint and several liability applies in various jurisdictions and whether the same benefit is offered outside the EU.

The national reports for Germany, the United Kingdom, the Czech Republic, Hungary confirmed the transposition of the rules of the EU Damages Directive regarding joint and several liability without significant deviation. In Germany, the Czech Republic and Belgium, settlement participants also enjoy the benefit provided by the EU Damages Directive. In Spain, all leniency applicants (not just immunity recipients) enjoy the benefit provided by the EU Damages Directive. Interestingly, the national report for Germany explicitly mentioned the risk of "*leniency inflation*": it may have a negative effect if the benefit is provided to a high number of cartel

[5] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG (5 June 2014) ECLI:EU:C:2014:1317.

participants (e.g., it may impose an unfair burden on cartel participants not filing for leniency and it may make it more difficult for some victims to claim damages).

The national report for Hungary emphasized that a benefit for leniency applicants existed in Hungary before the transposition of the EU Damages Directive. It may be considered a solution more beneficial for leniency applicants, because contrary to the EU Damages Directive, which limits liability to buyers and suppliers of the immunity recipient, previous Hungarian regulation suspended all claims against the immunity recipients until claims can be satisfied from other cartel participants.

Both the national report for Hungary and Italy raised the issue of statute of limitations. In Hungary, before the EU Damages Directive the period of limitations started for various cartel participants at a different time, irrespective of their joint and several liability. In Italy, the statute of limitations applicable to the immunity recipient is suspended until it is clarified that other cartel participants can provide for full compensation (in the absence thereof, the immunity recipient is liable not just for damages suffered by its own buyers and suppliers).

The national report for Spain emphasized that as a result of joint and several liability all cartel participants are liable for the full duration of the infringement and the damages occurred therein, irrespective of their actual participation. However, the duration of actual participation may form the basis for contribution claims of the jointly and severally liable entity.

Both the national report for Spain and Italy raised the issue of rejoinders i.e. irrespective of joint and several liability, defendants can call other defendants into litigation even if they enjoy the benefit under the EU Damages Directive. Courts in Italy allow a rejoinder in order to provide the possibility for other cartel participants to exercise their rights of defense in the context of private enforcement in a single proceeding and also to decide on contribution claims in a single proceeding.

The national report for Belgium raised the issue of contribution: the EU Damages Directive mentions different criteria for the court's assessment than the general rules of joint and several liability. While recital (37) of the EU Damages Directive mentions turnover, market share, or role in the cartel, the general tort rules typically mention relative fault and/or contribution, or as a fallback position: equal share.

In Brazil, there is a limitation similar to the EU Damages Directive: in case of successful leniency, the applicant is only responsible for the damages caused by its own conduct. In China and Switzerland, there is no limitation for the joint and several liability of cartel participants.

6. Type of actions

In general, in case of antitrust damages claims, which are brought before or in the absence of public enforcement action, the claimant needs to prove the infringement (stand-alone action), while in case of antitrust damages claims, which are brought after a public enforcement decision, the claimant can rely on the decision as proof of the infringement (follow-on action). The first question is whether stand-alone actions are allowed at all. The second question is how follow-on actions are defined.

As there is no corresponding definition in the EU Damages Directive, there may be differences in how various jurisdictions define follow-on actions. There are various dates, as of which an antitrust damages claim may be qualified as a follow-on action: (i) the launch of a competition authority investigation; (ii) the issuance of the statement of objections by the competition authority (i.e. the intention of the competition authority to find an infringement); (iii) the adoption of an infringement decision by the competition authority; (iv) the adoption of decision in judicial review by the courts (or the expiry of the appeal deadline).

The question how the launch of a competition authority investigation affects already filed antitrust damages claims (e.g., suspension of litigation) and the question how a competition authority

decision affects already filed antitrust damages claims (e.g., binding nature) is addressed in Section 14 below.

Almost all reporting jurisdictions allow stand-alone actions, without any special conditions. In Singapore, stand-alone actions are expressly precluded. In France, stand-alone actions are precluded in case of collective actions. The national report for Germany, Austria, China and Switzerland mentioned that stand-alone actions are very rare. In Germany, the current regime applicable to antitrust damages claims focuses on facilitating follow-on actions. While the national report for Italy mentioned that stand-alone actions are encouraged by case-law, which urges courts to interpret procedural rules in a functional way.

The national report for the United Kingdom mentioned hybrid actions, where a part of the antitrust damages claim is based on a competition authority decision, but a part of the claim is based on own evidence of the claimant. The national report for Spain defined hybrid actions as follow-on actions, which rely on a non-final competition authority decision, but also acknowledges partial overlap between the antitrust damages claim and the competition authority decision (in which case, the competition authority decision is only partially binding).

All reporting jurisdictions define follow-on actions as antitrust damages claims brought after a competition authority decision. The binding nature of competition authority decisions in antitrust damages litigation is subject to the competition authority decision becoming final (upheld on appeal, or appeal deadline expired). In France and Switzerland, the definition of follow-on actions explicitly contains the requirement for the competition authority decision to be final. The national report for the United Kingdom mentioned that in practice antitrust damages claims are brought after the publication of the competition authority decision (irrespective of appeals). It even mentioned an example, where the antitrust damages claim was brought after the issuance of the statement of objections. Notably, the European Commission publishes a press release on the issuance of a statement of objections, unlike national competition authorities. The national report for Hungary emphasized that an antitrust damages claim only qualifies as a follow-on action, if the competition authority established an infringement. In a similar vein, the national report for Belgium mentioned that an antitrust damages claim filed after the competition authority dismissed a complaint on the same infringement, does not qualify as a follow-on action.

Important to note that the national report for Spain suggested that in case of stand-alone actions, claimants should first file for a declaratory action for the establishment of the infringement.

