BELGIUM

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I. Introduction

No specific statutory basis exists for bringing actions for damages for breach of competition law under the Belgian Competition Act ("*Gecoördineerde wet tot bescherming van de economische mededinging/Loi coordonnée sur la protection de la concurrence économique*") or in any other statute. Accordingly, no specific procedural or evidentiary rules exist in this respect. The report thus sets out the general legal principles and rules applicable to claims for damages on a contractual and non-contractual (tort) basis.

Since courts have to send all relevant case-law to the Competition Council ("*Raad voor de Mededinging/Conseil de la Concurrence*"), 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 there is only one decision awarding damages in relation to breach of competition rules[1].

A specific procedure exists under art. 95 of the Law on Trade Practices of 14 July 1991 ("*Wet betreffende de handelspraktijken, de voorlichting en bescherming van de consument/Loi sur les pratiques du commerce et sur l'information et la protection du consommateur*"). This procedure allows plaintiffs to receive a cease and desist order against other traders committing acts of unfair competition. Such procedure is a procedure on the merits, 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.

The following analysis should thus be read in light of the above general comments.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there a specific statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

There exists no explicit statutory basis for bringing an action for damages for breach of competition rules. General legal bases therefore need to be used such as those for contractual claims for damages (art. 1142 and following Civil Code ("*Burgerlijk Wetboek/Code Civil*")) and claims on the basis of tort (article 1382 Civil Code).

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

1 This case was handled by us and the judgement never published: Court of First Instance of Brussels, 18 February 1994; for a summary, please see the last page of this report.

The commercial courts ("*Rechtbank van Koophandel/Tribunal de Commerce*") are mostly competent due to the typically commercial nature of defendants in competition-related cases (art. 573 Judicial Code ("*Gerechtelijk Wetboek/Code Judiciaire*")). However, when the defendant is not commercially active, the civil court ("*Rechtbank van Eerste Aanleg/Tribunal de Première Instance*") is competent (art. 568 Judicial Code).

In respect of the territorially competent court, 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 (art. 624 Judicial Code).

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

Strictly speaking, there are no specialised courts for bringing competition-based damages actions. However, when the outcome of a case is dependent on a competition practice, the court before which the case is pending – save where this is the Supreme Court ("*Hof van Cassatie/Cour de Cassation*") - , has the obligation to submit a request for a preliminary ruling to the Court of Appeal ("*Hof van Beroep/Cour d'Appel*") of Brussels, which will render a binding decision (for that case)[2]. During the time which the Court of Appeal needs to render its decision, the court in question has to stay proceedings. For this purpose, specialised chambers exist within the Court of Appeal of Brussels.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Limitations to standing

In order for a claim to be admissible, the plaintiff needs to be a natural person capable of freely and independently expressing his will or a legal person . In certain - statutorily provided for - circumstances, legal personality is not a requirement and specified interest groups can file claims.

There is no list of such interest groups, but some laws expressly provide that specific interest groups have the right to file claims. The most important are the following:

- by virtue of art. 4 of the Law on collective bargaining agreements ("*C.A.O. Wet/Loi C.C.T.*"),Trade Unions have the right to file claims which can arise from the application of this law or to defend the rights which the members of the Trade Unions have under collective bargaining agreements;
- by virtue of art. 577-9 Civil Code, an association of co-owners of buildings has the right to file claims.

When an interest group does not have legal personality, the articles of association of this group should provide for the right to file claims, or the conditions for representation have to be met.

Legal persons are validly represented by their competent corporate bodies (art. 703 Judicial Code).

2 art. 42*bis* Belgian Competition Act.

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, meaning that he can act if his rights are harmed or in serious threat of being harmed and the claim can result in a patrimonial or moral benefit for the plaintiff (art. 17 and 18 Judicial Code).

Moreover, non-nationals filing a claim or acting as an intervening party in proceedings are required to make a guarantee for the payment of the costs and indemnities which could arise from the proceedings if the Belgian defendant claims this *in limine litis* (art. 851 Judicial Code). However, EU nationals are not required to make a guarantee in cases where Belgian nationals would not be required to do so, as far as the claim relates to the exercise of fundamental freedoms guaranteed by EU law[3].

Connecting factors

The plaintiff must bring its action before the territorially competent jurisdiction.

Belgian defendants (art. 15 Civil Code) and EU nationals domiciled in Belgium (art. 2 Regulation 44/2001) can always be summoned before a Belgian court.

According to article 5(3) of Regulation 44/2001, a person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur[4].

Where Regulation 44/2001 – or other multilateral or bilateral treaties - does not apply, foreign defendants can be summoned before the Belgian courts by a foreign or Belgian plaintiff in the following cases[5]:

- if they have a domicile or elected domicile in Belgium (e.g. at the office of their lawyer);
- if the obligation which constitutes the basis of the claim originated in or has to be executed in Belgium;
- if the claim is connected to a lawsuit brought before a Belgian court;
- if there are different defendants, one of which is domiciled in Belgium (art. 635 Judicial Code);
- if none of the above is applicable, foreign defendants can be summoned before the court of the plaintiff's own domicile or registered office (art. 638 Judicial Code).

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Under Belgian law, there is no equivalent to class actions as they exist in the United States.

The limitations to the standing of natural or legal persons as set out above (C (i)), often prevent the possibility of collective claims, actions by representative bodies or any other form of public interest litigation. However, under certain circumstances, it is possible for certain associations to institute proceedings, to represent either several individual damages or collective damages. In any case, associations need either an explicit mandate to act for their members in the form of an *ad hoc* mandate, or a proviso in their articles of association.

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3 Court of Justice, 26 September 1996; Court of Justice, 20 March 1997, C-323/95, D.C. Hayes, J.K. Hayes/Kronenberger GmbH.

