

Executive summary and overview of the national report for Belgium

Section I – Summary of findings	
<p>No specific statutory basis exists for bringing actions for damages for breach of competition law under the Belgian Competition Act ("<i>Gecoördineerde wet tot bescherming van de economische mededinging/Loi coordonnée sur la protection de la concurrence économique</i>") or in any other statute. Accordingly, no specific procedural or evidentiary rules exist in this respect. This summary thus sets out the general legal principles and rules applicable to claims for damages on a contractual and non-contractual (tort) basis.</p> <p>Since courts are obligated to send all relevant case-law to the Competition Council ("<i>Raad voor de Mededinging/Conseil de la Concurrence</i>"), we have reviewed all case-law in the Council's library. We have also reviewed published case-law and cases handled by us. It follows from this research that only one decision awarding damages in relation to breach of competition rules exists.</p> <p>A specific procedure exists under art. 95 of the Law on Trade Practices of 14 July 1991 ("<i>Wet betreffende, de handelspraktijken en de voorlichting en bescherming van de consument/Loi sur les pratiques du commerce et sur l'information et la protection du consommateur</i>"). This procedure allows traders to receive a cease and desist order against other traders committing acts of unfair competition. Such procedure is a merits procedure, whereby the president of the commercial court can assess the alleged infringement and can only award a cease and desist order. An action for damages is not possible on this legal basis. Several decisions exist where infringement of competition rules under this procedure is invoked and accepted, but they all fall within the framework of said specific national procedure in respect of the general prohibition on unfair trade practices, specifically sanctioned by a cease and desist order. Proof of the alleged unfair practice is required, as well as the detrimental or possible detrimental effect it has on the interests of the plaintiff-trader.</p>	
Section II – status quo and forthcoming reforms – action for damages	
A. Legal Basis	
(i) Is there an explicit statutory basis?	No, therefore, the general law bases need to be used such as those for contractual claims for damages (art. 1142 and following Civil Code) and for claims on the basis of tort (art. 1382 Civil Code).
(ii) Is this statutory basis different from other actions for damages?	No.
(iii) Is there a distinction between EC and national law in this regard?	No.
B. Competent court	
(i) Which courts are competent?	Commercial Courts if the defendant is commercially active.
(ii) Are there specialised courts for private enforcement of competition rules?	No.
C. Standing	
(i) Limitations on standing of natural or legal persons, including those from other jurisdictions?	Standing is limited to natural persons capable of freely and independently expressing their will or legal persons (strict exceptions exist for associations). In addition, the plaintiff needs to have the capacity of rightholder of the right invoked in the claim and the plaintiff needs to have an acquired, personal, direct, legal and immediate interest when filing the claim.
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	The plaintiff has the choice between either the court where the defendant has its registered office or the court of the place where the infringement occurred or has effect in case of a non-contractual infringement. In

	contractual claims, the territorially competent court is that elected in a jurisdiction clause or in the absence of such clause, the plaintiff has the choice between the court where the defendant has its registered office or the court of the place where the contract originated or has to be executed.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	There are no class actions under Belgian law. However, in civil and commercial proceedings, the courts have accepted that an association may bring an action to defend the sum of individual interests of its members, if certain conditions are met. Several statutes have also allowed actions by an association, either for the defence of individual interests, or for the defence of a collective interest. The conditions for bringing such an action are very strict.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	If proven, damages will cover the entirety of the incurred damage. If possible, compensation needs to be done in kind (<i>'in natura'</i>). If this appears impossible or excessively difficult, the compensation can be done by equivalent (a financial indemnity).
(ii) What are the other forms of civil law liability (if any)?	None.
(iii) Does the infringement have to imply fault?	Fault or negligence.
(iv) If so, is fault based on objective criteria?	Fault or negligence can lie in the infringement of a statutory rule or in not complying with a duty of care. The standard of the latter is the <i>'bonus pater familias'</i> .
(v) Is bad faith (intent) required?	No.
(vi) Can negligence be taken into account?	Yes.
E. Rules of evidence	
a. General	In tort law, the plaintiff needs to prove fault, damage and the causal link between the fault and the damage.
(i) Burden of proof and identity of the party on which it rests?	The burden of proof is in principle on the plaintiff and more generally on each party seeking to prove the allegations or statements made by it.
(ii) Standard of proof	Civil trials: prove the 'legal truth' – Criminal trials: prove the 'real truth'. Civil trials: convince the judge – Criminal trials: no doubt possible.
(iii) Limitations concerning form of evidence	Not in commercial cases, except that the court needs to discard any evidence which has been obtained surreptitiously. Witness evidence is possible, but subject to specific rules.
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	Discovery does not exist as such. During the trial, the court can order parties to submit specified evidence.