7. Type of legal consequences

Although the most important private enforcement remedy in case of competition law infringements is the payment of compensation, there are a number of questions, which arise in relation to this. The first question is what type of harm compensation covers. The second question is if compensation has a punitive element. The third question is if other types of remedies are available.

Recital (12) of the EU Damages Directive explicitly identifies actual loss (*damnum emergens*), loss of profit (*lucrum cessans*) and interest as the elements of damages. The national report for Hungary and Brazil mentioned that costs necessary to eliminate damages is part of the damages. To the contrary, the national report for France mentioned that the injured party is not obligated to mitigate (eliminate) damages, therefore, such costs could not be claimed. While the national report for Belgium and China mentioned not the costs for the elimination of damages, but the costs for enforcing the claim as part of damages. The national report for Spain, France, Brazil and Switzerland mentioned the possibility of claiming non-pecuniary / immaterial / moral damages (e.g., damage to good reputation). In stark contrast, the national report for Hungary emphasized that non-pecuniary damages may not be claimed in case of an antitrust infringement. The national report for France mentioned the loss of opportunity (e.g., opportunity to expand business or raise capital for investments) as a type of damages, while the national report for Belgium mentioned loss of chance as such. It was also raised in the national report for France that the savings of the

person causing harm as a result of the competition law infringement could form the basis of damages.

Article 3(3) of the EU Damages Directive prohibits punitive or multiple damages. The rules of reporting Member States are in line with the EU Damages Directive. Due to the same consideration, to avoid overcompensation, some Member States (Czech Republic, Hungary) have explicitly excluded the otherwise available possibility for courts to moderate the amount of damages based on equity considerations. In the United Kingdom, exemplary damages have been awarded in exceptional circumstances.[6] In Singapore, exemplary damages are available (although no case has been brought claiming such damages). In Brazil, double damages are available in case of cartels. In China, the claim of damages in public interest litigation (in addition to claim by private claimants) is considered as punitive damages.

A number of national reports (Germany, the United Kingdom, Singapore) mentioned injunctions as a separate type of remedy available in case of competition law infringements. The national report for the United Kingdom mentioned declaratory relief as a type of remedy (although it is typically claimed in conjunction with another type of remedy). It also mentioned that other types of remedies (e.g., restitution or account of profits) have been unsuccessful. The national report for Germany mentioned that, based on jurisprudence, the nullity of follow-on agreements (e.g., contracts concluded with the direct purchasers and affected by the anticompetitive agreement), cannot be claimed. To the contrary, the national report for Italy mentioned that courts have ruled the (partial) nullity of follow-on agreements, if it was established that the relevant clauses were a result of the anticompetitive agreement. In such a case, if the conditions are met, the court may apply restitution or unjust enrichment as the remedy resulting from nullity (depending on whether the respective conditions for these remedies are met). While the national report for Belgium mentioned that restitution and unjust enrichment is not available in case of antitrust damages.

8. Statute of limitations

Particularly in case of secret cartels, special rules could be justified regarding the deadline within which antitrust damages claims can be made. Article 10 of the EU Damages Directive introduced harmonized rules on the statute of limitations: (i) the starting date of the limitation period; (ii) the duration of the limitation period; and (iii) suspension of the limitation period in case of public enforcement.

The national reports for Germany, Czech Republic, Hungary, Spain, France, Italy and Belgium confirmed the transposition of these rules of the EU Damages Directive without significant deviation.

More or less, all reporting jurisdictions regulate the statute of limitations in case of antitrust damages to not start before (a) the infringement has ceased; and (b) the claimant is aware of the infringement, the harm and the identity of the infringer. In Germany, the limitation period starts not from the specific date that claimant becomes aware of the circumstances necessary for exercising the right to compensation, rather from the end of the year, when this date has occurred. In Italy, courts take into consideration the competence of the injured party in assessing its awareness of the circumstances necessary for the start of the limitation period. In Brazil, it is a statutory rule that the claimant only becomes aware of the circumstances necessary for the start of the limitation period after the competition authority publishes its decision.

The national report for Hungary mentioned that before the transposition of the EU Damages Directive, the courts' interpretation of the starting date of the limitation period was significantly different to what the CJEU established in the *Volvo* case[7]: Hungarian courts considered the starting date of the limitation period the day of the press release concerning the competition

[6] Exemplary damages were prohibited by the EU Damages Directive, but were re-introduced by the Digital Markets, Competition And Consumers Act (DMCC).

[7] Case C-267/20 AB Volvo and DAF Trucks NV v RM (22 June 2022) ECLI:EU:C:2022:494.

authority decision. Notably, the Hungarian Competition Authority typically published the decision at the same time as the press release, contrary to the practice of the European Commission. The national report for France mentioned that the case-law before the transposition of the EU Damages Directive set the starting date for the limitation period as the date of the competition authority decision. The national report for Italy mentioned that the case-law before the transposition of the EU Damages Directive set the starting date for the limitation period as the starting date of the competition authority investigation.

Some jurisdictions decided to adopt (or keep) a longer limitation period: 6 years, for example, in the United Kingdom. There are jurisdictions where the limitation period is significantly shorter: in Singapore it is 2 years; in China and in Switzerland it is 3 years. The absolute limitation period of 10 years remains applicable in Germany, Austria and Switzerland to antitrust damages, while the absolute limitation period of 20 years remains applicable in Belgium to antitrust damages. To the contrary, in the Czech Republic, antitrust damages were explicitly excluded from the otherwise applicable absolute limitation period.

The most notable deviation among Member States regarding the suspension of the limitation period was set out in the national report for France: the competition authority investigation does not suspend, but interrupt the limitation period. In Switzerland, administrative proceedings do not suspend the limitation period, only a communication of summons to pay. While, in China reporting an alleged infringement to the competition authority interrupts the limitation period.