4 On 28 February 2002, the Supreme Court of Belgium ("*Hof van Cassatie/Cour de Cassation*") rendered a judgement relating to article 5(3) of the Brussels Convention which has now been replaced by the EU Council Regulation 44/2001 which supersedes the Brussels Convention as to legal proceedings instituted on or after 1 March 2002. The Supreme Court decided, in line with the ECJ case law, that when the place in which a harmful event occurred and the place in which the damage is suffered differ, the plaintiff has the option of suing the defendant in the courts of either place. However, this option is not unlimited. The option to sue at the place where the damage occurred is only available if that damage is a direct result of the harmful event. The rationale behind this ruling is that article 5(3) cannot be construed in such a way as to overrule completely the general principle of article 2 or to multiply unreasonably the possible jurisdictions.

5 This enumeration is limited to the hypotheses which are relevant to cases relating to competition matters.

Given the requisite personal interest, claims cannot be filed 'in the general interest'. The mere fact that representative bodies of an association pursue an objective set out in their articles of association does not automatically fulfil the requirement of personal interest. Therefore, neither class actions, nor public interest litigation are possible in Belgium. Certain exceptions have been provided for by law, such as for example:

- associations defending consumers' interests with legal personality can request a cease and desist order with respect to unfair trade practices (art. 98 of the Law on Trade Practices);
- associations defending the professional interests of members of a specific profession (e.g. lawyers, doctors, architects,…).

Natural or legal persons who have suffered individual damage can regroup themselves and file a single claim (closed group). The damages in such a case will be awarded to each individual and not to the group as a whole.

An action more similar to what is defined as public interest litigation action exists, whereby the Public Prosecutor can bring an action on behalf of the Belgian state. These actions are limited to criminal infringements and can only result in damages being awarded to victims if the victim becomes a civil party to the criminal proceedings ("*burgerlijke partij/partie civile*").

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

If proven, the damages will cover the entirety of the incurred damage (art. 1382 Civil Code and the case law relating thereto) in order to restore the victim to the situation he would have been in had the tort not taken place.

If possible, the compensation needs to be done in kind ("*in natura/en nature*"). However, if this appears to be impossible or excessively difficult – which is often the case – the compensation can be done by equivalent, by awarding a financial indemnity. This indemnity can take the form of a lump sum (which is usual) or of repeat payments (mainly if the transgressor can prove he is financially unable to pay the indemnity as a lump sum).

In the procedure of cease and desist orders, provided for by the Law on Trade Practices of 14 July 1991, the court can order its decision or a summary thereof to be published on or outside the premises of the transgressor, as well as in newspapers or to be published in any other manner, at the transgressor's cost. These measures can only be ordered if they will contribute to stopping the infringement or its effects (art. 99 Law on Trade Practices).

(ii) Other forms of civil liability (e.g. disqualification of directors)?

There are no specific sanctions for breach of competition law. Shareholders and directors can only be held personally liable for damages on the basis of article 1382 of the Civil Code (as set out in A(i)).

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

Under tort law, a person has to repair/compensate for the damage caused by his fault (implying an action) (art. 1382 Civil Code) or by his negligence (art. 1383 Civil Code). This fault or negligence can lie (1) in the infringement of any statutory rule or (2) in not complying with a duty of care. The standard for the latter is that one should act as a '*bonus pater familias*', meaning that the behaviour should be that of a normally careful person in the same circumstances. Said abstract standard is examined on a case-by-case basis, but generally speaking is objectified by taking external circumstances (such as time, place, climate, social status,

education, professional knowledge,…) into account and disregarding internal circumstances (such as age, sex, intelligence, character, temper,…).

Fault and negligence are mainly behaviour attributable to natural persons. However, in light of the 'organ theory', both the State and companies can be held responsible for the fault and/or negligence of their organs (art. 1382-1383 Civil Code and case law relating thereto).

Under contract law, the standard is distinct depending on whether dealing with obligations whereby a result is promised (breach if the result is not attained, except in cases of *force majeure*) or obligations whereby best efforts are required (breach if best efforts are not used). Contractual exclusions can never cover intentional fault (art. 1150 Civil Code) and fraud.

In Belgium, although this point is debatable and has never been explicitly addressed, violation of competition rules will imply that the fault element is fulfilled[6].

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to the other party etc.)

The general evidentiary rules, provided for in the Judicial Code are applicable to cases (both contractual and non-contractual) for damages.

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 (art. 870 Judicial Code) (cfr. the adagio: '*actori incubit probatio*'). This means that in tort law, the plaintiff needs to prove (1) fault, (2) damage and (3) the causal link between the fault and the damage.

The following methods of presenting evidence exist:

- production of documents deemed relevant by each party; such production may also be ordered by the court, subject to a financial penalty for non-compliance (art. 871, 877-882 Judicial Code);
- hearing of witnesses in relation to specific issues, which can be requested by the interested party or ordered by the court (art. 915-961 Judicial Code);
- appointment of an expert to draft a report (art. 962-991 Judicial Code);
- hearing of the parties (art. 992-1004 Judicial Code).

In most cases, production of documents is the only method used by parties. All documents are admissible and examined by the court on their relevance, credibility and value for the case at hand.

Specific rules exist as to the evidentiary force and hierarchy of different types of evidence (such as notarial deeds, written documents, etc.) used to prove obligations; such rules are less stringent between traders.

(ii) Standard of proof

Each party has to 'prove' the allegations made by it (art. 870 Judicial Code). Covered by this is – in civil trials - proof of the 'legal truth', even if this might diverge from the real truth. Legal truth and real truth can diverge, for example, if a party does not succeed in proving its allegations: party A owes an amount of money to party B, but the documents party B is submitting to the court in order to prove its claim do not comply with the legal conditions they should comply with. In

6 Supreme Court ("*Hof van Cassatie/Cour de Cassation*"), 10 April 1970; 22 September 1988; 3 October 1994: general principles.

this case, the real truth is that party A owes an amount of money to party B. The legal truth will be that party A does not owe this amount of money to party B.

However, in criminal trials, the 'real truth' will have to be proven.

No technical expressions are used as to the standard of proof. The court appreciates the produced evidence on a case-by-case analysis and decides on the alleged infringement.