(v)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	During the trial, the court can request third parties to submit specified evidence.
(vi)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	Parties as a rule have access to public documents from Belgian authorities.
b. Proving the infringement		
(i)	Is expert evidence admissible?	Yes.
(ii)	To what extent, if any, is cross examination permissible?	Only via the judge.
(iii)	Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	It will be treated as any other evidentiary document, although their authority will typically carry some weight with the deciding court.
c. Proving damage		
(i)	Are there any specific rules for evidence of damage?	No.
d. Proving causation		
(i)	Which level of causation must be proven: direct or indirect?	The causal link is accepted if it is shown that the damage, as it actually occurred in the case at hand, would not have occurred or would not have occurred to the same extent, if the fault had not taken place.
F. Grounds of justification		
(i)	Are there grounds of justification?	Yes: force majeure, insurmountable error, self defence, act imposed or permitted by law or an authority, and state of emergency.
(ii)	Is the 'passing on' defence taken into account?	No case law available.
(iii)	Are 'indirect purchaser' issues taken into account?	No case law available.
(iv)	Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Yes, contributory negligence is taken into account.
G. Damages		
a. Calculation of damages		
(i)	What economic or other models are used by courts to calculate damage?	Under tort law, the damaged party needs to be placed in the situation as if the infringement would not have

	occurred. The court can freely determine which elements and methods of calculation are used.
(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	The entire injury of the plaintiff will need to be compensated.
(iii) Are ex ante (time of injury) or ex post (time of trial) estimates used?	Ex post.
(iv) Are there maximum limits to damages?	The damages cannot exceed the injury.
(v) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	On the basis of the injury suffered by the plaintiff.
(vi) Are punitive or exemplary damages available?	No punitive, nor exemplary damages.
(vii) Are fines imposed by competition authorities taken into account when settling damages?	Since fines do not compensate damages, this question is irrelevant under Belgian law.
b. Interest	
(i) Is interest awarded from the date the infringement occurred the date of the judgment or the date of a decision by a competition authority?	The court is free to decide on the starting date of the interest. It can however never award more than is asked for.
(ii) What are the criteria to determine the levels of interest?	Courts are free to decide on the level of interest. Generally, they use the legal interest rate (7%). Occasionally, other interest rates are used. The rate can never be set arbitrarily.
(iii) Is compound interest included?	Yes, if specially requested, if they have fallen due on a nominal amount, if they are due on an entire year and if there is a specific notice on each yearly expiration date.
H. Timing	
(i) What is the time limit in which to institute proceedings?	Contractual claims: 10 years. Damages under tort law: 5 years after the damaged party becoming aware of the damage or its aggravation and in any case after 20 years from the occurrence of the fact causing the damage.
(ii) On average, how long do proceedings take?	several years.
(iii) It is possible to accelerate proceedings?	Yes, but the possibilities are limited.
(iv) How many judges sit in actions for damages cases?	Civil court: 1 or 3 at request of the parties. Commercial court: 1 professional judge and 2 expert judges. Court of Appeal: 3 judges.
(v) How transparent is the procedure?	Documents in the file are not accessible to the public. Oral court hearings in commercial cases are normally open to the public.
I. Legal costs	

(i)	Are Court fees paid up front?	Enrolment rights are.
(ii)	Who bears the legal costs?	The losing party shall reimburse the winning party for court fees. Actually, great discussion exists about the reimbursement of lawyer costs. A bill with respect hereto is pending before the Chamber of Deputies.
(iii)	Are contingency fees permissible?	Yes, except for the formula 'no win, no fee'.
(iv)	Are contingency fees generally available for private enforcement of EC competition law?	No difference is made.
(v)	Can the plaintiff/defendant recover costs?	See answer under I(ii).
(vi)	What are the different types of litigation costs?	<ul style="list-style-type: none"> - stamp duties, registration fees, registration rights and enrolment rights (to be paid when the case is registered with the court); - costs and fees related to legal documents (for example, bailiff's fee for the service of a writ of summons); - cost of authenticated copies of the judgment; - costs of investigative measures such as witness testimonies and court appointed experts; - experts appointed by the parties themselves; - travel costs of magistrates, registrars and parties if these journeys are ordered by the court; - the procedural indemnity; - lawyers' fees; and - costs of execution of a judgment (bailiff's fee).
(vii)	Are there any national rules for taxation of costs?	This term does not exist as such. The costs which may be recovered from the losing party are mentioned in the written submissions of each party.
(viii)	Is any form of legal aid insurance available?	Yes.
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	These could range from EUR 10,000 to hundreds of thousands of euros.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	No.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	N/A
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	No.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	No.
(v)	What are the key differences, if any, from	None.

	region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?	
(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	None that we are aware of.
(vii)	Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	Although there are hardly any cases relating to claims for damages for infringement of competition rules, actions for these infringements are not uncommon, albeit not always formulated on this basis. Actions for infringement of competition rules are brought for infringement of the catch-all provision of the Law on Trade Practices, whereby the only relief possible is a cease and desist order, usually together with a penalty per infringement detected or sustained after the order or per day delay in complying with the order.
(viii)	Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	There have been two cases which we are aware of. In one, the court decided not to award damages; in the other, it did.
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC		
(i)	Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	Although claims for damages for breach of competition rules are in principle available under the general principles of tort, it appears that parties are not inclined to follow this route. The problems run to the core of the Belgian procedural system which does not allow for discovery. Due to the plaintiff's burden of proof, even if a court has the possibility to order the production of 'specific' documents sustaining well defined issues, this will only be done if the plaintiff has shown or made it presumable to the court's satisfaction that such documents exist. In cases relating to alleged infringements of competition rules, this will prove to be a difficult task for the plaintiff.
(ii)	How could that be achieved?	It would be an improvement to increase the judge's power to order the production of documents.
(iii)	Are alternative means of dispute resolution available?	Arbitration and mediation are available.
(iv)	If so, to what extent are they successful?	Arbitration is quite successful. Mediation however is rarely used. It is assumed that in practice, actions for damages for breach of competition rules are generally settled.