The national report for Germany mentioned that suspension of the limitation period may not only start with the opening of a formal investigation (e.g., in case of the European Commission, undertakings are investigated before the opening of a formal investigation). The national report for the United Kingdom and Italy mentioned that suspension lasts until the competition authority decision is final i.e. it continues to apply until the appeal deadline expires or the decision is upheld by courts. The national report for Hungary and Spain mentioned that the ongoing alternative dispute resolution procedure also suspends the limitation period. The national report for Belgium also added that a collective action suspends the limitation period for all individual claims and that filing a claim against a jointly and severally liable entity suspends the statute for limitation for all other liable entities. The national report for Hungary mentioned that before the transposition of the EU Damages Directive, the courts' interpretation of the duration of suspension was different: suspension did not last until the competition authority decision became final. The national report for Brazil mentioned that this is still the interpretation in Brazil: suspension only lasts for the administrative proceedings.

IV. PROCEDURAL ISSUES

9. Competence

Damages claims are frequently dealt with by regular courts, however, antitrust damages claims seem to be more complex, particularly, in case of stand-alone actions, where the court needs to adjudicate the competition law infringement itself. This could justify the use of special courts, special panels within regular courts, or the requirement of special qualifications for judges to deal with such cases.

In most of the reporting jurisdictions, regular (civil) courts dealing with other types of damages actions, have jurisdiction for antitrust damages claims. A notable example is the United Kingdom, where there is a specialized court (Competition Appeal Tribunal, CAT), but it has parallel jurisdiction with the High Court. In Spain, France and Italy, commercial courts deal with such cases. Only a few jurisdictions (Germany, Spain) reported specialized panels within regular courts, which deal with such cases (in case of Spain, at appellate court level). In a number of jurisdictions (Germany, the United Kingdom, Czech Republic, Hungary), not the local, but the higher level courts have jurisdiction (material competence) for antitrust damages claims. Contrary to this, in Austria and Belgium, the general rules apply: district or regional court depending on the amount in dispute and the court according to the defendant's domicile. In Germany, there is

also a geographic concentration of jurisdiction: a certain regional court (*Landgericht*, LG) has exclusive jurisdiction (geographic competence) for all antitrust damages claims within the given appellate court district (*Oberlandesgericht*, OLG) to which the regional court belongs. Similarly, in France, there are eight commercial courts appointed to deal with such cases, in Italy, there are three and in Switzerland four such commercial courts. In Belgium, the courts in Brussels are appointed to deal with collective actions. Only Spain reported special qualifications to apply: judges dealing with such cases have special training in competition law, economics and accounting.

10. Standing (active legitimacy in court)

The main issue in relation to standing is whether there are any limitations regarding the claims of indirect purchasers and a passing-on defense. The EU Damages Directive has not just allowed indirect purchase claims [Article 12(1)], but practically introduced a presumption of passing-on [Article 14(2)]. Another significant issue is whether collective redress is available. Collective redress could be opt-out or opt-in collective actions, or representative actions of authorized entities. Assignment of claims became a popular option in jurisdictions, where no effective collective action is available.

Almost all reporting jurisdictions mentioned that there are no limitations on indirect purchaser claims and passing-on. In Singapore claims are limited to damages suffered directly, therefore, indirect purchaser claims are excluded. The national report for Brazil mentioned explicitly that there is no presumption of passing-on. While indirect purchaser claims are available in Switzerland, this does not extend to consumers.

Member States have implemented the rules of the EU Damages Directive without significant deviation. There are, however, some nuances regarding the application of these rules. Most importantly, in France, the presumption is reversed: it must be deemed that damages have not been passed-on, but the infringer can prove otherwise. In Germany, courts require tangible evidence for passing-on to be accepted, while not requiring extensive proof from direct purchasers if passing-on is likely to be small and rejecting passing-on in case of dispersed harm, where the harm suffered by indirect purchasers is small. The national report for the United Kingdom mentioned that the CAT considered passing-on not an issue of standing, but an issue of calculation of damages. Also, the CAT required an identifiable price increase by the direct purchaser in a causal relationship with the overcharge to accept passing-on as a factor influencing the amount of damages awarded. Finally, the CAT has taken a similar stance on dispersed harm: the principle of effective litigation would be jeopardized if indirect purchasers are unlikely to succeed in claiming damages due to the small amount of their own harm. The national report for Spain mentioned that it is unclear how the presumption of passing-on, introduced by the EU Damages Directive, applies to the customers of indirect purchasers. While the national report for Austria raised that the passing-on defense does not affect claims for loss of profit. The national report for Belgium emphasized that in case of collective actions, passing-on is excluded, because the claimants are consumers.

Almost all jurisdictions have representative actions. In Switzerland collective redress is not available in the form of representative actions. In the United Kingdom opt-out collective action is available in the form of a collective proceedings order (CPO) before the CAT, both for stand-alone and follow-on actions. In Hungary, there is a special type of opt-in collective action regulated by general civil procedure rules. The national report for Hungary mentioned public interest litigation: action filed by the national competition authority. The national report for Brazil also mentioned as a form of collective redress the actions filed by the public prosecutor's office.

The assignment of claims is possible in most reporting jurisdictions. However, their lawfulness has been debated. There has been litigation in Germany on the lawfulness of assignment of antitrust damages claims, because the assignee may require a license to provide legal services,

which question was ultimately referred to the CJEU.[8] Also, there has been litigation in Italy on the lawfulness of assignment of antitrust damages claims, because the assignee may require a license to provide financial intermediary services. The national report for the United Kingdom also mentioned that the assignment of the right to litigate is unlawful: the assignee must be entitled to the proceeds of the claim. The national report for France raised whether the requirement of harm being direct and personal to the claimant is met in case of the enforcement of an assigned claim. While the national report for Belgium raised that contractual non-assignment clauses between the litigants can limit the assignment of damages claims.