There is a difference between the degree of proof required in criminal trials and in civil trials: in criminal trials, the court has to be 100% sure that the allegations are proven before he can convict the accused. The expression '*in dubio, pro reo*' means: 'doubts benefit the accused'. In civil trials, however, the court has to be 'convinced' that the allegations are proven on the basis of consistent elements which point in the same direction.

Standard of proof for injunctions

Injunctions (or interim remedies) are normally granted in the framework of summary proceedings. They can also be granted in substantive proceedings prior to final judgement.

The basic requirement in summary proceedings is urgency – to prevent serious damage or inconvenience. Courts construe this requirement strictly but if one can establish urgency and that the request is legitimate, injunctions will generally be granted. However, need must be evident and the court cannot order measures having a definitive effect on the case.

Besides injunctions granted in the framework of summary proceedings or in substantive proceedings prior to final judgement, please also note the specific procedure under the Law on Trade Practices which allows plaintiffs to receive a cease and desist order against traders committing acts of unfair competition. Such procedure is conducted 'as if in summary proceedings', but is essentially a procedure on the merits. Therefore, standard of proof handled in procedures on the merits applies.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

There are no general rules limiting the admissibility of evidence based on its form. However, in civil cases pertaining to contractual matters, evidence needs to be in written form if the claim exceeds 375 EUR, meaning that at least some written evidence needs to be presented (art. 1341 Civil Code). In commercial cases, which will be the case for matters relating to breach of competition rules, said rule does not apply (art. 25 Commercial Code).

The court needs to discard any evidence which has been obtained surreptitiously, such as by breach of privacy.

The court can admit, at the request of a party, or order that witnesses be heard in respect of a specific and relevant fact (art. 915-916 Judicial Code). The court decides whether this is necessary on a discretionary basis, but will only order this measure if it is likely that identified witnesses can deliver proof of a specific, relevant and admissible fact. A non-appearing witness can be summoned to appear by the court, at the request of a party (art. 925 Judicial Code). If he still does not appear, a fine (amounting to EUR 2.50 to 250) plus damages for the injured party can be ordered by judicial decision (art. 926 Judicial Code). This decision will be notified to the non-appearing witness, with a writ of summons to appear before the court. If the summoned witness still does not appear, the court is bound to impose another fine.

Limitations on who can be called as a witness in civil proceedings

In Belgium, hardly any limitations exist on who can be called as a witness in civil proceedings (art. 931 Judicial Code). Minors under the age of 15 cannot appear as witnesses. Their declarations can only be used as indications, not as evidence[7].

People subject to professional secrecy can refuse to testify (art. 929 Judicial Code) (Please see also E(a)(iv)).

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:
- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

Discovery does not exist.

During the trial, the court can – *ex-officio* or upon parties' request[8] - order the parties to submit evidence which is in their possession (art. 871 Judicial Code). In addition, the court can – equally *ex officio* or upon parties' request - request third parties to submit specified documents, meaning that the court has to state exactly which documents have to be submitted; the order cannot be vague or general (art. 877 Judicial Code). Such order will be made if there are serious, specific and concurring suspicions that the party or the third person has a document containing proof of a relevant fact. This needs to be very precise. If such order or request is not complied with without a valid reason, a penalty can be imposed (art. 882 Judicial Code). The court is free to determine the amount of this penalty, but it has to be suitable. Moreover, a person who destroys, modifies or hides evidence he was ordered to produce in court can be punished with imprisonment from 8 days to 2 years and with a fine between EUR 130 and EUR 5,000 (art. 495*bis* Penal Code("*Strafwetboek/Code Pénal*")). There are no other sanctions. Hence, the court cannot draw any conclusions from the fact that a party does not remit evidence.

Can disclosure be legitimately refused?

The party or third person which is asked to produce documents can refuse if it has a legitimate reason to do so. Case law has determined what has to be understood as a 'legitimate reason':

- *force majeure*, e.g. theft, destruction or even loss of the documents;

- professional privilege: if the person who has to produce documents is bound by professional privilege, he has the obligation to refuse such production for documents covered by the professional privilege. Persons bound by professional privilege are: doctors, surgeons, healthcare professionals, pharmacists, midwives, judges, lawyers, notaries (except for registered and/or transcribed deeds) and priests. However, the professional privilege is not always absolute.

a) lawyers are held by an almost absolute professional privilege. This means that they can only produce documents, covered by professional privilege, when needed for their defence in procedures against clients.

b) doctors are held by the medical privilege. The Supreme Court, however, decided that the professional privilege of doctors is not absolute and that the court needs to examine in each specific case whether the refusal to produce documents is justified. Doctors performing as judicial experts are not bound by professional privilege and have to disclose all facts at issue to the court. Towards third parties, they are bound by professional privilege.

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7 In addition, descendants cannot be heard in cases in which their ascendants have opposed interests. Exceptions exist for minors. However, the question on who can be called as a witness is, in Belgium, most offen a matter of children witnessing in divorce proceedings of their parents. Therefore, this is of very minor importance to this study.

8 An application may only be made for a court order to request another party to produce a specific, identified document, but never to obtain all documents that may possibly be useful for the case.

Bankers are not held by a professional privilege, as their secrecy obligation is purely contractual. However, a court has the possibility to qualify this justified secrecy obligation as a legitimate reason for refusing the production of documents. The same principle is valid for exchange brokers and accountants.
- the right to privacy is not a legitimate reason for refusal.

Product of foreign discovery and material gathered by the Belgian national competition authority

In general, any evidence which is obtained legitimately is admitted in proceedings before the Belgian courts. Therefore, although discovery is not practised in Belgium, evidence obtained through discovery in other countries where discovery is admitted can be used in Belgian proceedings (cfr. comparative report, section E (a) (iv), "production of foreign discovery"). For the same reason, material gathered by the Belgian national competition authority can be used in civil proceedings.

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence is admissible.

Who can appoint an expert?

An expert can be appointed by the court to produce a report (art. 962 Judicial Code) or a party can produce an expert report drafted by an expert it appointed. However, a report emanating from an expert appointed by a party is typically considered to be somewhat biased. Parties can also agree on the appointment of an expert, in which case the court can confirm their agreement (art. 964 Judicial Code).

Who can be an expert?

There exist lists of "official" experts. However, this does not prevent parties or the court from appointing experts that are not listed as such.

What can the expert give evidence on and what is the value of the expert report?

The judicial order for expert evidence will accurately define its scope (art. 963 Judicial Code). The appointed expert is confined to dealing with the issues explicitly provided for in the order, but he is free to use any materials, consult any information or conduct any researches he deems useful in order to be able to draft his report.

In general, an expert is requested to give evidence on points that require specific knowledge or technical expertise. Expert evidence on the law is not admissible, although there is an exception regarding foreign law (cfr. comparative report, section E(b)(I)).

The findings of an expert report do not hold any legal evidentiary weight and a merely non-binding opinion is formulated. The reports do carry factual evidentiary weight used to convince or inform the court of certain issues. In other words, the court has to determine liability, not the expert. In order to determine liability, however, the court can base its reasoning on the facts and the consequences thereof as established by the expert's report.

Parties are allowed to submit statements, documents and allegations to the court-appointed expert, to be taken into account when drafting his report (art. 978-979 Judicial Code).

The expert can request documents (e.g. accounts) from one of the parties if he needs these for the purposes of his report. If a party refuses to disclose such information, the expert cannot oblige that party to do so. The party which has an interest in the other party disclosing the requested information, has to apply to the

court for an order for disclosure in application of art. 877 Judicial Code (cfr. section E (a) (iv)).

(ii) To what extent, if any, is cross-examination permissible?

Cross-examination of witnesses is only possible via the judge. Parties cannot direct questions to witnesses (art. 936-937 Judicial Code).

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, or an authority from another EU Member State have evidential value?

In law, a prior statement and/or decision by a national competition authority, a national court or an authority from another EU member state submitted to the court, has the same evidential value as any other evidentiary document. However, in fact, the court will attach more importance to it as such documents stem from an official source.

N.B.: although not a matter of proof in the strict sense, please note that, when the outcome of a case is dependent on a competition practice, the court before which the case is pending (except for the Supreme Court), has the obligation to submit a request for preliminary ruling to the Court of Appeal of Brussels, which will render a binding decision (for that case)[9].

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

Suffered damage is perceived as the loss of a patrimonial or extra-patrimonial benefit. The interest in maintaining the lost benefit needs to be legitimate (art. 1382 Civil Code). The court has the opportunity to estimate the damages at a reasonable amount, but only if it cannot conclude to an amount with mathematical certainty.

Interim remedies to obtain evidence exist. They include injunctions, sequestration and freezing orders, the appointment of trustees or experts, examination of documents to establish their legitimacy and questioning of witnesses.

(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[10].

The court which ascertains that more than one person committed a fault has to examine whether a causal link exists between each of these faults and the damage, - notwithstanding the fact that another fault intervenes – by examining whether each of the faults necessarily caused the damage; this means that for every fault, the court has to decide whether the damage would have occurred as it actually occurred without this infringement[11].

Therefore, in the case of more than one person committing a fault, the evaluation must be made for every fault individually.

This evaluation is clearly different from the test of "causalité adéquate" in French law (cfr. comparative report, section E(d)(i)).

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9 art. 42*bis* Belgian Competition Act.

10 Supreme Court, 10 November 1981; 14 September 1982; 21 September 1983; 02 September 1986; 24 September 1986; 02 June 1987.

11 Supreme Court, 24 March 1999.

F. Grounds of justification

(i) Are there grounds of justification?

The following justification grounds are available: *force majeure* (act of God), insurmountable error, self defence, act imposed or permitted by law or an authority, and state of emergency[12]. Note, however, that certain conditions apply to the idea of an act imposed or permitted by law or an authority: the imposed or permitted act has to be executed without imprudence and without abuse and the actor cannot exceed the limits of the order or the permission.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

There have not been cases to date where these issues have been addressed. Therefore, we are basing our reply on the application of general principles and the use of analogy.

Indirect purchaser

In theory, indirect purchasers could claim damages on the basis of a wrongful act. However, filing a claim against a person with whom the plaintiff did not enter into an agreement or did not even have direct contact, would cause serious difficulties towards showing a causal link between the infringement and the damage suffered. Moreover, indirect purchasers claiming damages would need to prove that the higher prices have been passed on to them by the direct purchaser.

Passing on

Translated to Belgian law, this concept brings us to the accumulation of compensations. Can the prejudiced party accumulate any damages it receives from the infringing party, with sums which have been paid to him by other parties in connection with the infringement? Or, inversely, can the infringing party deduct from the damages to be paid by him, sums which the prejudiced party has already received from other persons in connection with the infringement? This question has to be answered in light of the principle that the prejudiced party needs to be placed in the situation as if the infringement would not have occurred. Therefore, the prejudiced party cannot receive a compensation which is too small to restore it to its previous situation, nor a compensation which would actually have as a consequence that it would make a profit out of the wrongful act.

The Supreme Court has ruled on this subject that the accumulation of compensations is possible if the compensations do not have the same legal cause and if they have a different object[13]. Based on this case law, it would probably not be possible for a defendant to be exempted from paying damages on the basis of the 'passing on' defence. Indeed, the damages find their legal cause in the wrongful act, whereas the payment of the overcharges finds its legal cause in the contract of sale.

However, an indication that the compensations have the same legal cause and the same object is the possibility for the third party who has paid a compensation to the prejudiced party to file a claim against the infringing party in stead of the prejudiced party. As stated above, an indirect purchaser would probably be allowed to claim damages from the infringing party. If you allow this and you do not allow the passing on defence, the infringing party would have to pay twice: once to the directly prejudiced party and once to the indirect purchaser, which would be unacceptable.

12 cfr. case law; Van Ommeslaghe, P., *Droit des Obligations,* Vol. 3, Titre IV; Van Gerven, W. and Covemaeker, S., *Verbintenissenrecht* 2001, 244.