11. Evidence

The four main issues in relation to evidentiary questions of antitrust damages claims are the following: (i) special rules on burden of proof, in particular, the reversal of burden of proof and presumptions; (ii) access to evidence at other parties, in particular, the rules of disclosure; (iii) access to evidence in the files of the competition authority; (iv) the use of experts. The EU Damages Directive contains rules on these topics, with the exception of experts. Article 17(2) of the EU Damages Directive sets out the presumption of harm in case of cartels (without determining its amount). Articles 5-8 of the EU Damages Directive set out the harmonized rules of disclosure. The EU Damages Directive makes disclosure subject to strict proportionality assessment of the courts, but also allows disclosure for categories of information (i.e. not only individually identified documents), at the same time, excluding access to leniency statements and settlement submission. The EU Damages Directive makes access to competition authority files subject to the condition that the given information cannot be reasonably obtained from other parties.

Outside the EU (Singapore, China, Switzerland), no presumptions apply to antitrust damages claims.

Member States have implemented the presumption of harm set out in the EU Damages Directive without significant deviation. In Germany, the statutory rules set out the exact scope of the presumption: transactions with the same product type, within the same geographic area and time period as the cartel. In Austria, the definition of cartels - in case of which the presumption of harm applies - is wider than foreseen in the EU Damages Directive: it covers not only restrictions by object, but also restrictions by effect. Similarly, in Belgium, the definition covers decisions of associations of undertakings and vertical agreements. In Hungary, a presumption of 10% overcharge existed before the EU Damages Directive was implemented, and remained in force afterwards.

The national report for Hungary mentioned that there are institutions regulated by general civil procedure rules, which could also be used to alleviate the burden of proof on the claimant: in case of statement emergency and evidence emergency,[9] the court can make adverse inferences, similarly to what is foreseen in Article 8(2) of the EU Damages Directive. The national report for France mentioned that even before the transposition of the EU Damages Directive, courts were inclined to make inferences regarding damages in case of follow-on actions.

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[8] Case C-253/23 - ASG 2.

[9] In case of a statement emergency, the party must suggest that the information necessary to substantiate the given statement is only available to the adverse party and verify that it has taken necessary measures to obtain this information. If the other party has not provided this information upon request of the court, the court can consider the given statement substantiated.
An evidence emergency is when (i) the party must suggest that indispensable evidence is only available to the adverse party and that it has taken necessary measures to obtain this evidence; (ii) it is impossible for the party to present the evidence, but it can be expected from the adverse party to present evidence to the contrary; (iii) the adverse party has thwarted evidence. In these cases, the court can consider the given fact verified.

Some jurisdictions (Czech Republic and France) categorize the effect of competition authority decisions as a presumption of infringement. This issue is addressed in detail in Section 14 below. The presumption of passing-on is addressed in detail in Section 10 above.

Out of the non-EU jurisdictions, disclosure is available in Singapore. Also, similar sanctions apply to non-compliance with a disclosure order as set out by the EU Damages Directive.

Member States have implemented the disclosure rules of the EU Damages Directive without significant deviation. A number of national reports from Member States mentioned that the disclosure rules introduced as a result of the EU Damages Directive are significantly different to general civil procedure rules and are not available for other types of claims. The national report for Spain and Belgium even mentioned that the implementing rules are very close to the wording of the EU Damages Directive. The national report for Germany mentioned that - in addition to the limitations set out by the EU Damages Directive - disclosure can be refused, if the person can refuse testimony under general civil procedure rules. The national report for the Czech Republic mentioned that disclosure is subject to the payment of security deposit. Both the national report for the United Kingdom and Hungary mentioned that the effectiveness of disclosure can be limited in practice by the unavailability of documents. The national report for France mentioned that statutory rules added to the rules of the EU Damages Directive, by setting out what can be considered to belong to the same category of documents regarding which disclosure can be ordered: documents with the same nature, purpose, creation time and content.

The national report for the United Kingdom mentioned that in practice courts favor an expert-led disclosure, which means that the experts of the parties set out what kind of documents they intend to rely on.

Most importantly, a surprising number of jurisdictions (the United Kingdom, Czech Republic, Spain, France) have pre-trial disclosure. While in Italy, Belgium and Switzerland, there are no rules on pre-trial disclosure. In Hungary and China, no pre-trial disclosure is available. The national report for the United Kingdom emphasized that pre-action disclosure is limited in scope.

Outside the EU (Singapore, China, Switzerland), the same limitations apply to access to the competition authority's file as set out in the EU Damages Directive. In Singapore, internal documents of the competition authority are excluded from disclosure. In China, confidential information can be shared by the competition authority, but only with protective measures. Nevertheless, attorneys can access confidential information. In Switzerland, parties of the administrative procedure can access leniency files, but have to sign an agreement setting out a restriction of use in advance.

Member States have implemented the limitation of access to the competition authority's file via disclosure set out in the EU Damages Directive without significant deviation. The national report for Spain emphasized the practical difficulties in accessing the competition authority's file: claimants are not party to the investigation, so they are not aware, which documents are part thereof. An issue, which can be resolved by requesting the competition authority to provide the index of the case file. The national report for France mentioned an added limitation to the use of evidence access from the competition authority files: only the requesting person and its legal successor may use the evidence. The national report for Austria mentioned that - in the aftermath of the CJEU judgment in the *Donau Chemie* case[10] - courts require for granting access to the competition authority files that the requesting party demonstrates that without access it would be practically impossible to enforce the antitrust damages claim. It also mentioned that in criminal cases, access to competition authority files could be obtained indirectly: injured parties have a right to inspect the criminal files, but this question was ultimately referred to the CJEU.[11]

[10] Case C-536/11 Bundeswettbewerbsbehörde v Donau Chemie and Others (6 June 2013) ECLI:EU:C:2013:366.
[11] Case C-2/23 - FL und KM Baugesellschaft and S.