13 Supreme Court, 15 April 1937, 4 November 1971, 26 June 1990, 28 April 1992.

Another argument for not allowing the passing on defence is that even where higher prices have been fully passed on, there may be damage sustained by the direct purchaser due to loss of customers.

These reasonings are debatable and we presume that in practice, a court will take into account the fact that the overcharges have been passed on, so as to diminish the damages to be paid by the infringing party, without exempting the infringing party from paying damages.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

If the plaintiff has contributed to the damage through a fault or negligence of his own, the amount of damages will be reduced to the extent that the fault or negligence has contributed to the damage (case law).

Moreover, the plaintiff is under a duty of mitigation of losses. This means that although the plaintiff is not under the obligation to restrict the damage, he only has the obligation to take appropriate measures to restrict the damage if that would be the behaviour of a reasonable and careful person[14].

If the plaintiff has fulfilled his duty of mitigation of losses, the incurred costs therefore can be recovered from the defendant. If the plaintiff did not fulfil his duty of mitigation of losses, the only sanction is the partial loss of the right to be wholly compensated for the suffered damage. In that case, the plaintiff will not be compensated for that part of the damage which could have been avoided should he have fulfilled his duty of mitigation of losses.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Under tort law, the damaged party needs to be placed in the situation as if the infringement would not have occurred. The calculation is done on the basis of injury suffered by the plaintiff. This includes suffered losses and lost profits, material and moral damages[15], direct and indirect damages and loss of chance. Direct damage is damage suffered by the direct victim (plaintiff in question) of the infringement. Indirect damage is damage incurred by other persons than the direct victim of the infringement in question, and which is caused by the damage incurred by the direct victim. Under tort law, the damage which was not foreseeable also has to be reimbursed. Note that foreseeability is a criterion used in determining the infringement. This means that, in order to give rise to liability, an action has to cause damage which was reasonably foreseeable[16].

Under contract law, the criterion used is a comparison between the situation in which the damaged party would have been if the contract would have been properly performed and the actual situation (i.e., the loss of the expected benefit); only the damage that was foreseen or foreseeable at the time of entering into the contract, if the non-execution of the obligation has not been caused intentionally (art. 1150 Civil Code); this only applies to the cause of the damage and not to the level of damages.

(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, including injury suffered outside the national territory and outside the EU.

14 Supreme Court, 14 May 1992.
15 Moral damage can be physical or psychological pain or any other moral injury (Supreme Court, 3 February 1987).
16 Supreme Court, 5 May 1971.

In relation to jurisdiction, please note the 'Shevill' case[17] in which it was decided that: in case of insult through a press article spread throughout a number of Member States, the plaintiff can file a claim for compensation before either:

- the courts of the Member State where the publisher of the insulting publication is established, which courts are competent for the claim for the entire damage resulting from the insult; or

- the courts of every Member State where the publication has been spread, which courts are only competent to decide on the damage caused on their territory.

(iii) What economic or other models are used by courts to calculate damage?

The aim is to put the damaged party in a situation such as if the infringement or contractual breach had not taken place. The court can freely determine which elements and methods of calculation are used. The burden to prove the actual damage lies with the plaintiff. The plaintiff is free to choose any manner in which it wants to prove this. Normally, the court will not create calculation methods itself and therefore, mostly, the court will follow the method of calculations proposed by the plaintiff if the defendant is found liable for the damage. Therefore, the court will normally not appoint an expert to assist with the quantification of damages. These will include, e.g., references to previous accounting periods and profits of other firms in the sector.

However, in some law domains, calculation methods exist which are generally used by the courts. For example, for distribution agreements, the indemnity *in lieu* of notice[18] will be calculated – by unanimous case law - on the basis of the average 'semi-gross-profits' obtained by the distributorat the moment of the breach of the agreement. 'Semi-gross-profits' means either the gross profit reduced by the variable[19] general costs, or the net profit increased by the general fixed costs (the latter being the most common method).

In Intellectual Property cases, courts generally apply the following calculation method for indemnification of the victim of counterfeiting/infringements[20]:

- loss of profit

Firstly, the extent and the amount of the counterfeit will be determined (the number of counterfeit/infringing products – "*namaakmassa/la masse contrefaisante*").
Secondly, if the victim commercialises its products itself, the loss of profit will be equal to the profits it would have made on the commercialisation of the number of counterfeit/infringing products.
If the victim does not commercialise its products itself, the loss of profit will be equal to the remuneration the victim would have received if the counterfeiter/infringer would have asked for a licence to commercialise the number of products it actually commercialised.

- incurred loss

This is generally considered to contain two elements: the damage to the monopoly and the brand name and the costs caused by the prosecution of the counterfeiter/infringer.
The damage to the monopoly and the brand name covers the decrease in value of the products made by the victim, caused by the counterfeiting/infringement.

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17 Court of Justice, C-68/93, 7 March 1995, Shevill/Chequepoint/Presse Alliance.

18 Indemnity *in lieu* of notice is an indemnity which has to be paid by the party which terminates the contract without respecting the notice period which should be taken into account (e.g. in distribution agreements, agency agreements).

19 A fixed cost is a cost that does not vary depending on production or sales levels, such as rent, property tax, insurance, or interest expense. A variable cost is a unit cost which depends on total volume (www.investorwords.com). Variable costs = total costs – fixed costs.

20 subject to future changes resulting from European legislation which will enter into force shortly.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The damages need to be assessed on the date of rendering a decision, with the sole exception of cases where a nominal amount is claimed on the basis of breach of a contractual or statutory obligation. Except in these cases, the court will take into account factors such as inflation[21] or other modification of purchasing power occurring between the infringement and the date of his decision. However, the court cannot take into consideration intervening events which have no relation to the infringement or to the damage and which have worsened or improved the situation of the victim[22]. The court is, however, allowed to take into consideration intervening events which, even if they are outside the specific domain of the infringement, have influenced the damage and intervening events which are related to the infringement[23].

(v) Are there maximum limits to damages?

If the infringement, the damage and the causal link are proven, then the entire injury needs to be covered by the awarded damages. There are thus no maximum limits to damages.

(vi) Are punitive or exemplary damages available?

No punitive damages are available. There does exist a system in Belgium of penalties ("*dwangsom/astreinte*"), laid down in articles 1385*bis*-1385*octies* Judicial Code. Such penalties are awarded as a measure ancillary to the primary conviction, whereby the penalties will be due if the awarded court order is not complied with, either per day delay or per found infringement after the order. In a case before the court of first instance of Brussels, Belgium was convicted for not complying with EC rules, subject to a penalty per day delay in complying[24].

Exemplary damages do not exist either (cfr. comparative report, section G(a)(vi)).

(vii) Are fines imposed by competition authorities taken into account when settling damages?

There have not been cases on the basis of which this question can be answered. Since fines do not compensate damages, this question is irrelevant under Belgian law.

(b) Interest

Preliminary remark: in this report, we will only examine 'compensating interest' ("*vergoedende interest/intérêts compensatoires*") as this is the kind of interest which will be awarded in cases where damages are awarded for breach of competition law[25].

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgment; or**
- **the date of a decision by a competition authority?**

The interest forms part of the damages and the court can determine freely whether to award one global amount for damages (interest included) or a sum plus interest.

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21 A provision for inflation can take either the form of added interest or can be comprised in a global amount (cfr. this report, section G (b) (I) and the comparative report, section G (a) (iv)).

22 Supreme Court , 7 September 1982.

23 Supreme Court, 4 July 1955.

24 Case Nr R.G. 54.636, Court of First Instance of Brussels, *15 civil servants of the Secretariat of the Council of the European Communities v National office of pensions and the Belgian State*, 09/02/1990.

25 As opposed to statutory interest ("*moratoire interest/intérêts moratoires*"), which is due in case of late payment (art. 1153 Civil Code).

The starting date of the interest has to be determined in order to duly compensate the damage suffered by the plaintiff. The court is not bound by any specific rules in this respect.

Provided that the plaintiff specifically claims interest, it may be awarded as from the moment that the damage occurred[26]. The court is, however, free to decide on the starting date[27] (sometimes the moment of the infringement, the moment the damage occurred, the moment of payment by the plaintiff, the consolidation date, an average date,…) and on the interest rate (usually 7%), albeit not in an arbitrary manner. The court can never award more than is asked for.

In addition, if so requested, the court can award interest as from the date of rendering its judgement until full payment of the ordered amount. The rationale being that as from the judgement, the conviction has been fixed in a monetary sum accruing interests.

(ii) What are the criteria to determine the levels of interest?

The courts are entirely free to determine the interest rate. The court assessing the case at hand has discretionary power in this respect[28]. If the court does not determine a level of interest, which occurs quite regularly, the legal interest rate (currently 7%) will be applied[29]. Courts generally use the legal interest rate since this rate is applicable by default. Other interest rates which are occasionally used are those used by banks, the average rate over a certain period, etc. However, the rate can never be set arbitrarily.

(iii) Is compound interest included?

If specifically requested, compound interest can be awarded on the conditions that (1) interest has fallen due on a nominal amount, (2) interest is due for an entire year and (3) there is a specific notice on each yearly expiration date (art. 1154 Civil Code).

H Timing

(i) What is the time limit in which to institute proceedings?

Subject to specific statutes of limitations, such as in case of agency agreements, the right to bring contractual claims lapses after ten years. The right to bring a claim for damages under tort law lapses if no claim is brought within five years after the damaged party became aware of the damage or its aggravation and in any case after twenty years from the occurrence of the fact causing the damage (art. 2262*bis* Civil Code).

(ii) On average, how long do proceedings take?

It is very difficult to estimate the duration of proceedings due to the specificity of each case. In general, Belgian courts are very slow and a very simple case will on average take about a year for each instance. The speed in bringing a matter to trial depends on the case's complexity, the court's workload and parties' pro-activeness.

Usually, however, cases take several years.

(iii) Is it possible to accelerate proceedings?

There is no fixed time table binding parties to file their submissions. In standard substantive proceedings, the only possibility for speeding up proceedings is when parties co-operate in filing their respective written submissions quickly and requesting a court date for the hearing (art. 750 Judicial Code). Alternatively, if

26 Supreme Court, 7 October 1976; 10 June 1982; 29 October 1986; …
27 Supreme Court, 24 January 1924; 16 February 1983; …
28 Supreme Court, 24 April 1941; 8 January 1973; …
29 Supreme Court, 20 July 1965.

one of the parties remains silent for a long period of time, a court deadline can be requested by the other party or parties (art. 747§2 Judicial Code).

Fast-track proceedings (summary proceedings ("*kort geding/référé*") are available for interim remedies. The basic requirement in summary proceedings is urgency – to prevent serious damage or inconvenience. Courts interpret this requirement strictly but if one can establish urgency and that the request is legitimate, interim remedies will generally be granted. However, the need must be evident and the court cannot order measures which will have a definitive effect on the case.

Moreover, a number of procedures are conducted 'as if in summary proceedings', whereby the proceedings are fast-tracked but the case is heard on its merits and effective measures are granted, e.g. the cease and desist procedure for unfair trade practices.

In cases which only require "short debates" ("*korte debatten /débats succints*"), the case can be pleaded at the introductory hearing or on a date close to the hearing (at the request of the plaintiff, who specifies this request in the writ of summons), after which the court will render its decision.

Another means of partial acceleration is to seek permission from the president of the competent court to shorten the term between the service of writ and the first hearing. This term is normally at least 8 days, and can – in cases of proven urgency – be shortened to a couple of hours.

(iv) How many judges sit in actions for damages cases?

In civil courts, there is one judge, unless parties request that the case be heard by a panel of three judges (art. 78 Judicial Code). As mentioned above, a case for damages for breach of competition rules will usually not be heard by a civil court, but rather by a commercial court, which consists of three judges (one professional judge and two lay judges) (art. 84 Judicial Code). In the Court of Appeal, a case will be heard by three judges.