All jurisdictions reported that there are no special rules for experts in case of antitrust damages claims and the general rules apply. In the United Kingdom, the only expectation regarding an expert is to have suitable expertise and independence, but the courts have more control over the scope of expert evidence (issues and evidence are pre-determined). In a number of jurisdictions (Hungary, Spain, France, Belgium, Switzerland), both private and court-appointed experts may be used, with nuances regarding their employment. In China, parties can use private experts, while the court can engage specialized institutes to provide analysis. In Switzerland, private expert opinions have a lower probative value than court-appointed expert opinions. In Hungary, only experts registered to the judicial expert list can be appointed by the court. Also, there are detailed rules in reconciling contradicting (private) expert evidence. The national report for Spain emphasized the issue that there are very few experts with the necessary expertise, which can be appointed by the court. In France, experts not on the judicial list can only be appointed if the parties agree, or the requesting party verifies that there is no expert on the judicial list with the necessary special expertise.

12. Calculation

In addition to the question of what may be awarded, set out in Section 7 above, there is a separate (procedural) issue in how courts quantify damages. The main question concerning the calculation of antitrust damages is what kind of calculation methods courts use (or if they leave calculation completely to experts). For example, the European Commission adopted a communication in 2013 on quantification and the accompanying staff working document contained a practical guide to quantification, while in 2019, the European Commission adopted guidelines on the *estimation* of passing-on [as foreseen in Article 16 of the EU Damages Directive].[12] Additionally, it is important whether courts are empowered to estimate antitrust damages, and if yes, what are the criteria for such estimation. The EU Damages Directive prescribes Member States to enable courts to estimate (i) the proportion of passing-on [Article 12(5)]; and (ii) the amount of harm [Article 17(1)]. The criteria for the latter, as set out by the EU Damages Directive, is that "*it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available*". Finally, an important procedural issue is whether the courts are allowed to separate the adjudication of the rather complicated issue of quantification and the more principle-based issue of liability. The intervention of competition authorities regarding quantification is dealt with in Section 14 below.

In most reporting jurisdictions, courts apply the calculation methods set out in the practical guide of the European Commission. The national report for France explicitly mentioned that courts regularly follow the practical guide of the European Commission. In Spain, there are national guidelines, equivalent to the practical guide of the European Commission, concerning the calculation of antitrust damages. The national report for the United Kingdom emphasized the use of regression analysis (instead of the simple techniques mentioned in the practical guide), which can eliminate distortions by external factors.

In all reporting jurisdictions, courts are empowered to estimate the amount of damages, with more or less the same standard as in the EU Damages Directive, with only some nuances. In a number of jurisdictions (Germany, Hungary, France, Italy, Belgium) estimation is based on general and/or pre-existing civil procedure rules. In Germany, the standard for courts to use their power to estimate harm is lower in case of antitrust damages than in other cases and courts are encouraged to estimate the minimum harm in case of antitrust damages. In France and Italy, Article 17(1) of the EU Damages Directive did not require transposition. In Hungary and Belgium, case-law confirmed that the general rules allowing estimation apply in case of antitrust damages. While in the Czech Republic, empowering the courts to estimate harm is considered a significant deviation from general rules, particularly because courts are usually rigorous in expecting an exact

[12] See footnote 2.

calculation of harm. In Italy, it is debated whether the conditions for equitable quantification are met in case of antitrust damages.

The national report for Germany, Hungary and Spain emphasized that evidence must be taken before the court can opt for estimation. In Spain and France, the inactivity of the claimant in providing evidence and using the tools available (e.g., not requesting access to evidence in the possession of third parties) precludes an estimation of harm by courts. In Singapore, the standard for estimation is that evidence, which could lead to the calculation of the exact amount, is unobtainable. In Italy, the standard is higher: impossibility of quantification based on objective factors. In Belgium, the standard is lower: quantification is excessively costly.

Split proceedings are allowed in all reporting jurisdictions (in some jurisdictions without express statutory rules). In France, split proceedings are rare in practice and in the Czech Republic, professionals are sceptical about split proceedings. While in Germany, partial judgments are often used in antitrust damages cases. However, such a judgment is not available if the same facts form the basis of liability and quantification. In the United Kingdom, the CAT goes further by splitting the procedure along various issues, not just the questions of liability and quantification. In Spain and Italy, the possibility of split proceedings was established in case-law.

13. Costs

The cost of litigation is a very sensitive issue, which can have a profound impact on enforcement of claims. This is not different in case of antitrust damages. One aspect of the issue is whether procedural rules allow litigation cost benefits for claimants in any form (e.g., no upfront payment of fees, lower court fees, carrying only own costs in case of losing). Such benefits could be provided by law or by courts (e.g., wide discretion of courts in allocating costs). Another aspect of the issue is whether national rules allow or encourage third-party funding of antitrust damages claims.

As far as litigation costs are concerned, most jurisdictions have no special rules applicable to antitrust damages claims. Almost all jurisdictions (the United Kingdom, Czech Republic, Hungary, France, Austria, Italy, Belgium, China, Switzerland) apply a loser pays principle i.e. the unsuccessful party bears its own litigation costs and the costs of the adversary party. Only nuances were mentioned in the national reports. In the United Kingdom, if the party incurred extremely high costs, they are not reimbursed even in case of a successful claim. Similarly, in Hungary and Italy, unnecessary or superfluous costs incurred by the successful party are not reimbursed. Both in Hungary and Spain, in case of partial success, each party bears its own costs. In Spain, there is an upper limit for reimbursement. In Switzerland, the costs of private experts fall outside reimbursement. In Singapore, even in case of a successful claim, only reasonable costs are reimbursed.

Only very few jurisdictions have statutory rules on third-party funding. In most jurisdictions (Czech Republic, Hungary, Spain, Belgium) it is not regulated, but also not prohibited. Both in the United Kingdom and France, there are ongoing regulation efforts regarding third-party funding in case of collective actions. The United Kingdom has the most experience with regulating third-party funding. The rules on CPOs require demonstration of the funding, there is a prohibition in place for damage-based return arrangements for third-party funders. Additionally, there is a self-regulatory body and code of conduct for litigation funders. In Belgium, a recommendation regarding third-party funding was adopted by the attorneys' bar association. In China, the lawfulness of third-party funding is undecided, while in Singapore, third-party funding is prohibited.

14. Cooperation with competition authorities

Communication between competition authorities and courts is an important part of the interplay between public and private enforcement of competition law. It is undisputed that courts should inform competition authorities if they detect a potential antitrust infringement in the course of

their proceedings. However, an obligation to always suspend antitrust damages litigation if a competition authority decides to launch an investigation regarding the same potential infringement, could seriously influence the effectiveness of private enforcement. It is also clear that competition authorities should participate in antitrust damages litigation. However, competition authorities intervening on the side of the claimant could tip the balance between the parties in private litigation. On the other hand, intervention instead of a full-scale investigation could make competition law enforcement more effective. Finally, if competition authorities, using their investigative toolkit and based on all evidence collected, come to the conclusion that there was an infringement, it should have a significant impact on antitrust damages litigation, not denying that the binding nature of an administrative body's decision on independent courts could raise constitutional issues. In any case, Article 9 of the EU Damages Directive established that infringements found by the national competition authority are irrefutably established, while infringements found by national competition authorities of other Member States should be regarded at least as *prima facie* evidence.

There is a surprisingly high number of jurisdictions, including Member States (Singapore, France, Italy, Belgium and China), where there is no obligation for courts to notify competition authorities. In Singapore, only follow-on actions are allowed. In France, the strict separation of powers does not allow a notification obligation. In Italy, there is no obligation to suspend, but in practice courts likely suspend litigation. In the United Kingdom, it is the parties to the litigation and not the court, who are obligated to provide copies of their documents to the competition authority. The suspension of litigation in case of an investigation is not mandatory in all jurisdictions. In Hungary and China, suspension is mandatory, while in Spain, Austria, Belgium and Switzerland suspension is optional. In the United Kingdom and France, suspension of litigation is voluntary, and requires the consent of the parties. In the Czech Republic and China, the issue is not regulated clearly.

Competition authorities can intervene in all reporting jurisdictions, but in neither of the jurisdictions does the opinion of the competition authority have a binding nature. However, the scope of the opinion of the competition authority and the exact procedural status of the competition authority slightly differs. In the United Kingdom, the competition authority can submit written observations and oral submissions, its position is similar to an intervener. In Hungary and Spain, courts can call competition authorities to make written statements, but competition authorities can also file written statements voluntarily. In the Czech Republic and China, *amicus curiae* is not recognized. In line with Article 17(3) of the EU Damages Directive, Member States allow courts to request the assistance of competition authorities regarding the quantification of damages. Notably, in Hungary, the legislator went beyond this: the court can request assistance also regarding the causal link.

In the case of Member States, the decision of the European Commission and national competition authorities is binding, with the exception of Italy and Belgium. In Italy, courts may disregard competition authority decisions if they deem the decision irremediably vitiated. In Belgium, courts can disregard competition authority decisions if the competition authority has not investigated a crucial aspect of the case. While in Brazil and China infringement decisions are not binding. In Singapore and Switzerland, there is no express rule on the binding nature of competition authority decisions. Nevertheless, in Singapore, claimants can rely on the facts established by decisions; and in Switzerland jurisprudence suggests that competition authority decisions should be binding, in particular if the claimant has participated in the administrative procedure. Typically, infringement decisions are binding. For example, commitment decisions do not have the same effect and decisions not establishing an infringement do not preclude damages litigation. In Member States, binding effect only applies in case of final decisions: either reviewed and upheld by courts, or after the deadline for judicial review expires. In some jurisdictions (the United Kingdom, Belgium), not only the finding of an infringement is binding i.e. the operative part of the decision, but also the facts, which directly support such a finding i.e. parts of the reasoning. In the United Kingdom, there was a case, where parties agreed explicitly on which parts of the competition authority's decision were binding. The national report for Hungary, Spain

and France mentioned, in line with the judgment of the CJEU judgment in the *Repsol* case,[13] that the binding nature of the competition authority decision has a personal, material, temporal and territorial scope: the same infringer and the same infringement with the duration and in the relevant product and geographical market identified in the decision. The national report for Belgium mentioned that competition authority decisions are not binding regarding fault of the infringer. The national report for Switzerland mentioned that competition authority decisions are not binding regarding the amount of damages. The national report for Spain also emphasized that in case of a partial overlap between the competition authority's decision and the antitrust damages claim, the claimant can still rely on facts established in the decision. In Germany, not only the decisions of the European Commission and the German competition authority are binding, but also the decisions of competition authorities of other Member States. While most jurisdictions provide only for some probative value. In a few Member States (the Czech Republic, Hungary), Article 9 of the EU Damages Directive was transposed by rendering decisions of foreign competition authorities capable of creating a presumption concerning the infringement. In France, Austria, Belgium and Switzerland, foreign decisions are simply regarded as evidence.