(v) How transparent is the procedure?

Documents used by parties are exchanged between them and are usually only presented to the court at the oral hearing unless the court requests to be presented with the documents before said hearing. These documents are not accessible to the public. Parties are kept informed of all procedural aspects.

I Costs

(i) Are Court fees paid up front?

The enrolment rights are normally advanced by the bailiff when the case is enrolled with the court and are to be paid back to him immediately by the plaintiff. They can be recovered from the losing party. Registration rights amount to EUR 25 and to 3% for amounts exceeding EUR 12,500. Stamp duties amount to EUR 5. Enrolment rights amount to EUR 82 for the commercial court. Drafting rights amount to EUR 30. Costs of authenticated copies of the judgment amount to EUR 2.85 per page. The procedural indemnity amounts to EUR 342.09 for the commercial court, relating to a case with a claim exceeding EUR 2,500.

(ii) Who bears the legal costs?

Legal costs which may be recovered from the losing party are:

- stamp duties, registration fees, registration rights, enrolment rights;
- 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;
- travel costs of magistrates, registrars and parties if these journeys are ordered by the court; and
- the procedural indemnity (this is envisaged to cover part of the lawyers' fees, but is a very small amount).

The costs of execution of a judgment must be borne by the party against whom execution is sought (art. 1024 Judicial Code).

In past years, case law almost unanimously agreed that each party has to bear its own lawyers' fees. However, in August 2002, a new law came into force according to which the winning party can recover the reasonable costs and lawyers' fees from the losing party, on the condition that the case concerns payments in arrears in the framework of commercial transactions. Commercial transactions are defined as 'transactions between undertakings or between undertakings and authorities or services inviting tenders which lead to the supply of goods or services against payment'. A considerable part of recent case law and legal authors are in favor of expanding this principle to all lawyer fees payable in the framework of legal proceedings. The issue is still very controversial in Belgium.

On 28 February 2002, the Belgian Supreme Court decided that the costs borne by the injured party in order to determine the existence of damage and its amount (expert fees) can be recovered from the losing party (e.g. in the case of a car accident, the plaintiff will need to pay an automobile expert, in order to determine the existence of damage to the car and its amount)

At present, a bill proposing the recoverability of lawyers' fees from the losing party, as general principle, is pending before the Belgian Chamber of Deputies[30].

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Lawyers are free to determine the amount of their fees and their method of calculation. However, certain rules have to be respected: an agreement to determine the amount of the fees, taking into account the outcome of the proceedings, is prohibited if this amounts to the formula 'no win, no fee'. On the other hand, it is possible to determine the amount of the fees in function of the value of the case, (e.g. a certain percentage). It is also possible to determine an additional compensation in case of success (often a percentage of the obtained amount of money). These rules can be summarized as follows: contingency fees are permissible, except for the formula 'no win, no fee' (cfr. comparative report section I(iii)).

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

see answer under question I(ii)

(v) What are the different types of litigation costs?

- 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;

30 www.dekamer.be: doc 51K0417 (2003/2004). The bill provides for the recovery of lawyers' fees by the winning party in civil cases, and of the civil party in criminal proceedings. However, the court can take into account the economic situation of the defendant by determining the costs to be reimbursed.

- the procedural indemnity;
- lawyers' fees; and
- costs of execution of a judgment (bailiff's fee).

(vi) Are there national rules for taxation of costs?

The common law term 'taxation of costs' does not exist as such in Belgian law. The costs which may be recovered from the losing party are listed under I(ii). In principle, every party mentions these costs (if applicable) in its written submissions. When rendering his judgment, the court will decide about who bears the costs and the amount thereof. As these amounts are set by law, it is in principle not possible to litigate about them.

(vii) Is any form of legal aid insurance available?

It is possible to enter into an insurance policy with respect to legal assistance. There are no restrictions on the type of person who can enter into such a policy. An insurance policy is made according to the person entering into it. Therefore, there are no real limits on recovery. The recovery will be proportional to the amount of the premium. Insurance companies can refuse to award an insurance policy above a certain amount of recovery, this being a matter of policy of each insurance company.

(viii) What are the likely average costs in an action brought by a third party in respect to a hard-core violation of competition law?

It is impossible to estimate the average costs due to the specificity of each case. The costs could range from around EUR 10,000 in a straightforward case with no appeal, to hundreds of thousands of euros in a complex case with several instances.

The costs involved in pursuing a damages claim for EUR 1 million where there is an easily provable hardcore restriction would perhaps be in the region of EUR 25,000 – 75,000, including lawyers' fees and court fees. The court fees consist of:

- EUR 250 for the writ of summons (includes court bailiff's fee, enrolment rights and other taxes on writ of summons);
- EUR 342.09 procedural indemnity; and
- EUR 5 stamp duty.

Three per cent registration rights on the amount awarded would also be payable. If EUR 1 million is awarded, EUR 30,000 registration rights will be due.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The answers concern tort-based and contractual claims in general due to the absence of statutory provisions laying down the possibility of specifically claiming damages for infringements of competition rules and the absence of case-law in this respect.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No.

(iii) Are there any differences according to whether defendant is a public authority or natural or legal person?

No.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There is no interaction that we are aware of. However, a leniency programme in Belgium has been installed very recently and therefore it is too early to confirm this.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

No.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

<u>Law on Trade Practices</u>

Although there are hardly any cases relating to claims for damages for infringement of competition rules, actions for abuse of dominant position (and other infringements of competition rules) are not uncommon, albeit not always formulated on this basis. Such actions are brought on the basis of breach of the catch-all provision (art. 93)[31] 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.

<u>Private international law relating to claims concerning non-contractual obligations (applicable law)</u>

The applicable law on issues of tort is determined by the place where the tort took place, the so-called '*locus delicti*' (art. 3 Civil Code), except when this leads to dispositions which are contrary to Belgian private international law of public order.

(vii) 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 where the issue of damages was addressed in this respect. In one instance, damages were awarded[32], in the other case, the court decided not to award damages[33].