V. CONCLUSIONS

Based on the 13 national reports (Germany, the United Kingdom, Czech Republic, Hungary, Spain, Singapore, France, Austria, Italy, Brazil, Belgium, China, Switzerland), the following conclusions can be drawn about the past 10 years of antitrust damages.

As far as regulation of antitrust damages is concerned, only a few national reports (*Czech Republic*, *Italy*) mentioned a completely separate act regulating antitrust damages and none of the national reports mentioned that a completely separate procedural regime would apply to antitrust damages. All jurisdictions apply a combination of general rules of civil law and civil procedure, together with special rules, mostly set out by national competition law. Some EU Member States (*Germany*, *Hungary*) had special antitrust damages rules even before the EU Damages Directive. There is a wide spectrum on the use of soft law in case of antitrust damages. In most jurisdictions it is completely absent from the regulatory toolkit, while in some, there are detailed soft law in this area (e.g., the 9 Practice Directions issued by the CAT in the *United Kingdom*; SPC CPL Interpretation, SPC AML Interpretation and SPC guiding cases in *China*).

It is difficult to outline a clear trend concerning the number of antitrust damages cases, because in most jurisdictions there are no official statistics or exact figures. However, most of the national reports indicated a rise in cases. Another thing that is clear from the national reports is the very low level of successful antitrust damages cases. For example, *Germany* reported an estimated success rate of 11%. The *United Kingdom* reported only 3 awarded damages out of more than 300 cases in the past 10 years (not including settlements). The *Czech Republic* and *Hungary* reported only 1 awarded damages. The clear outlier seems to be *Spain*, which reported a first instance success rate of 89% on more than 1000 cases. There were other jurisdictions, which reported a low number of cases with a fairly high success ratio (e.g., *France* – 52 cases, 22 awarded damages). Another interesting statistic is that in some jurisdictions, most private enforcement cases do not seem to revolve around cartels (e.g., abuse of dominance in *France, Switzerland* and *China*).

Another clear trend, which can be identified, in respect of EU Member States is that despite the fact that the EU Damages Directive was adopted 10 years ago, most of its rules were not applicable or not effectively applied in closed cases. On the one hand, the substantive provisions of the EU Damages Directive were not applicable to harm caused by an infringement, which took place before the implementation of the directive. On the other hand, some procedural provisions of the EU Damages Directive, like the rules of disclosure, were not effectively applied by national courts.

[13] Case C-25/21 Repsol Comercial de Productos Petrolíferos (20 April 2023) ECLI:EU:C:2023:298.

The three main issues mentioned by almost all national reports were: (i) difficulties in relation to the quantification of damages; (ii) issues in relation to the use of disclosure; and (iii) the lack of any or an effective collective action mechanism.

In *Germany*, the main reason for the very low success rate seems to be the difficulties in relation to the quantification of damages. This is despite the fact that German courts apply their power to award estimated damages more freely. In *Spain*, the main reason for the high number of successful antitrust damages cases seems to be the central judicial guidance on the level of damages: the decision of the Supreme Court that the overcharge cannot be considered by lower courts to be below 5%. Interestingly, the statutory presumption of 10% overcharge in *Hungary* does not seem to have been applied successfully before courts.

Another issue is the lack of effectiveness of disclosure, which was mentioned by almost all national reports. Notably, the national report for *Hungary* mentioned that the new disclosure rules introduced for the implementation of the EU Damages Directive, have not been tested, despite being applicable for more than 7 years. A surprising number of reporting jurisdictions have pre-trial disclosure (*United Kingdom, France, Spain, Czech Republic*). Nevertheless, it is far from being globally available. Even where available, it comes with limitations. In the *United Kingdom*, de novo evidence cannot be requested in pre-trial disclosure. In *France*, pre-trial discovery is very limited with respect to confidential information (only experts can review, only samples or summaries are provided). While, in the *Czech Republic*, the applicant must pay a deposit to request pre-trial disclosure.

In *Germany*, no collective action is available for antitrust damages and the lawfulness of the claim assignment model applied in a number of antitrust damages cases was disputed. In *Italy*, the assignment of damages claim may require the permit from the financial supervisory authority. In *Belgium*, reportedly both the collective action model and the assigned claims model were unsuccessful. Only a few reporting jurisdictions (*United Kingdom*) have opt-out collective actions.

There were a number of other issues raised only by a few national reports. For example, a few national reports emphasized the practical inexistence of stand-alone damages actions (e.g., *Germany, Austria, China* and *Switzerland*). While there clearly are jurisdictions, where stand-alone actions are frequent, which seems to be in correlation with the availability of an effective collective action mechanism (see the *United Kingdom*). In the national report for *Germany* and *Hungary* the conflict with public enforcement was emphasized with respect to the fall of leniency applications. In the national report for the *United Kingdom*, issues in relation to litigation funding were discussed in detail (e.g., scrutinizing funding agreements and prohibition of damage-based agreements in collective proceedings before the CAT). Notably, *China* also had a case adjudicating third-party funding and there is soft law in *Belgium* on the topic.

Apart from the novel institutions introduced in EU Member States as a result of the EU Damages Directive, there was no clear trend on the most important developments at national level. In the *United Kingdom*, new opt-out collective proceedings were introduced in 2015. However, the new regime also brought with it the problem of carriage disputes i.e. when there are two overlapping applications for a collective proceedings order (CPO) and the court needs to choose. Also, in 2024, exemplary (multiple) damages have been re-introduced before the CAT by the Digital Markets, Competition And Consumers Act (DMCC).

Despite a lot of similarities (particularly, in case of EU Member States), a strikingly high number of issues are currently dealt with by the reporting jurisdictions in a very different way:

- Scope: In all EU Member States, the implementation of the EU Damages Directive covered not only infringements of EU competition law, but also damages claims based on national competition law. In *Germany* and *Italy*, damages claims based on the infringement of the DMA, also fall under the same regime. Other types of infringements mentioned were the violation of competition authority decisions (*Germany*) and concentrations (*China*).

- Courts: Unlike in the *United Kingdom*, where the CAT acts as a specialized court, in most reporting jurisdictions, antitrust damages litigation falls within the competence of general courts, including commercial courts. In some jurisdictions (*Spain, Italy*), the judges sitting in general or commercial courts and dealing with antitrust damages, have to have special qualifications or training. In *France*, administrative courts have jurisdiction in case of damages claims based on bid rigging i.e. where the state is the claimant.

- Competition authority decisions: While in EU Member States the operative part of a final prohibition decision is binding, in other reporting jurisdictions there are various solutions. In the *United Kingdom*, non-final decisions are also binding, not just the operative part, but also the essential facts in the reasoning, on which the finding of an infringement was based. Also, in the *United Kingdom*, the launch of public enforcement procedures do not have an effect on private enforcement: there is no mandatory suspension of antitrust damages litigation. In *Switzerland*, there is no explicit rule on binding competition authority decisions, however, academia suggests that such decisions have a significant impact on antitrust damages litigation. While in *China*, there is a rebuttable presumption created in soft law, according to which administrative decisions (including the facts established therein) are considered to be true. In *Brazil*, administrative decisions are not binding in antitrust damages litigation. Finally, there are some jurisdictions, where constitutional doubts were raised in relation to the mandatory suspension of damages litigation in case of the launch of public enforcement action (*France*) and the binding effect of competition authority decisions (*Italy*).

- Elements of a damages claim (unlawfulness, harm, fault, causal link):

    - The few national reports indicated that their cartel definition differs from the definition of the EU Damages Directive. In the case of *Austria*, the definition also covers "restrictions by effect", while in the case of *Belgium*, the definition also covers decisions of associations and vertical agreements.

    - A few national reports (*France, Spain, Switzerland*) mentioned moral or non-pecuniary damages to be available in case of competition law infringements. In *France* and Belgium, the loss of opportunity / loss of chance can also qualify as harm. Only a few jurisdictions have punitive or multiple damages (*United Kingdom, Brazil*). While in *China*, damages to the public interest may be separately enforced by the public prosecutor in public interest litigation, which could be considered as claiming punitive damages.

    - The national report for *Austria* mentioned that the EU Damages Directive's presumption of harm in case of cartels should be interpreted to include a presumption of a causal link, while the national report for *Spain* mentioned that the presumption should be interpreted to include a presumption of fault.

    - The national report for *Italy* mentioned that knowledge about the unlawful nature of the conduct is sufficient to substantiate the fault requirement. The national reports for the *Czech Republic* and *China* mentioned that there is no fault requirement in case of antitrust damages. While the national report for *Belgium* mentioned that it was clarified as a result of the implementation of the EU Damages Directive that there is a fault requirement (at the same time a presumption of fault was included).

- Joint and several liability: Reporting jurisdictions outside the EU do not apply an exemption from joint and several liability to immunity recipients. In *Spain*, the exemption from joint and several liability established by the EU Damages Directive, applies not only to immunity recipients. In the *Czech Republic* and *Belgium*, companies, which participated in a settlement procedure in public enforcement, also fall under the exemption from joint and several liability. In *Italy*, despite joint and several liability, there is a mandatory involvement of all cartelists.

- Limitation period: Some jurisdictions have an absolute and objective limitation period (*Germany*, *Czech Republic*, *Austria*, *Belgium*, *Switzerland*) in addition to the subjective limitation period harmonized by the EU Damages Directive. Also, in *Germany*, the limitation period seems to be calculated not from the date of the starting event, but from the end of the year, when the starting event occurred. Meanwhile, in *Italy*, the start of the limitation period depends also on the competence of the claimant. In non-EU reporting jurisdictions, the limitation period is different (shorter in *China*, longer – in certain cases – in the *United Kingdom*).

- Passing-on defence: In the *United Kingdom*, courts consider the passing-on not as a question of standing, rather as a question of calculation of damages. In *France*, seemingly contrary to the EU Damages Directive, there is a presumption not for, but against passing-on.

- Experts: A number of solutions are applied, from no private experts allowed at all, to private experts only with the consent of the parties (*France*), up to the free use of private experts (*United Kingdom*, *Hungary*, *Belgium*).

There were a number of suggestions reported for the potential improvement of legal framework or guidance applicable to antitrust damages:

a) Quantification of damages: The national report for *Germany* suggested that a rule of thumb should be introduced for certain types of infringement regarding the amount of damages, to ease the burden of proof. While the national report for *Hungary* suggested the global introduction of the 10% overcharge presumption.

b) Disclosure: The national report for the *United Kingdom* suggested that a more extensive disclosure regime should be introduced with an expert-led approach i.e. narrowing the scope and scale of disclosure. The national report for *Switzerland* suggested allowing pre-trial disclosure globally. While the national report for *Belgium* suggested more stricter sanctions in case of non-compliance with disclosure rules.

c) Collective actions: While the national report for the *United Kingdom* did not suggest the implementation of its opt-out collective proceedings model, the national report for *Germany* suggested that the representative actions regulated by the EU Representative Action Directive could be applied to antitrust damages.

To summarize, despite some remarkable regulatory developments in the *United Kingdom* and case-law developments in *Spain*, no breakthrough seems to have happened in the effectiveness of antitrust damages in the past 10 years. There is clearly room for improvement both on the side of the legislator and the courts, as well as further harmonization within the EU (i.e. possible amendment of the EU Damages Directive).