<u>III. Facilitating private enforcement of Articles 81 and 82 EC</u>

(i) Which of the above elements of claims for damages (under section II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

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.

<u>Obstacles</u>

Firstly, the Belgian procedural system 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

31 This provision lays down the general prohibition on actions contrary to fair trade practices, through which a trader prejudices or can prejudice the professional interests of one or more other traders. A parallel provision in the same law lays down the same general prohibition in light of the interests of one or more consumers.

32 Case Nr. 17.731/90 – Répertoire n° 94/5580 – jugement n° 97), Court of First Instance of Brussels, Belgium, *Claude Bettens and others v. S.A. Raffinerie Tirlemontoise, the Belgian State and others,* 18 February 1994.

33 Case Nr. 2000/AR/352, Court of Appeal of Antwerp, Belgium, *Marie-Jeanne Hermans and Joseph Daniels v. NV Maloir Victor and Victor Maloir*, 11 February 2002.

documents exist. In cases relating to alleged infringements of competition rules, this will prove to be a difficult task for the plaintiff.

Secondly, the Belgian procedural system does not allow cross-examination. Questions have to be asked by intermediary of the court, who can refuse to ask certain questions and who will generally not exercise the same level of pressure as a party would.

Thirdly, another hurdle lies in the ailing judicial system in Belgium (shortage of staff, poor facilities, low salaries, no administrative support). Competition cases are generally very complicated and time consuming, whereas courts are not acquainted with competition rules and do not have the necessary resources and time to investigate competition cases as they should be investigated.

Fourthly, judicial procedures in Belgium are very long and costly, which has a deterrent effect on victims to start proceedings.

Finally, as to damages, which are generally quoted as the second main advantage of a procedure for private enforcement, they will normally be excluded in mere contractual disputes where one of the parties claims injury as a result of a contractual provision it has itself signed.

Possible improvements

In the light of the above, it is clear that measures which could facilitate the private enforcement of Articles 81 and 82 EC are: allowing discovery proceedings and cross-examination, providing for expert economic evidence, a complete and thorough upgrading and modernisation of the Belgian judicial system and perhaps the installation of specialised courts.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Pursuant to Article 1676 Judicial Code, each dispute which has arisen or which can arise from a legal relationship, and for which it is allowable to enter into a settlement agreement, can be submitted to arbitration by way of an agreement. In addition, parties are always free to settle a dispute which has arisen out of court. It is assumed that in practice, actions for damages for breach of competition rules are generally settled.

Another possibility is mediation. Mediation however has, up till now, very little success in Belgium (cfr. comparative report, section III (ii)).

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V. National case law summaries

Case Nr. 17.731/90 – Répertoire n° 94/5580 – jugement n° 97), Court of First Instance of Brussels, *Claude Bettens and others v. S.A. Raffinerie Tirlemontoise, the Belgian State and others,* 18/02/1994.

Facts and legal issues

Between 1975 and 1978, a number of French farmers (Bettens and others) entered into agreements for an undetermined period with sugar factories of Tirlemont (amongst which S.A. Raffinerie Tirlemontoise). These agreements obligated S.A. Raffinerie Tirlemontoise to purchase from the farmers the totality of their annual production of beets at identical conditions as those applicable by S.A. Raffinerie Tirlemontoise to Belgian farmers.

Although it had become very difficult for S.A. Raffinerie Tirlemontoise to continue to purchase the beets at the agreed conditions, these conventions were executed as agreed upon until 1985. In 1985, S.A. Raffinerie Tirlemontoise proposed another contract to the farmers for the harvest of 1986-87 and then stopped executing the old agreement. The farmers filed a complaint with the European Commission for breach of the competition rules contained in the Treaty of Rome: the contract of 1986-87 contained a provision according to which priority was given to Belgian farmers. This complaint led to a settlement. Afterwards, the Commission decided that this clause was indeed contrary to the competition rules contained in the Treaty, but that the settlement agreed upon between the parties had remedied this.

One year after the decision of the European Commission, the farmers summoned S.A. Raffinerie Tirlemontoise before the Court of First Instance of Brussels for breach of competition rules.

Held

The Court found in favour of the arguments of the farmers, declared the 1986-87 contract nul and void for infringement of economic public order and convicted the S.A. Raffinerie Tirlemontoise to pay damages to the farmers.

Note: The farmers lodged an appeal against this decision, consequently, a settlement agreement was entered into between the parties.

Case Nr. 2000/AR/352, Court of Appeal of Antwerp, *Marie-Jeanne Hermans and Joseph Daniels v. NV Maloir Victor and Victor Maloir*, 11/02/2002

Facts and legal issues

On 29 February 1993, Ms. Hermans entered into an agreement of recognition of debt and exclusive sale with NV Interbrew Leuven by terms of which she purchased beverages from Mr. Maloir.

In 1995, NV Interbrew Leuven put both Ms. Hermans and Mr. Daniels on notice for breach of contract because Ms. Hermans had started purchasing beverages from Mr. Daniels. Ms. Hermans denied liability for breach of contract because other purchasers of beverages received discounts by NV Interbrew Leuven which were never granted to her. She

estimated that this behavior constituted a violation of the European and Belgian competition rules, which was prejudicial to her competitive position. Moreover, she argued that the agreement between her and NV Interbrew Leuven would be incompatible with the exemption of Article 81, 3° TEC.

Held

According to article 14,c,2 of Regulation 1984/83 of the Commission of 22 June 1983, the exemption can be withdrawn when the supplier applies prices or sale terms to the retailer which are, without any justification, less favourable than the terms he applies to other retailers.

The Court ruled that it was not proven that NV Interbrew Leuven applied prices or sale terms to Ms. Hermans which were, without any justification, less favourable than the terms applied to other retailers. Therefore, there was no ground to rescind the exclusive sale agreement. On the contrary, by contracting with Mr. Daniels, Ms. Hermans was found to violate the exclusive sale agreement and Mr. Daniels was found to be an accomplice to this breach.